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VOLUME 551

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2006

JUNE 4 THROUGH SEPTEMBER 28, 2007

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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ERRATUM

547 U. S. 1191, No. 05-9212: "denied" should be "granted".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

JOHN G. ROBERTS, JR., CHIEF JUSTICE.
JOHN PAUL STEVENS, 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.
SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE.

RETIRED

SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

ALBERTO R. GONZALES, ATTORNEY GENERAL.[1]
PETER D. KEISLER, ACTING ATTORNEY GENERAL.[2]
PAUL D. CLEMENT, SOLICITOR GENERAL.
WILLIAM K. SUTER, CLERK.
FRANK D. WAGNER, REPORTER OF DECISIONS.
PAMELA TALKIN, MARSHAL.
JUDITH A. GASKELL, LIBRARIAN.

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[1] Attorney General Gonzales resigned effective September 17, 2007.

[2] Mr. Keisler became Acting Attorney General effective September 18, 2007.

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 February 1, 2006, viz.:

For the District of Columbia Circuit, JOHN G. ROBERTS, JR., 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, JOHN G. ROBERTS, JR., 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, SAMUEL A. ALITO, JR., Associate Justice.

For the Ninth Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

For the Eleventh Circuit, CLARENCE THOMAS, Associate Justice.

For the Federal Circuit, JOHN G. ROBERTS, JR., Chief Justice.

February 1, 2006.

(For next previous allotment, see 546 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2006

UTTECHT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY *v.* BROWN

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

No. 06–413. Argued April 17, 2007—Decided June 4, 2007

A Washington jury sentenced respondent Brown to death, and the state appellate courts affirmed. Subsequently, the Federal District Court denied Brown's habeas petition, but the Ninth Circuit reversed, finding that under *Witherspoon* v. *Illinois*, 391 U. S. 510, and its progeny, the state trial court had violated Brown's Sixth and Fourteenth Amendment rights by excusing "Juror Z" for cause on the ground that he could not be impartial in deciding whether to impose a death sentence.

Held:

1. Courts reviewing claims of error under *Witherspoon* and *Wainwright* v. *Witt*, 469 U. S. 412, especially federal habeas courts, owe deference to the trial court, which is in a superior position to determine a potential juror's demeanor and qualifications. This Court's precedents establish at least four relevant principles. First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. *Witherspoon*, *supra*, at 521. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. *Witt*, 469 U. S., at 416. Third, to balance these interests, a juror who is substantially impaired in the ability to impose the death penalty under the state-law

framework can be excused for cause, but if the juror is not so impaired, removal for cause is impermissible. *Id.*, at 424. Fourth, in determining whether a potential juror's removal would vindicate the State's interest without violating the defendant's right, the trial court bases its judgment in part on the juror's demeanor, a judgment owed deference by reviewing courts. *Id.*, at 424–434. The trial court is in a superior position to assess demeanor, a factor critical in assessing the attitude and qualifications of potential jurors. *Id.*, at 428. The Antiterrorism and Effective Death Penalty Act of 1996's requirements provide additional, and binding, directions to accord deference, creating an independent, high standard to be met before a federal court may issue a habeas writ to set aside state-court rulings. By not according the required deference here, the Ninth Circuit failed to respect the limited role of federal habeas relief in this area. Pp. 5–10.

2. In applying the *Witherspoon-Witt* rule, it is instructive to consider the entire *voir dire* in Brown's case and then turn to Juror Z's questioning. Pp. 10–15.

(a) Here, 11 days of *voir dire* were devoted to determining whether potential jurors were death qualified. During that phase, 11 of the jurors the defense challenged for cause were excused. The defense objected to 7 of the 12 jurors the State challenged for cause, and only 2 of those 7 were excused. Before deciding a contested challenge, the court allowed each side to explain its position and recall a potential juror. It also gave careful and measured explanations for its decisions. Before individual oral examination, the court distributed a questionnaire asking jurors to explain their attitudes toward the death penalty and explained that Brown was only eligible for death or life in prison without possibility of release or parole. It repeated the sentencing options before Juror Z's group was questioned. Pp. 10–13.

(b) The transcript reveals that, despite the preceding instructions and information, Juror Z had both serious misunderstandings about his responsibility as a juror and an attitude toward capital punishment that could have prevented him from returning a death sentence under the facts of this case. He was told at least four times that Brown could not be released from prison and stated six times that he could follow the law. But he also gave more equivocal statements that he would consider the death penalty only if there was no possibility that Brown would be released to reoffend. When the State challenged Juror Z on the grounds that he was confused about the conditions under which death could be imposed and seemed to believe it only appropriate when there was a risk of release and recidivism, the defense volunteered that it had no objection. Pp. 13–15.

Syllabus

3. The Ninth Circuit erred in holding that both the state trial court's excusal of Juror Z and the State Supreme Court's affirmance were contrary to, or an unreasonable application of, clearly established federal law. Pp. 15–22.

(a) Contrary to the Ninth Circuit's conclusion, the State Supreme Court explicitly found that Juror Z was substantially impaired. Even absent this explicit finding, the only fair reading of the opinion is that the state court applied the *Witt* standard in assessing his excusal. Regardless, there is no requirement in a case involving the *Witherspoon-Witt* rule that a state appellate court make particular reference to each juror's excusal, for it is the trial court's ruling that counts. Pp. 15–17.

(b) On this record, the trial court acted well within its discretion in granting the State's motion to excuse Juror Z. His answers, on their face, could have led the trial court to believe that he would be substantially impaired in his ability to impose the death penalty absent the possibility that Brown would be released and would reoffend. The trial court, furthermore, is entitled to deference because it had an opportunity to observe Juror Z's demeanor. The State's challenge, Brown's waiver of an objection, and the trial court's excusal of Juror Z support the conclusion that the interested parties all felt that removal was appropriate under the *Witherspoon-Witt* rule. While there is no independent federal requirement that a state-court defendant object to the prosecution's challenge to preserve a *Witherspoon* claim, voluntary acquiescence to, or confirmation of, a juror's removal can be taken into account. The defense did not just deny a conscientious trial judge an opportunity to explain his judgment or correct an error; it also deprived reviewing courts of further factual findings to help explain the trial court's decision. The need to defer to the trial court's demeanor decision does not foreclose the possibility of reversal where the record discloses no basis for a substantial impairment finding, but the record here does not show the trial court exceeded its discretion in excusing Juror Z. The State Supreme Court recognized the deference owed and, contrary to the Ninth Circuit's misreading of its opinion, identified the correct standard required by federal law and found it satisfied. Pp. 17–20.

(c) The Court is not persuaded by Brown's additional arguments to depart from the State Supreme Court's determination of the state law at issue or to ignore Brown's failure to object to Juror Z's excusal. Pp. 20–22.

451 F. 3d 946, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. STEVENS, J., filed a

dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 35. BREYER, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, p. 44.

John J. Samson, Assistant Attorney General of Washington, argued the cause for petitioner. With him on the briefs were *Robert M. McKenna*, Attorney General, *Paul D. Weisser*, Senior Counsel, and *William Berggren Collins* and *Jay D. Geck*, Deputy Solicitors General.

Deputy Solicitor General Dreeben argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Fisher*, and *Sri Srinivasan*.

Suzanne Lee Elliott, by appointment of the Court, 549 U. S. 1250, argued the cause for respondent. With her on the brief was *Gilbert H. Levy*.*

JUSTICE KENNEDY delivered the opinion of the Court.

Respondent Cal Coburn Brown robbed, raped, tortured, and murdered one woman in Washington. Two days later,

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*A brief of *amici curiae* urging reversal was filed for the State of Oregon et al. by *Hardy Myers*, Attorney General of Oregon, *Mary Williams*, Solicitor General, *Rolf Moan*, Assistant Attorney General, and *Dan Schweitzer*, and by the Attorneys General for their respective States as follows: *Dustin McDaniel* of Arkansas, *Edmund G. Brown, Jr.*, of California, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Gary G. King* of New Mexico, *Marc Dann* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Robert F. McDonnell* of Virginia, and *Patrick J. Crank* of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *John Holdridge*, *Brian W. Stull*, *Steven R. Shapiro*, and *Larry Yackle;* and for the National Association of Criminal Defense Lawyers by *Amy Howe*, *Kevin K. Russell*, *Thomas C. Goldstein*, *Jeffrey L. Fisher*, *Pamela S. Karlan*, and *Susan Rozelle*.

he robbed, raped, tortured, and attempted to murder a second woman in California. Apprehended, Brown confessed to these crimes and pleaded guilty to the California offenses, for which he received a sentence of life imprisonment. The State of Washington, however, sought the death penalty and brought Brown to trial. Based on the jury's verdicts in the guilt and sentencing phases of the trial, Brown was sentenced to death. His conviction and sentence were affirmed by the Supreme Court of the State of Washington. *State* v. *Brown*, 132 Wash. 2d 529, 940 P. 2d 546 (1997) (en banc).

Brown filed a petition for writ of habeas corpus in the United States District Court for the Western District of Washington. The District Court denied the petition, App. to Pet. for Cert. 77a–79a, 91a, but the United States Court of Appeals for the Ninth Circuit reversed. *Brown* v. *Lambert*, 451 F. 3d 946 (2006). The Court of Appeals considered, among other arguments for setting aside the capital sentence, the contention that under *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), and its progeny, the state trial court had violated Brown's Sixth and Fourteenth Amendment rights by excusing three potential jurors—whom we refer to as Jurors X, Y, and Z—for cause. The State moved to excuse these jurors due to the concern that they could not be impartial in deciding whether to impose a death sentence. The Court of Appeals held it was proper to excuse Jurors X and Y, but agreed with the defense that it was unconstitutional to excuse Juror Z for cause. On this premise the court held that Brown's death sentence could not stand, requiring that Brown receive a new sentencing trial more than a decade after his conviction.

We granted certiorari, 549 U. S. 1162 (2007), and we reverse the judgment of the Court of Appeals.

I

When considering the controlling precedents, *Witherspoon* is not the final word, but it is a necessary starting

point. During the *voir dire* that preceded William Witherspoon's capital trial, the prosecution succeeded in removing a substantial number of jurors based on their general scruples against inflicting the death penalty. The State challenged, and the trial court excused for cause, 47 members of the 96-person venire, without significant examination of the individual prospective jurors. 391 U. S., at 514–515; see also Brief for Petitioner in *Witherspoon* v. *Illinois*, O. T. 1967, No. 1015, p. 4. The Court held that the systematic removal of those in the venire opposed to the death penalty had led to a jury "uncommonly willing to condemn a man to die," 391 U. S., at 521, and thus "woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments," *id.*, at 518. Because "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State," *id.*, at 519, the Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty," *id.*, at 522. The Court also set forth, in dicta in a footnote, a strict standard for when an individual member of the venire may be removed for cause on account of his or her views on the death penalty. *Id.*, at 522–523, n. 21.

In *Wainwright* v. *Witt*, 469 U. S. 412 (1985), the Court explained that "*Witherspoon* is best understood in the context of its facts." *Id.*, at 418. The Court noted that in *Witherspoon* the trial court had excused half the venire—every juror with conscientious objections to capital punishment. 469 U. S., at 416. Furthermore, the state sentencing scheme under which Witherspoon's sentence was imposed permitted the jury "unlimited discretion in choice of sentence." *Id.*, at 421. When a juror is given unlimited discretion, the Court explained, all he or she must do to follow instructions is consider the death penalty, even if in the end he or she would not be able to impose it. *Ibid.* Rejecting the strict stand-

ard found in *Witherspoon*'s footnote 21, the Court recognized that the diminished discretion now given to capital jurors and the State's interest in administering its capital punishment scheme called for a different standard. The Court relied on *Adams* v. *Texas*, 448 U. S. 38, 45 (1980), which provided the following standard: "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Witt*, 469 U. S., at 424 (internal quotation marks omitted).

The Court in *Witt* instructed that, in applying this standard, reviewing courts are to accord deference to the trial court. Deference is owed regardless of whether the trial court engages in explicit analysis regarding substantial impairment; even the granting of a motion to excuse for cause constitutes an implicit finding of bias. *Id.*, at 430. The judgment as to "whether a venireman is biased . . . is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations [are] entitled to deference even on direct review; the respect paid such findings in a habeas proceeding certainly should be no less." *Id.*, at 428 (internal quotation marks, footnote, and brackets omitted). And the finding may be upheld even in the absence of clear statements from the juror that he or she is impaired because "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." *Id.*, at 424–425. Thus, when there is ambiguity in the prospective juror's statements, "the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State." *Id.*, at 434.

The rule of deference was reinforced in *Darden* v. *Wainwright*, 477 U. S. 168 (1986). There, the State had chal-

lenged a potential juror, and the defense had not objected to his removal. Without further questioning from the trial court, the juror was excused. *Id.*, at 178. The petitioner argued to this Court that the transcript of *voir dire* did not show that the removed juror was substantially impaired because the critical answer he had given was ambiguous. The Court rejected this argument. "[O]ur inquiry does not end with a mechanical recitation of a single question and answer." *Id.*, at 176. Even when "[t]he precise wording of the question asked of [the venireman], and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty," the need to defer to the trial court remains because so much may turn on a potential juror's demeanor. *Id.*, at 178. The absence of an objection, and the trial court's decision not to engage in further questioning as it had prior to excusing other jurors, supported the conclusion that the juror was impaired. *Ibid.*

In *Gray* v. *Mississippi*, 481 U. S. 648 (1987), the Court addressed once more a case involving not the excusal of a single juror but rather systematic exclusion. The State had lodged for-cause or peremptory challenges against every juror who "expressed any degree of uncertainty in the ability to cast . . . a vote" for the death penalty, *id.*, at 652, and quickly exhausted all 12 of its peremptory challenges, *id.*, at 653. The prosecution then challenged a juror who had expressed no opposition to the death penalty and had said many times that she could return a death sentence. The trial court denied the challenge. *Id.*, at 654–655. Arguing that the trial court had erroneously denied certain earlier challenges for cause, and thus had forced the State to waste peremptory challenges, the prosecution sought to reopen those previous challenges. The trial court refused to do so, but removed the current juror, over objection from the defense. *Id.*, at 655. On appeal all of the state judges agreed the juror could not be excused for cause under either the *Witherspoon* or

the *Witt* standard, but the majority held it was appropriate, under the circumstances, to treat the challenge in question as a peremptory strike. 481 U. S., at 656–657.

This Court reversed, holding that the juror had been removed for cause and that she was not substantially impaired under the controlling *Witt* standard. 481 U. S., at 659. The error was not subject to harmlessness review, and thus the sentence could not stand. *Ibid.* *Gray* represents a rare case, however, because in the typical situation there will be a state-court finding of substantial impairment; in *Gray*, the state courts had found the opposite, which makes that precedent of limited significance to the instant case.

These precedents establish at least four principles of relevance here. First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. *Witherspoon*, 391 U. S., at 521. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. *Witt*, 469 U. S., at 416. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. *Id.*, at 424. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts. *Id.*, at 424–434.

Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors. *Id.*, at 428; *Darden*, *supra*, at 178. Leading treatises in the area make much of nonverbal communication. See, *e. g.*, V.

Starr & M. McCormick, Jury Selection 389–523 (3d ed. 2001); J. Frederick, Mastering Voir Dire and Jury Selection 39–56 (2d ed. 2005).

The requirements of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, of course, provide additional, and binding, directions to accord deference. The provisions of that statute create an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings. See 28 U. S. C. §§ 2254(d)(1)–(2); *Williams* v. *Taylor*, 529 U. S. 362, 413 (2000) (O'Connor, J., concurring in part and concurring in judgment).

By not according the required deference, the Court of Appeals failed to respect the limited role of federal habeas relief in this area prescribed by Congress and by our cases.

II

A

In applying the principles of *Witherspoon* and *Witt*, it is instructive to consider the entire *voir dire* in Brown's case. Spanning more than two weeks, the process entailed an examination of numerous prospective jurors. After the third day of the *voir dire*, during which few jurors were questioned, the trial court explained the process would "have to go a little bit faster." Tr. 1398. The next day, the court reiterated this concern, for it had told the jury the trial would take no more than six weeks in order not to conflict with the Christmas holidays. *Id.*, at 1426.

Eleven days of the *voir dire* were devoted to determining whether the potential jurors were death qualified. During that phase alone, the defense challenged 18 members of the venire for cause. Despite objections from the State, 11 of those prospective jurors were excused. As for the State, it made 12 challenges for cause; defense counsel objected seven times; and only twice was the juror excused following an objection from the defense. Before deciding a contested

challenge, the trial court gave each side a chance to explain its position and recall the potential juror for additional questioning. When issuing its decisions the court gave careful and measured explanations. See, *e. g.*, *id.*, at 2601–2604 (denying the State's motion to excuse a juror following an objection for defense); App. 97–100 (granting the State's motion to excuse Juror X despite an objection from defense).

Before the State challenged Juror Z, the defense moved to excuse a potential juror who had demonstrated some confusion. After argument from both counsel, the trial court explained that it would be open to further questioning if one of the parties felt the juror's position could be clarified: "I thought at first the both of you were wanting to excuse [this juror] since he seemed kind of confused to both sides, but if there really is a question, let me know and I don't have any hesitation about bringing the juror out here and following up." *Id.*, at 26. Consistent with the need for an efficient *voir dire*, the court also told counsel: "Let me point something out to both sides. If you are going to agree on a challenge, . . . we can shortcut some of what happens out here." *Ibid.*

Setting aside the disputed circumstances of Juror Z's removal, the defense refrained from objecting to the State's challenges for cause only when the challenged juror was explicit that he or she would not impose the death penalty or could not understand the burden of proof. See Tr. 1457, 1912, 2261, 2940. For other jurors, the defense objections were vigorous and, it seems, persuasive. The defense argued that the jurors' equivocal statements reflected careful thinking and responsibility, not substantial impairment. See, *e. g.*, *id.*, at 1791, 2111, 2815. The tenacity of Brown's counsel was demonstrated when, long after the trial court had overruled the defense objection and excused Juror Y, the defense moved in writing to have her returned for further questioning and rehabilitation. *Id.*, at 3151–3154. The trial

court denied this motion after argument from both parties. *Id.*, at 3154.

The defense also lodged its own challenges for cause. In defending them against the State's objections, defense counsel argued, contrary to the position Brown takes in this Court, that a trial court cannot rely upon a potential juror's bare promises to follow instructions and obey the law. See, *e. g.*, *id.*, at 1713–1714, 1960–1961, 2772–2773, 3014–3016. With regard to one juror, defense counsel argued:

> "Any time this individual was asked any questions about following the law, he will always indicate that he will. But when we look to see . . . his view[s] on the death penalty, . . . they [are] so strong that they would substantially impair his ability to follow the law and to follow his oath as a juror." *Id.*, at 1960–1961.

In at least two instances this argument appears to have prevailed when the trial court overruled the State's objection to Brown's challenge for cause.

A final, necessary part of this history is the instruction the venire received from the court concerning the sentencing options in the case. Before individual oral examination, the trial court distributed a questionnaire asking jurors to explain their attitudes toward the death penalty. When distributing the questionnaire, the court explained the general structure of the trial and the burden of proof. It described how the penalty phase would function:

> "[I]f you found Mr. Brown guilty of the crime of first degree murder with one or more aggravating circumstances, then you would be reconvened for a second phase called a sentencing phase. During that sentencing phase proceeding you could hear additional evidence [and] arguments concerning the penalty to be imposed. You would then be asked to retire to determine whether the death penalty should be imposed or whether the

> punishment should be life imprisonment without the possibility of parole.
>
> "In making this determination you would be asked the following question: Having in mind the crime with which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency? If you unanimously answered yes to this question, the sentence would be death. . . . [Otherwise] the sentence would be life imprisonment without the possibility of release or parole." *Id.*, at 1089–1090.

After the questionnaires were filled out, the jurors were provided with handbooks that explained the trial process and the sentencing phase in greater depth. Small groups of potential jurors were then brought in to be questioned. Before Juror Z's group began, the court explained once more that if Brown were convicted, "there are only two penalties that a jury could return, one is life in prison without possibility of release or parole. And that literally means exactly that, a true life in prison without release or parole." *Id.*, at 2016.

With this background, we turn to Juror Z's examination.

B

Juror Z was examined on the seventh day of the *voir dire* and the fifth day of the death-qualification phase. The State argues that Juror Z was impaired not by his general outlook on the death penalty, but rather by his position regarding the specific circumstances in which the death penalty would be appropriate. The transcript of Juror Z's questioning reveals that, despite the preceding instructions and information, he had both serious misunderstandings about his responsibility as a juror and an attitude toward capital punishment that could have prevented him from returning a death sentence under the facts of this case.

Under the *voir dire* procedures, the prosecution and defense alternated in commencing the examination. For Juror Z, the defense went first. When questioned, Juror Z demonstrated no general opposition to the death penalty or scruples against its infliction. In fact, he soon explained that he "believe[d] in the death penalty in severe situations." App. 58. He elaborated, "I don't think it should never happen, and I don't think it should happen 10 times a week either." *Id.*, at 63. "[T]here [are] times when it would be appropriate." *Ibid.*

The questioning soon turned to when that would be so. Juror Z's first example was one in which "the defendant actually came out and said that he actually wanted to die." *Id.*, at 59. Defense set this aside and sought another example. Despite having been told at least twice by the trial court that if convicted of first-degree murder, Brown could not be released from prison, the only example Juror Z could provide was when "a person is . . . incorrigible and would reviolate if released." *Id.*, at 62. The defense counsel replied that there would be no possibility of Brown's release and asked whether the lack of arguments about recidivism during the penalty phase would frustrate Juror Z. He answered, "I'm not sure." *Id.*, at 63.

The State began its examination of Juror Z by noting that his questionnaire indicated he was "in favor of the death penalty if it is proved beyond a shadow of a doubt if a person has killed and would kill again." *Id.*, at 69. The State explained that the burden of proof was beyond a reasonable doubt, not beyond a shadow of a doubt, and asked whether Juror Z understood. He answered, "[I]t would have to be in my mind very obvious that the person would reoffend." *Id.*, at 70. In response the State once more explained to Juror Z, now for at least the fourth time, that there was no possibility of Brown's being released to reoffend. Juror Z explained, "[I]t wasn't until today that I became aware that we had a life without parole in the state of Washington," *id.*,

at 71, although in fact a week earlier the trial judge had explained to Juror Z's group that there was no possibility of parole when a defendant was convicted of aggravated first-degree murder. The prosecution then asked, "And now that you know there is such a thing . . . can you think of a time when you would be willing to impose a death penalty . . . ?" *Id.*, at 71–72. Juror Z answered, "I would have to give that some thought." *Id.*, at 72. He supplied no further answer to the question.

The State sought to probe Juror Z's position further by asking whether he could "consider" the death penalty; Juror Z said he could, including under the general facts of Brown's crimes. *Ibid.* When asked whether he no longer felt it was necessary for the State to show that Brown would reoffend, Juror Z gave this confusing answer: "I do feel that way if parole is an option, without parole as an option. I believe in the death penalty." *Id.*, at 72–73. Finally, when asked whether he could impose the death penalty when there was no possibility of parole, Juror Z answered, "[I]f I was convinced that was the appropriate measure." *Id.*, at 73. Over the course of his questioning, he stated six times that he could consider the death penalty or follow the law, see *id.*, at 62, 70, 72, 73, but these responses were interspersed with more equivocal statements.

The State challenged Juror Z, explaining that he was confused about the conditions under which death could be imposed and seemed to believe it only appropriate when there was a risk of release and recidivism. *Id.*, at 75. Before the trial court could ask Brown for a response, the defense volunteered, "We have no objection." *Ibid.* The court then excused Juror Z. *Ibid.*

III

On federal habeas review, years after the conclusion of the *voir dire*, the Court of Appeals granted Brown relief and overturned his sentence. The court held that both the state trial court's excusal of Juror Z and the State Supreme

Court's affirmance of that ruling were contrary to, or an unreasonable application of, clearly established federal law. 451 F. 3d, at 953. The Court of Appeals held that the Supreme Court of Washington had failed to find that Juror Z was substantially impaired; it further held that the State Supreme Court could not have made that finding in any event because the transcript unambiguously proved Juror Z was not substantially impaired. For these reasons, explained the Court of Appeals, the trial court's decision to excuse Juror Z was contrary to the *Witherspoon-Witt* rule despite Brown's failure to object. Each of the holdings of the Court of Appeals is wrong.

A

As part of its exposition and analysis, the Court of Appeals found fault with the opinion of the Supreme Court of Washington. It stated that although the State Supreme Court had held that Jurors X and Y were substantially impaired, the same "finding is missing from the state court's discussion" of Juror Z's excusal. 451 F. 3d, at 950. The Court of Appeals therefore held "[t]he Washington Supreme Court in this case *applied the wrong standard* with respect to Juror Z." *Id.*, at 953, n. 10. This is an erroneous summary of the State Supreme Court's opinion. The state court did make an explicit ruling that Juror Z was impaired. In a portion of the opinion entitled "Summary and Conclusions," the court held: "The trial court properly exercised its discretion in excusing for cause prospective jurors [X, Y, and Z] during voir dire. Their views would have prevented or substantially impaired their ability to follow the court's instructions and abide by their oaths as jurors." *Brown*, 132 Wash. 2d, at 631, 940 P. 2d, at 598, 599. It is unclear why the Court of Appeals overlooked or disregarded this finding, and it was mistaken in faulting the completeness of the Supreme Court of Washington's opinion.

Even absent this explicit finding, the Supreme Court of Washington's opinion was not contrary to our cases. The

court identified the *Witherspoon-Witt* rule, recognized that our precedents required deference to the trial court, and applied an abuse-of-discretion standard. 132 Wash. 2d, at 601, 940 P. 2d, at 584. Having set forth that framework, it explained:

> "[Brown] did not object at trial to the State's challenge of [Juror Z] for cause. At any rate, [Juror Z] was properly excused. On voir dire he indicated he would impose the death penalty where the defendant 'would reviolate if released,' which is not a correct statement of the law. He also misunderstood the State's burden of proof . . . although he was corrected later. The trial court did not abuse its discretion in excusing [Juror Z] for cause." *Id.*, at 604, 940 P. 2d, at 585.

The only fair reading of the quoted language is that the state court applied the *Witt* standard in assessing the excusal of Juror Z. Regardless, there is no requirement in a case involving the *Witherspoon-Witt* rule that a state appellate court make particular reference to the excusal of each juror. See *Early* v. *Packer*, 537 U. S. 3, 9 (2002) *(per curiam)*. It is the trial court's ruling that counts.

B

From our own review of the state trial court's ruling, we conclude the trial court acted well within its discretion in granting the State's motion to excuse Juror Z.

Juror Z's answers, on their face, could have led the trial court to believe that Juror Z would be substantially impaired in his ability to impose the death penalty in the absence of the possibility that Brown would be released and would reoffend. And the trial court, furthermore, is entitled to deference because it had an opportunity to observe the demeanor of Juror Z. We do not know anything about his demeanor, in part because a transcript cannot fully reflect that information but also because the defense did not object to Juror Z's

removal. Nevertheless, the State's challenge, Brown's waiver of an objection, and the trial court's excusal of Juror Z support the conclusion that the interested parties present in the courtroom all felt that removing Juror Z was appropriate under the *Witherspoon-Witt* rule. See *Darden*, 477 U. S., at 178 (emphasizing the defendant's failure to object and the judge's decision not to engage in further questioning as evidence of impairment).

Juror Z's assurances that he would consider imposing the death penalty and would follow the law do not overcome the reasonable inference from his other statements that in fact he would be substantially impaired in this case because there was no possibility of release. His assurances did not require the trial court to deny the State's motion to excuse Juror Z. The defense itself had told the trial court that any juror would make similar guarantees and that they were worth little; instead, defense counsel explained, the court should listen to arguments concerning the substance of the juror's answers. The trial court in part relied, as diligent judges often must, upon both parties' counsel to explain why a challenged juror's problematic beliefs about the death penalty would not rise to the level of substantial impairment. Brown's counsel offered no defense of Juror Z. In light of the deference owed to the trial court the position Brown now maintains does not convince us the decision to excuse Juror Z was unreasonable.

It is true that in order to preserve a *Witherspoon* claim for federal habeas review there is no independent federal requirement that a defendant in state court object to the prosecution's challenge; state procedural rules govern. We nevertheless take into account voluntary acquiescence to, or confirmation of, a juror's removal. By failing to object, the defense did not just deny the conscientious trial judge an opportunity to explain his judgment or correct any error. It also deprived reviewing courts of further factual findings that would have helped to explain the trial court's decision.

The harm caused by a defendant's failure to object to a juror's excusal was described well by a Washington appellate court in a different case:

> "When a challenge for cause is made, opposing counsel can object either on the grounds that it is facially insufficient or that the facts needed to support it are not true. [Defendant] did neither. Had [defendant] objected immediately to the State's challenge for cause, the court could have tried the issue and determined the law and the facts. Because [defendant] did not timely object to the excusal of Juror 30, the court had no opportunity to remedy whatever factual questions were in the mind of [defendant's] counsel." *State* v. *Taylor*, No. 16057–2–III etc., 1998 WL 75648, *5 (Wash. App., Feb. 24, 1998) (unpublished opinion) (citations omitted).

The defense may have chosen not to object because Juror Z seemed substantially impaired. See 451 F. 3d, at 959 (Tallman, J., dissenting from denial of rehearing en banc). Or defense counsel may have felt that Juror Z, a basketball referee whose stepbrother was a police officer, would have been favorable to the State. See App. 68, 74; 451 F. 3d, at 953, n. 9 (reasoning that "defense counsel declined to object because he was glad to get rid of juror Z. After all, Z had described himself as pro-death penalty . . . . Defense counsel must have thanked his lucky stars when the prosecutor bumped Z"). Or the failure to object may have been an attempt to introduce an error into the trial because the defense realized Brown's crimes were horrific and the mitigating evidence was weak. Although we do not hold that, because the defense may have wanted Juror Z on the jury, any error was harmless, neither must we treat the defense's acquiescence in Juror Z's removal as inconsequential.

The defense's volunteered comment that there was no objection is especially significant because of frequent defense objections to the excusal of other jurors and the trial court's

request that if both parties wanted a juror removed, saying so would expedite the process. In that context the statement was not only a failure to object but also an invitation to remove Juror Z.

We reject the conclusion of the Court of Appeals that the excusal of Juror Z entitles Brown to federal habeas relief. The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment. But where, as here, there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful *voir dire*, the trial court has broad discretion. The record does not show the trial court exceeded this discretion in excusing Juror Z; indeed the transcript shows considerable confusion on the part of the juror, amounting to substantial impairment. The Supreme Court of Washington recognized the deference owed to the trial court and, contrary to the Court of Appeals' misreading of the state court's opinion, identified the correct standard required by federal law and found it satisfied. That decision, like the trial court's, was not contrary to, or an unreasonable application of, clearly established federal law.

IV

Brown raises two additional arguments that rely upon Washington state law. He first contends we should not consider his failure to object because Washington state law does not require a defendant to object to a challenge to a potential juror. See Tr. of Oral Arg. 35 ("As to the . . . failure to object . . . we have admitted that what [defense counsel] said was I have no objection. . . . But [they] all knew that this issue could be raised for the first time on appeal"). In addition he asserts that even if Juror Z's statements indicated that he would base his decision upon the risk of Brown re-

offending, that requirement was consistent with the state sentencing scheme.

For the reasons explained above the defense's failure to object in this case has significance to our analysis even on the assumption that state law did not require an objection to preserve an error for review in the circumstances of this case. The Supreme Court of Washington, however, noted Brown's failure to object, suggesting it had significance for its own analysis. *Brown*, 132 Wash. 2d, at 604, 940 P. 2d, at 585. This is consistent with Washington law, which permits a party to "except" to the opposing party's challenge of a juror for cause, Wash. Rev. Code § 4.44.230 (2006), and gives appellate courts discretion to bar "any claim of error which was not raised in the trial court" unless that error is a "manifest error affecting a constitutional right," Wash. Rule App. Proc. 2.5(a) (2006). See also 13 R. Ferguson, Washington Practice: Criminal Practice and Procedure § 4908, p. 432 (3d ed. 2004) ("In general, issues not raised in the trial court will not be considered for the first time on appeal. It is the purpose of this general rule to give the trial court an opportunity to correct the alleged error. Accordingly, it is the duty of counsel to call the trial court's attention to the alleged error . . . " (footnotes omitted)).

The Supreme Court of Washington also held that Juror Z misstated Washington's sentencing law. *Brown*, *supra*, at 604, 940 P. 2d, at 585. It is not for us to second-guess that determination, and our conclusion is, in any event, the same as that court's. Juror Z did not say that the likelihood of Brown's harming someone while in prison would be among his sentencing considerations. Rather, the sole reason Juror Z expressed for imposing the death penalty, in a case where the accused opposed it, was whether the defendant could be released and would reviolate. That is equivalent to treating the risk of recidivism as the sole aggravating factor, rather than treating lack of future dangerousness as a possible mitigating consideration. See Wash. Rev. Code § 10.95.020

(2006) (setting forth aggravating factors); § 10.95.070 (setting forth future dangerousness as one of eight mitigating factors).

For these reasons, we are not persuaded to depart from the Supreme Court of Washington's determination of the state law at issue or to ignore Brown's failure to object.

* * *

Capital defendants have the right to be sentenced by an impartial jury. The State may not infringe this right by eliminating from the venire those whose scruples against the death penalty would not substantially impair the performance of their duties. Courts reviewing claims of *Witherspoon-Witt* error, however, especially federal courts considering habeas petitions, owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror. The Court of Appeals neglected to accord this deference. And on this record it was error to find that Juror Z was not substantially impaired. 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.

APPENDIX

Excerpts of Verbatim Report of Proceedings *(Voir Dire)* (Nov. 3, 1993) in *State* v. *Brown*, Cause No. 91–1–03233–1 (Super. Ct. King Cty., Wash.), App. 57–75:

THE COURT: All right. [Juror Z]. (Prospective Juror, [Juror Z], entered the courtroom.)

THE COURT: That's fine, [Juror Z]. Good afternoon.

[JUROR Z]: Good afternoon.

THE COURT: Do you have any questions at all about any of the preliminary instructions that you got this afternoon and the format that we were talking about or the reasons

why the attorneys have to discuss the penalty phase when there may never really be a penalty phase.

[JUROR Z]: No, I think I understand the situation.

THE COURT: Did you answer or nod your head about remembering something about having heard this crime before?

[JUROR Z]: No, I did not.

THE COURT: Okay. We'll start with the defense.

MS. HUPP: Thank you, your Honor.

VOIR DIRE EXAMINATION

BY MS. HUPP:

Q Good afternoon. My name is Lin-Marie Hupp, and I'm one of Cal Brown's attorneys.

I would like to start off asking you some questions about your feelings about the death penalty. I want to reinforce what the Judge has already told you, which is there are no right or wrong answers. We just need to get information about your feelings so we can do our job.

A Okay.

Q Can you tell me when it was you first realized this was a potential death penalty case?

A Not until last Monday when I was here in the initial jury information session.

Q Okay. Can you tell me when the Judge read that long thing to you and basically told you that this was a potential in the case, can you tell me what you were thinking when you heard that?

A I guess I wasn't surprised when I got the announcement for jury duty. And it was more than the standard two weeks that most everybody else goes to. I thought it must be a pretty substantial case. In my mind I tried to guess what it might be, so this is one of the things that entered into it.

Q Can you give me an idea of what your general feelings about the death penalty are?

A I do believe in the death penalty in severe situations. A good example might be the young man from, I believe he was from Renton that killed a couple of boys down in the Vancouver area and was sentenced to the death penalty, and wanted the death penalty. And I think it is appropriate in severe cases.

Q And that case you're talking about, that is the one where he actually came out, the defendant actually came out and said that he actually wanted to die?

A I believe that was the case.

Q Does that have any kind of bearing on your idea that the death penalty was appropriate in his case?

A I believe that it was in that case.

Q If you removed that factor completely from it, is that again the type of case that you think the death penalty would be appropriate?

A It would have to be a severe case. I guess I can't put a real line where that might be, but there are a lot of cases that I don't think it's where people would—

Q Okay. And let me kind of fill in the blanks for myself here by just asking you a couple of questions about that. I'm assuming that there would not be any case other than murder that you would think the death penalty would be appropriate?

A I think that is correct.

Q Okay. And the way the law is in Washington anyway, in order to get to the point where you would even consider the death penalty, the State would first have to prove that you had committed a premeditate[d] murder and one that had been thought about beforehand.

Do you have any kind of feeling that something other than a premeditated murder, in other words, one that would have been planned that would be appropriate for the death penalty?

A No. I think it would have to be premeditated.

Q In addition to that in Washington even premeditated murders are not eligible for a potential death penalty unless the State also proves aggravating circumstances. In this case the State is alleging or is going to try and prove a number of aggravating circumstances, four of them. Okay. And the ones that they are going to try and prove are that the murder was committed, a premeditated murder was committed during a rape, a robbery, a kidnapping and that it was done in order to conceal a witness or eliminate a witness.

Does that fall within the class of cases that you think the death penalty is appropriate?

A I think that would be.

Q Okay. Now, how about other sentencing options in a case like that, do you think that something other than the death penalty might be an appropriate sentence?

A I think that if a person is temporarily insane or things of that that lead a person to do things that they would not normally do, I think that would enter into it.

Q All right. Other than—well, maybe what we should do—the way that the law is in Washington, if the jury finds beyond a reasonable doubt that somebody has committed a premeditated murder with at least one aggravating circumstance, and in this case you have a potential for the four, then the jury reconvenes to consider whether or not the death penalty should be imposed or whether or not a life sentence without parole should be imposed.

One sort of aside here, life without parole is exactly what it sounds like. It is a life sentence. You're not ever eligible for parole. You hear about it in the papers sometimes where somebody has got a life sentence and they're going to be eligible for parole in 10 years or 20 years.

A I understand.

Q Were you aware before that Washington has got this kind of sentence where it's life without parole where you are not ever eligible for parole?

A I did not until this afternoon.

Q That is the two options that the jury has if they found the person guilty of premeditated murder beyond a reasonable doubt plus aggravating circumstances beyond a reasonable doubt.

Do you think that you could consider both options?

A Yes, I could.

Q Could you give me an idea sort of have you thought about sort of the underlying reason why you think the death penalty is appropriate, what purpose it serves, that kind of thing?

A I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate.

Q Okay. Now, knowing that you didn't know before when you were coming to those opinions about the two options that we have here obviously somebody who is not going to get out of jail no matter which sentence you give them if you got to that point of making a decision about the sentence, does that mean what I'm hearing you say is that you could consider either alternative?

A I believe so, yes.

Q Now, in your, I think in your questionnaire you sort of referred to that also, what you kind of thought about was if somebody had been killed and it had been proven to you that they would kill again. Understanding that the two options there are life without parole or the death penalty, there is not a lot of likelihood that people are going to spend a lot of time talking about whether or not they're going to kill again in the sentencing phase of this case. Is that going to make you frustrated? Are you going to want to hear about things like that, about people's opinions in the penalty phase?

A I'm not sure.

Q Okay. That's very fair. Do you have any kind of feelings about the frequency of the use of the death penalty in the United States today? Do you think it's used too frequently or not often enough?

A It seemed like there were several years when it wasn't used at all and just recently it has become more prevalent in the news anyway. I don't think it should never happen, and I don't think it should happen 10 times a week either. I'm not sure what the appropriate number is but I think in severe situations, it is appropriate.

Q It sounds like you're a little more comfortable that it is being used some of the time?

A Yes.

Q You weren't happy with the time when it wasn't being used at all?

A I can't say I was happy or unhappy, I just felt that there were times when it would be appropriate.

Q Let me ask you, and we may have covered this already, but let me ask you just to make sure I understand. If the State were to prove beyond a reasonable doubt that the defendant had committed a premeditated murder with aggravating circumstances that I have laid out for you, rape, robbery, kidnapping, to conceal or eliminate a witness, at least one of those, in addition another thing you might hear in this trial is some evidence that the defendant deliberately inflicted pain upon the victim before she died for some period of time.

If that was the crime that you heard about and came to a decision about guilty about, do you think you consider a life sentence?

A I could consider it but I don't know if I really have enough information to make a determination.

Q Right. And it's real tough to be asking you these questions and even tougher for you to have to answer them without any evidence before you. But you understand that this is our only time to do that before you have heard all the evidence?

A I understand, yes.

Q As a matter of fact, the law in this state after, even after you have found somebody guilty of really hideous crime

like that presumes that the sentence, the appropriate sentence is life without parole. The State has the burden of proof, again, in the penalty phase. And they would have to prove beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit a life sentence.

Are you comfortable with that idea that you start off presuming that, as a matter of fact, even for a hideous crime that a life sentence is the appropriate sentence?

A It is or is not?

Q That it is an appropriate sentence.

A I guess I'm a little confused by the question. So, you go into it with a life sentence is the appropriate sentence?

Q Right. If you look at the chart here, there's almost a mirror image to start off a trial presuming that somebody is innocent and you start off a sentencing presuming that a life sentence is appropriate?

A I see.

Q Okay.

A Yes.

Q Okay. Now, as far as mitigating circumstances, you had mentioned the idea that maybe somebody was temporarily insane. The Judge is going to give you an instruction on mitigating circumstances, and I will defin[e] it for you, but the definition is real broad. The definition basically is, any reason, not a justification, not an excuse for the crime and not a defense to the crime, but a reason for imposing something other than death. That's pretty broad.

MR. MATTHEWS: I object to that question. I don't believe that is a question. I believe that's a statement.

THE COURT: The objection will be sustained.

Q (BY MS. HUPP) The judge will instruct you about what a mitigating circumstance is.

But what I want to be real clear about is that it's not a defense to the crime. Okay. In other words, if you believe that somebody was really temporarily insane at the time he

committed the offense, well, then it wouldn't be premeditated. It would be an insanity defense, and that would all get dealt with—

MR. MATTHEWS: Your Honor, again, I am going to object to the nature of the question.

THE COURT: [Juror Z], you were the one that actually brought it up in terms of the mental status of the person. You are the one who said temporarily insane when they committed this kind of crime. You realize that there are particular defenses that may be available in the actual criminal case itself, the guilt phase.

But once you get to the penalty phase, we're not talking about the crime in any way, and you're simply trying to determine what the appropriate punishment or sanction should be for a crime that a person has been found guilty of. At that point in time, something like all sorts of mitigating circumstances come into it, and mental status can come into it. But it would only be evaluated in the light of the mitigating circumstances, not a defense. Do you understand that?

A Understand.

Q (BY MS. HUPP) To just sort of follow up on that, if mental status came into play and you were presented with some sort of evidence about mental status, is that the sort of evidence you would consider?

A Yes, I could.

Q How about things like somebody's childhood or their emotional development?

A I could consider it. I don't have strong feelings one way or the other.

Q Okay. All right. And, also, when we talk about mitigating circumstances, what might be mitigating to you might not matter much to the person sitting next to you in juror's box. Do you think you could discuss your feelings about those things?

A Yes.

Q Could you, say the person next to you says something is mitigating and you don't think it's very mitigating at all, could you also discuss it in this situation?

A (Nodding head).

Q Could you respect that other person's opinion?

A Everybody is entitled to an opinion, yes.

Q Another thing that happens at the sentencing phase of the trial is that the jury would have to be unanimous, in other words, everybody would have to agree if they were going to impose a death sentence. If one person, four people, five people, how ever many people don't agree with that, then the sentence is life. Okay. So, it kind of strips away that sort of comfort in numbers that some people get from the idea of having a unanimous decision.

Do you think you can accept the responsibility for such an important decision for yourself?

A I do.

Q Okay. Thank you.

MS. HUPP: I have no further questions.

THE COURT: The State.

VOIR DIRE EXAMINATION

BY MR. MATTHEWS:

Q [Juror Z], I'm Al Matthews. I'm one of two prosecutors in the case. I have got some very specific questions, and perhaps we can clear them up real rapidly.

I see your step-brother is a policeman and you see him about four times a year.

A (Nodding head).

Q Do you ever have any discussions about the death penalty, is this a subject that ever comes up?

A No.

Q Have you ever had occasion to discuss it at all within the family circle?

A I don't believe so.

Q You mentioned on your questionnaire, and we do read them, that you're in favor of the death penalty if it is proved beyond a shadow of a doubt if a person has killed and would kill again. Do you remember making that statement?

A Yes.

Q First of all, have you ever been on a jury trial before?

A I have not.

Q Now, you made this statement before you read your juror's handbook I imagine?

A Yes.

Q So, I want to ask you, the thing that bothers me, of course, is the idea beyond a shadow of a doubt. The law says beyond a reasonable doubt, and it will be explained to you what it actually means. But I want to assure you it doesn't mean, I don't believe the Court would instruct . . . you it means beyond all doubt or beyond any shadow of a doubt. Knowing that, would you still require the State to prove beyond a shadow of a doubt that the crime occurred knowing that the law doesn't require that much of us?

A I would have to know the, I'm at a loss for the words here.

Q You can ask me any questions, too, if you need some clarification.

A I guess it would have to be in my mind very obvious that the person would reoffend.

Q Well, we're not talking about that, sir.

A Or was guilty, yes.

Q So, we're talking about that?

A Yes.

Q So, you would be satisfied with a reasonable doubt standard? You would be willing to follow the law?

A Yes.

Q In other words, nothing, there is very few things in life absolutely certain?

A I understand.

Q And that is basically what we're saying to you, and that is what the term reasonable doubt means—

A (Nodding head).

Q —that we don't have to prove it beyond all doubt.

Now, we get to the penalty phase and the question becomes slightly different. It presumes life as a person is presumed innocent in the guilt phase, it is presumed that the proper penalty for the beginning point in the penalty phase is life in prison without parole.

Now, you mentioned that you would have to be satisfied that the person would not kill again. Now, you know that the possible, that the only two penalties are life in prison without parole or death. The person, if he is committed, if he is convicted of aggravated murder, is not going to be out on the streets again, not going to come in contact with the people that he had a chance to run into before. So, the likelihood of him killing someone out in the street is nil or practically nil at that point.

I guess the reverse side of what you're saying is, if you could be convinced that he wouldn't kill again, would you find it difficult to vote for the death penalty given a situation where he couldn't kill again?

A I think I made that statement more under assumption that a person could be paroled. And it wasn't until today that I became aware that we had a life without parole in the state of Washington.

Q And now that you know there is such a thing and they do mean what they say, can you think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life?

A I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole.

Q And I realize this is put on you rather suddenly, but you also recognize as someone who is representing the State

in this case, we have made the election to ask that the jury if he is found guilty, ask that the jury vote for the death penalty.

And I'm asking you a very important thing and to everyone in here, whether you, knowing that the person would never get out for the rest of his life, two things. And they're slightly different. One, whether you could consider the death penalty and the second thing I would ask you is whether you could impose the death penalty. I'm not asking a promise or anything.

But I'm asking you, first, could you consider it, and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?

A Yes, sir.

Q So, this idea of him having to kill again to deserve the death penalty is something that you are not firm on, you don't feel that now?

A I do feel that way if parole is an option, without parole as an option. I believe in the death penalty. Like I said, I'm not sure that there should be a waiting line of people happening every day or every week even, but I think in severe situations it's an appropriate measure.

Q But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?

A I could consider it, yes.

Q Then could you impose it?

A I could if I was convinced that was the appropriate measure.

MR. MATTHEWS: I have no further questions.

THE COURT: All right. [Juror Z], there is something that I want to clarify in response to some of the questions that were asked of you.

VOIR DIRE EXAMINATION

BY THE COURT:

Q In your questionnaire it talks about beyond a shadow of a doubt, and the prosecutor here went into that a little further. You realize that that is the standard that the law imposes on the State to prove a case beyond a reasonable doubt. And, obviously, that is a question of interpretation.

You officiate basketball games. That's in your questionnaire. You, even at the college level, knowing how fast that game is, you have to make a call on some of those calls and you have to decide whether to blow that whistle and make that particular call. Do you think you understand the difference between a reasonable call and beyond a shadow of a doubt type call?

A I guess I do. The terminology beyond a shadow of a doubt, when I wrote that I wasn't even sure whether, I mean, it's just terminology that I have heard probably watching Perry Mason or something over the years. But I guess the point I was making that it has to be—

Q You would have to be positive?

A I would have to be positive, that's correct.

Q The State has to convince you?

A Yes.

Q As they would have to convince any reasonable person?

A Yes.

THE COURT: [Juror Z], let me have you step back into the juryroom. The bailiff will excuse you from there in just a few minutes. Thank you.

Counsel, any challenge to this particular juror?

MR. MATTHEWS: I would, your Honor, not on the term beyond a shadow of a doubt, I think he would certainly stick with the reasonable doubt standard. But I think he is very confused about the statements where he said that if a person can't kill again, in other words, he's locked up for the rest of his life, he said, basically, he could vote for the death penalty

if it was proved beyond a shadow of. And I am certainly going to concede that he means beyond a reasonable doubt. And if a person kills and will kill again. And I think he has some real problems with that. He said he hadn't really thought about it. And I don't think at this period of time he's had an opportunity to think about it, and I don't think he said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again. So, that is my only challenge.

MR. MULLIGAN: We have no objection.

THE COURT: Counsel, the request of the prosecutor's office, we will go ahead and excuse [Juror Z].

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

Millions of Americans oppose the death penalty. A cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases. An individual's opinion that a life sentence without the possibility of parole is the severest sentence that should be imposed in all but the most heinous cases does not even arguably "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright* v. *Witt*, 469 U. S. 412, 420 (1985) (emphasis deleted). Moreover, an individual who maintains such a position, or even one who opposes the death penalty as a general matter, "'may not be challenged for cause based on his views about capital punishment.'" *Ibid.* Today the Court ignores these well-established principles, choosing instead to defer blindly to a state court's erroneous characterization of a juror's *voir dire* testimony.[1] Although this case

[1] The Court opens its opinion with a graphic description of the underlying facts of respondent's crime, perhaps in an attempt to startle the reader or muster moral support for its decision. Given the legal question at issue, and the procedural posture of this case, the inclusion of such a de-

comes to us under the standard of review imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, the level of deference given by the Court to the state courts in this case is completely unwarranted based on the record before us. Because I find no justification in the record or elsewhere for the decision to strike Juror Z for cause, I must dissent.

I

When the State challenged Juror Z, it argued that he was "confused about the conditions under which [the death penalty] could be imposed and seemed to believe it only appropriate when there was a risk of release and recidivism." *Ante*, at 15. A more accurate characterization of Juror Z's testimony is that although he harbored some general reservations about the death penalty, he stated that he could consider and would vote to impose the death penalty where appropriate.[2] When asked for "an idea . . . of the underlying

scription is, in my view, both irrelevant and unnecessary. Cf. *Witt*, 469 U. S., at 440, n. 1 (Brennan, J., dissenting) ("However heinous Witt's crime, the majority's vivid portrait of its gruesome details has no bearing on the issue before us. It is not for this Court to decide whether Witt deserves to die. That decision must first be made by a jury of his peers, so long as the jury is impartial and drawn from a fair cross section of the community in conformity with the requirements of the Sixth and Fourteenth Amendments").

[2] In contrast to Juror Z's statements, those jurors who have been properly struck under the *Witherspoon-Witt* rule have made much stronger statements with regard to their inability to follow the law or to impose the death penalty. See, *e. g.*, *Wainwright* v. *Witt*, 469 U. S. 412, 416 (1985) (juror confirming that her personal beliefs would interfere with her ability to judge the guilt or innocence of the defendant); *id.*, at 438, n. 7 (STEVENS, J., concurring in judgment) (discussing the two other jurors who were properly dismissed for cause, one of whom stated that he would not be able to "'follow the law as instructed by the Court'" when the death penalty was in issue, and the other of whom stated that he could not "keep an open mind as to whether to vote for the death penalty or life"); *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). Cf. *Gray* v. *Mississippi*, 481 U. S. 648, 653–654, and n. 5, 659 (1987) (holding that a juror who seemed "some-

reason why you think the death penalty is appropriate [or] what purpose it serves," Juror Z responded that "the *type* of situation" in which the death penalty would be appropriate was "if a person [was] incorrigible and would reviolate if released." App. 62 (emphasis added). After it was explained to Juror Z that the only two sentencing alternatives available under Washington law would be life imprisonment without the possibility of parole and a death sentence, Juror Z repeatedly confirmed that even if he knew the defendant would never be released, he would still be able to consider and vote for the death penalty. *Id.*, at 62, 72, 73. As for any general reservations Juror Z may have had about the imposition of the death penalty, it is clear from his testimony that he was in no way categorically opposed to it. When asked whether he was "a little more comfortable that it is being used some of the time," Juror Z responded in the affirmative. *Id.*, at 63.

While such testimony might justify a prosecutor's peremptory challenge, until today not one of the many cases decided in the wake of *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), has suggested that such a view would support a challenge for cause. The distinction that our cases require trial judges to draw is not between jurors who are in favor of the death penalty and those who oppose it, but rather between two subclasses within the latter class—those who will conscientiously apply the law and those whose conscientious scruples necessarily prevent them from doing so.[3] As then-Justice

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what confused" but who stated that she "could" vote for the death penalty "'was clearly qualified to be seated as a juror under the *Adams* [v. *Texas*, 448 U. S. 38 (1980),] and *Witt* criteria'").

[3] "The state of this case law leaves trial courts with the difficult task of distinguishing between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." *Witt*, 469 U. S., at 421.

Rehnquist explained in his opinion for the Court in *Lockhart* v. *McCree*, 476 U. S. 162, 176 (1986):

> "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law."

Today's opinion simply ignores the justification for this strict rule. As we explained 20 years ago:

> "The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.' *Wainwright* v. *Witt*, 469 U. S., at 423. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It 'stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law.' *Witherspoon* v. *Illinois*, 391 U. S., at 523." *Gray* v. *Mississippi*, 481 U. S. 648, 658–659 (1987).

In its opinion, the Court blindly accepts the state court's conclusory statement that Juror Z's views would have "substantially impaired" his ability to follow the court's instructions without examining what that term means in practice and under our precedents. *Ante*, at 16. Even AEDPA does not permit us to abdicate our judicial role in this fashion.

The high threshold that must be crossed to establish the kind of impairment that would justify the exclusion of a juror under the rule of *Wainwright* v. *Witt* is illustrated by Justice Powell's opinion for the Court in *Darden* v. *Wainwright*, 477 U. S. 168 (1986). In that case, we assumed that a prospec-

tive juror's affirmative answer to the following question would not suffice to support his exclusion for cause: " 'Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?' " *Id.*, at 178. We recognized that the juror's answer by itself did not compel the conclusion that he could not under any circumstances recommend the death penalty. See *ibid.* ("The precise wording of the question asked of [the juror], and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty"). We nevertheless upheld his exclusion because the trial judge had previously explained that he wanted to know if " 'you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence *even though the facts presented to you should be such as under the law would require that recommendation?*' " *Id.*, at 176 (emphasis added). Our holding in *Darden* rested squarely on the distinction between mere opposition to the death penalty—even when based on religious or moral principles—and an inability to perform the legally required duties of a juror.

In contrast, in *Gray,* 481 U. S. 648, we reversed a death sentence where a juror had been impermissibly struck for cause. In that case, the trial court struck a juror who appeared confused and who at times seemed to equivocate, but who eventually acknowledged that "she could consider the death penalty in an appropriate case." *Id.*, at 653; cf. *voir dire* testimony of Juror Z, App. 73 ("I could [impose the death penalty] if I was convinced that [it] was the appropriate measure"). The Court distinguishes *Gray* from the case now before us solely on the basis that in *Gray* there was no state-court finding of substantial impairment. *Ante,* at 9. In the Court's view, this distinction is grounded in the

fact that, here, there was "an explicit ruling that Juror Z was impaired." *Ante*, at 16. That "ruling" consists of a one-sentence conclusion included in the final summary section of the Washington Supreme Court's opinion. That conclusion is based on an earlier part of the court's opinion, in which it found that during *voir dire*, Juror Z "indicated that he would impose the death penalty where the defendant 'would reviolate if released,' which is not a correct statement of the law." *State* v. *Brown*, 132 Wash. 2d 529, 604, 940 P. 2d 546, 585 (1997). Under our precedents, a juror's statement that he would vote to impose a death sentence where there is a possibility that the defendant may reoffend, provided merely as an example of when that penalty might be appropriate, does not constitute a basis for striking a juror for cause.[4]

In the alternative, and perhaps recognizing the tenuous nature of the state court's "ruling," the Court relies on the fact that the trial court's judgment is entitled to deference because it had the unique opportunity to observe Juror Z's demeanor during *voir dire*. A ruling cannot be taken at face value when it is clear that the reasoning behind that ruling is erroneous in light of our prior precedents.[5] There is abso-

[4] To the extent the Washington Supreme Court deemed Juror Z "substantially impaired" because he initially demonstrated a misunderstanding of or confusion about the relevant law, that would also be an insufficient basis to support his exclusion for cause, given that by the end of the *voir dire* questioning, his confusion on that point had abated and he had made clear that even if the defendant were never to be released, he could still consider the death penalty. He also initially "misunderstood the State's burden of proof in a criminal case" but, as the Washington Supreme Court itself explained, "he was corrected later." 132 Wash. 2d, at 604, 940 P. 2d, at 585.

[5] Although pre-AEDPA, we recognized in *Gray* that the deference traditionally given to a trial court's findings may not be due when those findings are based on a misapplication of federal law. See 481 U. S., at 661, n. 10 ("The State has devoted a significant portion of its brief to an argument based on the deference this Court owes to findings of fact made by a trial court. Such deference is inappropriate where, as here, the trial

lutely nothing in the record to suggest—even in light of the trial court's tendency to provide "careful and measured explanations" for its decisions, *ante,* at 11—that anything about Juror Z's demeanor would dull the impact of his numerous affirmative statements about his ability to impose the death penalty in any situation. In effect, the Court reads something into nothing and defers to a finding that the trial court never made, instead of relying on the finding on which the Washington Supreme Court clearly based its own ruling and which finds no support in our decisions.

In its analysis, the Court places great emphasis on defense counsel's failure to object to Juror Z's exclusion for cause, characterizing it as "voluntary acquiescence to, or confirmation of," his removal. *Ante,* at 18. A closer look at the *voir dire* transcript, which the Court has included as an appendix to its opinion, reveals that the Court's interpretation of defense counsel's statement is not necessarily accurate. Upon being asked by the judge if either party had any challenge to Juror Z, the State provided that it did and the defense responded to the judge that it had "no objection." App. 75. Although the Court reads defense counsel's statement to mean that defense counsel had no objection to Juror Z's exclusion, it is more clearly read to mean that the defense had no objection to Juror Z serving on the jury and therefore no reason to challenge him.[6]

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court's findings are dependent on an apparent misapplication of federal law").

[6] As the Court of Appeals recognized in its opinion, it could also certainly be the case that "defense counsel declined to object because he was glad to get rid of juror Z[, given that] Z had described himself as pro-death penalty, and reiterated numerous times, under oath, that he would be willing and able to impose the death penalty." *Brown* v. *Lambert,* 451 F. 3d 946, 953, n. 9 (CA9 2006); cf. *Witt,* 469 U. S., at 437 (STEVENS, J., concurring in judgment) (noting that in the case of one juror who stated unequivocally that she "'could not bring back a death penalty,'" the defense's objection to the prosecutor's motion to excuse her for cause served to demonstrate that defense counsel *wanted* the juror to remain on the jury).

Even if we were to interpret defense counsel's statement as the failure to provide an affirmative "defense of Juror Z," *ante*, at 18, it is important to recognize that Washington law does not require an objection to preserve an error for review.[7] *Ante*, at 20; see also *State* v. *Levy*, 156 Wash. 2d 709, 719, 132 P. 3d 1076, 1081 (2006) ("We have long held that even if the defendant fails to object at trial, error may be raised on appeal if it 'invades a fundamental right of the accused'" (quoting *State* v. *Becker*, 132 Wash. 2d 54, 64, 935 P. 2d 1321, 1326 (1997))).

In any event, whether defense counsel's statement is taken as a failure to provide a defense of Juror Z or as acquiescence in his recusal, it is irrelevant to the ultimate disposition of this case. We said in *Witt* that the failure to object "in a situation later claimed to be so rife with ambiguity as to constitute constitutional error" is a factor that should be considered when assessing a defendant's claims, 469 U. S., at 431, n. 11, but in this case there was absolutely no basis for striking Juror Z. Thus, counsel's failure to provide an affirmative response to the State's motion, though perhaps not strategically sound, does not doom respondent's constitutional claim. Unlike *Witt*, in which there was arguably some ambiguity in the juror's *voir dire* responses, here Juror Z had unambiguously asserted his full capability to follow the law. See, *e. g.*, App. 58 ("I do believe in the death penalty in severe situations"); *id.*, at 62 (responding to whether he could consider both available sentencing options, "Yes, I could"); *id.*, at 63 ("I just felt that there were times when [the death penalty] would be appropriate"); *id.*, at 72 (responding to whether he could consider and impose the death penalty where the defendant would otherwise never be released from prison, "Yes, sir"); *id.*, at 73 (responding to whether he could

[7] In contrast, in *Witt*, we found it significant enough to note that since it had decided the case, the Florida Supreme Court had "enforced a contemporaneous-objection rule when dealing with *Witherspoon* challenges." *Id.*, at 431, n. 11.

consider and vote for the death penalty where the alternative is a life sentence without the possibility of parole, "I could [impose it] if I was convinced that was the appropriate measure"); cf. *Witt*, 469 U. S., at 438 (STEVENS, J., concurring in judgment) ("Given . . . [the juror's] somewhat timorous responses, it is entirely possible that her appearance and demeanor persuaded trial counsel that he would prefer a more vigorous or less reluctant juror").

II

Even a juror who is generally opposed to the death penalty cannot permissibly be excused for cause so long as he can still follow the law as properly instructed. The Court recognizes this principle, see *ante*, at 5–6, and yet the perverse result of its opinion is that a juror who is clearly willing to impose the death penalty, but considers the severity of that decision carefully enough to recognize that there are certain circumstances under which it is not appropriate (*e. g.*, that it would only be appropriate in "severe situations," App. 63), is "substantially impaired." It is difficult to imagine, under such a standard, a juror who would not be considered so impaired, unless he delivered only perfectly unequivocal answers during the unfamiliar and often confusing legal process of *voir dire* and was willing to state without hesitation that he would be able to vote for a death sentence under any imaginable circumstance. Cf. *Adams* v. *Texas*, 448 U. S. 38, 50–51 (1980) ("We repeat that the State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths. But [the Constitution does not allow the exclusion of] jurors whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected").

Today, the Court has fundamentally redefined—or maybe just misunderstood—the meaning of "substantially impaired," and, in doing so, has gotten it horribly backwards.

It appears to be under the impression that trial courts should be encouraging the inclusion of jurors who will impose the death penalty rather than only ensuring the exclusion of those who say that, in all circumstances, they cannot. The Court emphasizes that "the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." *Ante,* at 9. But that does not and cannot mean that jurors must be willing to impose a death sentence in every situation in which a defendant is eligible for that sanction. That is exactly the outcome we aimed to protect against in developing the standard that, contrary to the Court's apparent temporary lapse, still governs today. See *Gray,* 481 U. S., at 658 (explaining that to permit the exclusion of jurors other than those who will not follow their oaths "unnecessarily narrows the cross section of venire members" and "'stack[s] the deck against the petitioner'" (quoting *Witherspoon,* 391 U. S., at 523)).

Judge Kozinski's opinion for the Court of Appeals in this case is solidly grounded on the entire line of our cases recognizing the basic distinction dramatically illustrated by Justice Powell's opinion in *Darden* and by Justice Rehnquist's statement in *Lockhart.* He surely was entitled to assume that the law had not changed so dramatically in the years following his service as a law clerk to Chief Justice Burger that a majority of the present Court would not even mention that basic distinction, and would uphold the disqualification of a juror whose only failing was to harbor some slight reservation in imposing the most severe of sanctions.

I respectfully dissent.

JUSTICE BREYER, with whom JUSTICE SOUTER joins, dissenting.

I join JUSTICE STEVENS' dissent. I write separately to emphasize that, in my opinion, the Court's strongest piece of evidence—defense counsel's words "no objection" (uttered in response to the court's excusing Juror Z)—should play no

role in our analysis. App. 75. The words "no objection" meant in context at most what they say, namely that defense counsel did not object to the judge's excusing Juror Z for cause. Often States treat such a failure to object as waiving a point. But that is not so here. That is because the Washington Supreme Court has told us that, under state law, counsel's failure to object is without significant legal effect. *Ante*, at 20 (opinion of the Court); *ante*, at 42 (STEVENS, J., dissenting); *State* v. *Levy*, 156 Wash. 2d 709, 719–720, 132 P. 3d 1076, 1080–1081 (2006). And that means we must treat this case as if a proper objection had been made.

The majority continues to rely upon the statement, however, not as proving an objection, but as helping to demonstrate courtroom "atmospherics," such as facial expressions or vocal hesitations or tones of voice sufficient to warrant excusing Juror Z for cause. *Ante*, at 17–20, 21. But in my view the majority reads too much into too little. What the words "no objection" suggest is simply that defense counsel did not have any objection. And to find more in those few words treats them like a Rorschach blot, permitting a reviewing judge to affirm (or to reverse) the trial judge on no more than the subjective view of the written record that the appellate judge may take. Or, it simply offers a backdoor way to avoid the effect of Washington's procedural rule. The latter would wrongly ignore Washington law. The former would too often make it impossible to obtain meaningful review of silent records. There is no need, after all, to stretch the significance of ordinary statements and thereby to *assume* special atmospherics that support (or undercut) a trial judge's decision. Where special courtroom atmospherics matter, a lawyer (or the judge) can always make appropriate remarks for the record.

Basing my conclusions, then, on the written record itself, and in particular upon what Juror Z said in response to questions, I believe, for the reasons JUSTICE STEVENS sets forth (and applying the Antiterrorism and Effective Death Penalty

Act's strict standard), that the trial judge's decision to excuse Juror Z was constitutionally erroneous and a new trial is necessary.

For these reasons, I dissent.

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SAFECO INSURANCE COMPANY OF AMERICA ET AL. *v.* BURR ET AL.

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

No. 06–84. Argued January 16, 2007—Decided June 4, 2007*

The Fair Credit Reporting Act (FCRA) requires notice to a consumer subjected to "adverse action . . . based in whole or in part on any information contained in a consumer [credit] report." 15 U. S. C. § 1681m(a). As applied to insurance companies, "adverse action" is "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." § 1681a(k)(1)(B)(i). FCRA provides a private right of action against businesses that use consumer reports but fail to comply. A negligent violation entitles a consumer to actual damages, § 1681*o*(a), and a willful one entitles the consumer to actual, statutory, and even punitive damages, § 1681n(a).

Petitioners in No. 06–100 (GEICO) use an applicant's credit score to select the appropriate subsidiary insurance company and the particular rate at which a policy may be issued. GEICO sends an adverse action notice only if a neutral credit score would have put the applicant in a lower priced tier or company; the applicant is not otherwise told if he would have gotten better terms with a better credit score. Respondent Edo's credit score was taken into account when GEICO issued him a policy, but GEICO sent no adverse action notice because his company and tier placement would have been the same with a neutral score. Edo filed a proposed class action, alleging willful violation of § 1681m(a) and seeking statutory and punitive damages under § 1681n(a). The District Court granted GEICO summary judgment, finding no adverse action because the premium would have been the same had Edo's credit history not been considered. Petitioners in No. 06–84 (Safeco) also rely on credit reports to set initial insurance premiums. Respondents Burr and Massey—whom Safeco offered higher than the best rates possible without sending adverse action notices—joined a proposed class action, alleging willful violation of § 1681m(a) and seeking statutory and punitive damages under § 1681n(a). The District Court granted Safeco summary judgment on the ground that offering a single, initial rate for insurance

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*Together with No. 06–100, *GEICO General Insurance Co. et al.* v. *Edo*, also on certiorari to the same court.

cannot be "adverse action." The Ninth Circuit reversed both judgments. In GEICO's case, it held that an adverse action occurs whenever a consumer would have received a lower rate had his consumer report contained more favorable information. Since that would have happened to Edo, GEICO's failure to give notice was an adverse action. The court also held that an insurer willfully fails to comply with FCRA if it acts in reckless disregard of a consumer's FCRA rights, remanding for further proceedings on the reckless disregard issue. Relying on its decision in GEICO's case, the Ninth Circuit rejected the District Court's position in the Safeco case and remanded for further proceedings.

Held:

1. Willful failure covers a violation committed in reckless disregard of the notice obligation. Where willfulness is a statutory condition of civil liability, it is generally taken to cover not only knowing violations of a standard, but reckless ones as well. See, *e. g.*, *McLaughlin* v. *Richland Shoe Co.*, 486 U. S. 128, 133. This construction reflects common law usage. The standard civil usage thus counsels reading § 1681n(a)'s phrase "willfully fails to comply" as reaching reckless FCRA violations, both on the interpretive assumption that Congress knows how this Court construes statutes and expects it to run true to form, see *Commissioner* v. *Keystone Consol. Industries, Inc.*, 508 U. S. 152, 159, and under the rule that a common law term in a statute comes with a common law meaning, absent anything pointing another way, *Beck* v. *Prupis*, 529 U. S. 494, 500–501. Petitioners claim that § 1681n(a)'s drafting history points to a reading that liability attaches only to knowing violations, but the text as finally adopted points to the traditional understanding of willfulness in the civil sphere. Their other textual and structural arguments are also unpersuasive. Pp. 56–60.

2. Initial rates charged for new insurance policies may be adverse actions. Pp. 60–67.

(a) Reading the phrase "increase in any charge for . . . any insurance, existing or applied for," § 1681a(k)(1)(B)(i), to include a disadvantageous rate even with no prior dealing fits with the ambitious objective of FCRA's statement of purpose, which uses expansive terms to describe the adverse effects of unfair and inaccurate credit reporting and the responsibilities of consumer reporting agencies. See § 1681(a). These descriptions do nothing to suggest that remedies for consumers disadvantaged by unsound credit ratings should be denied to first-time victims, and the legislative histories of both FCRA's original enactment and a 1996 amendment reveal no reason to confine attention to customers and businesses with prior dealings. Finally, nothing about insurance contracts suggests that Congress meant to differentiate applicants

from existing customers when it set the notice requirement; the newly insured who gets charged more owing to an erroneous report is in the same boat with the renewal applicant. Pp. 60–63.

(b) An increased rate is not "based in whole or in part on" a credit report under § 1681m(a) unless the report was a necessary condition of the increase. In common talk, "based on" indicates a but-for causal relationship and thus a necessary logical condition. Though some textual arguments point another way, it makes more sense to suspect that Congress meant to require notice and prompt a consumer challenge only when the consumer would gain something if the challenge succeeded. Pp. 63–64.

(c) In determining whether a first-time rate is a disadvantageous increase, the baseline is the rate that the applicant would have received had the company not taken his credit score into account (the "neutral score" rate GEICO used in Edo's case). That baseline comports with the understanding that § 1681m(a) notice is required only when the credit report's effect on the initial rate is necessary to put the consumer in a worse position than other relevant facts would have decreed anyway. Congress was more likely concerned with the practical question whether the consumer's rate actually suffered when his credit report was taken into account than the theoretical question whether the consumer would have gotten a better rate with the best possible credit score, the baseline suggested by the Government and respondent-plaintiffs. The Government's objection to this reading is rejected. Although the rate initially offered for new insurance is an "increase" calling for notice if it exceeds the neutral rate, once a consumer has learned that his credit report led the insurer to charge more, he need not be told with each renewal if his rate has not changed. After initial dealing between the consumer and the insurer, the baseline for "increase" is the previous rate or charge, not the "neutral" baseline that applies at the start. Pp. 64–67.

3. GEICO did not violate the statute, and while Safeco might have, it did not act recklessly. Pp. 67–70.

(a) Because the initial rate GEICO offered Edo was what he would have received had his credit score not been taken into account, GEICO owed him no adverse action notice under § 1681m(a). Pp. 67–68.

(b) Even if Safeco violated FCRA when it failed to give Burr and Massey notice on the mistaken belief that § 1681m(a) did not apply to initial applications, the company was not reckless. The common law has generally understood "recklessness" in the civil liability sphere as conduct violating an objective standard: action entailing "an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Farmer* v. *Brennan*, 511 U. S. 825, 836. There being no

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indication that Congress had something different in mind, there is no reason to deviate from the common law understanding in applying the statute. See *Beck* v. *Prupis*, *supra*, at 500–501. Thus, a company does not act in reckless disregard of FCRA unless the action is not only a violation under a reasonable reading of the statute, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless. The negligence/recklessness line need not be pinpointed here, for Safeco's reading of the statute, albeit erroneous, was not objectively unreasonable. Section 1681a(k)(1)(B)(i) is silent on the point from which to measure "increase," and Safeco's reading has a foundation in the statutory text and a sufficiently convincing justification to have persuaded the District Court to adopt it and rule in Safeco's favor. Before these cases, no court of appeals had spoken on the issue, and no authoritative guidance has yet come from the Federal Trade Commission. Given this dearth of guidance and the less-than-pellucid statutory text, Safeco's reading was not objectively unreasonable, and so falls well short of raising the "unjustifiably high risk" of violating the statute necessary for reckless liability. Pp. 68–70.

No. 06–84, 140 Fed. Appx. 746; No. 06–100, 435 F. 3d 1081, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY and BREYER, JJ., joined, in which SCALIA, J., joined as to all but footnotes 11 and 15, in which THOMAS and ALITO, JJ., joined as to all but Part III–A, and in which STEVENS and GINSBURG, JJ., joined as to Parts I, II, III–A, and IV–B. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, in which GINSBURG, J., joined, *post*, p. 71. THOMAS, J., filed an opinion concurring in part, in which ALITO, J., joined, *post*, p. 73.

Maureen E. Mahoney argued the cause for petitioners in both cases. On the briefs in No. 06–84 were *Michael K. Kellogg*, *Sean A. Lev*, *Michael P. Kenny*, *Cari K. Dawson*, *Susan H. Ephron*, and *Lisa E. Lear*. With *Ms. Mahoney* on the briefs in No. 06–100 were *Richard P. Bress*, *Robert D. Allen*, *Meloney Cargil Perry*, *Jay F. Utley*, and *Brandon P. Long*.

Patricia A. Millett argued the cause for the United States as *amicus curiae* in both cases. With her on the brief were

Counsel

Solicitor General Clement, *Deputy Solicitor General Hungar*, *John F. Daly*, and *Lawrence DeMille-Wagman.*

Scott A. Shorr argued the cause for respondents in both cases. With him on the brief were *Robert A. Shlachter*, *Steve D. Larson*, and *Scott L. Nelson.*†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the American Insurance Association by *Seth P. Waxman*, *Noah A. Levine*, *J. Stephen Zielezienski*, and *Allan J. Stein;* for the Consumer Data Industry Association by *Anne P. Fortney;* for Farmers Insurance Co. of Oregon et al. by *Theodore J. Boutrous, Jr.*, *Gail E. Lees*, *Mark A. Perry*, *William E. Thomson*, *Christopher Chorba*, *Barnes H. Ellis*, and *James N. Westwood;* for the Financial Services Roundtable et al. by *L. Richard Fischer*, *Beth S. Brinkmann*, *Seth M. Galanter*, *Robin S. Conrad*, and *Shane Brennan;* for Ford Motor Co. by *David G. Leitch*, *John M. Thomas*, *Walter Dellinger*, and *Matthew M. Shors;* for the Freedomworks Foundation by *Gene C. Schaerr*, *Steffen N. Johnson*, and *Linda T. Coberly;* for Mortgage Insurance Cos. of America et al. by *Thomas M. Hefferon*, *Richard M. Wyner*, *Joseph F. Yenouskas*, and *Jeremiah S. Buckley;* for the National Association of Mutual Insurance Cos. by *Sheila L. Birnbaum*, *Barbara Wrubel*, *Douglas W. Dunham*, and *Ellen P. Quackenbos;* for the Property Casualty Insurers Association of America by *Susan M. Popik* and *Merri A. Baldwin;* for Trans Union LLC by *Michael O'Neil* and *Roger L. Longtin;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the State of Oregon et al. by *Hardy Myers*, Attorney General of Oregon, *Peter Shepherd*, Deputy Attorney General, *Mary H. Williams*, Solicitor General, and *Kaye E. McDonald*, Assistant Attorney General, by *Eugene A. Adams*, Interim Attorney General of the District of Columbia, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *Carl C. Danberg* of Delaware, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *J. Joseph Curran, Jr.*, of Maryland, *Mike Hatch* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Eliot Spitzer* of New York, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Henry McMaster* of South Carolina, *Larry Long* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Darrell V. McGraw, Jr.*, of West Virginia, *Peggy A. Lautenschlager* of Wisconsin, and *Patrick J. Crank* of Wyoming; for Insurance Commissioners of the State of Delaware et al. by *Patrick T. Ryan*, *Jeanie Kunkle Vaudt*, Assistant Attorney General of Iowa, *John W. Campbell*,

JUSTICE SOUTER delivered the opinion of the Court.*

The Fair Credit Reporting Act (FCRA or Act) requires notice to any consumer subjected to "adverse action . . . based in whole or in part on any information contained in a consumer [credit] report." 15 U. S. C. § 1681m(a). Anyone who "willfully fails" to provide notice is civilly liable to the consumer. § 1681n(a). The questions in these consolidated cases are whether willful failure covers a violation committed in reckless disregard of the notice obligation, and, if so, whether petitioners Safeco and GEICO committed reckless violations. We hold that reckless action is covered, that GEICO did not violate the statute, and that while Safeco might have, it did not act recklessly.

I

A

Congress enacted FCRA in 1970 to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy. See 84 Stat. 1128, 15 U. S. C. § 1681; *TRW Inc.* v. *Andrews*, 534 U. S. 19, 23 (2001). The Act requires, among other things, that "any person [who] takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" must notify the affected consumer.[1] 15

John H. Clough, Michael W. Ridgeway, Rob McKenna, Attorney General of Washington, and *Christina Beusch*, Assistant Attorney General of Washington; and for the National Consumer Law Center, Inc., et al. by *Richard J. Rubin, Joanne S. Faulkner*, and *Elizabeth D. De Armond.*

*JUSTICE SCALIA joins all but footnotes 11 and 15 of this opinion.

[1] So far as it matters here, the Act defines "consumer report" as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, [or] credit capacity . . . which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . credit or insurance to be used primarily for personal, family, or household purposes." 15 U. S. C. § 1681a(d)(1) (footnote omitted). The scope of this definition is not at issue.

U. S. C. § 1681m(a). The notice must point out the adverse action, explain how to reach the agency that reported on the consumer's credit, and tell the consumer that he can get a free copy of the report and dispute its accuracy with the agency. *Ibid.* As it applies to an insurance company, "adverse action" is "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." § 1681a(k)(1)(B)(i).

FCRA provides a private right of action against businesses that use consumer reports but fail to comply. If a violation is negligent, the affected consumer is entitled to actual damages. § 1681*o*(a) (2000 ed., Supp. IV). If willful, however, the consumer may have actual damages, or statutory damages ranging from $100 to $1,000, and even punitive damages. § 1681n(a) (2000 ed.).

B

Petitioner GEICO[2] writes auto insurance through four subsidiaries: GEICO General, which sells "preferred" policies at low rates to low-risk customers; Government Employees, which also sells "preferred" policies, but only to government employees; GEICO Indemnity, which sells standard policies to moderate-risk customers; and GEICO Casualty, which sells nonstandard policies at higher rates to high-risk customers. Potential customers call a toll-free number answered by an agent of the four affiliates, who takes information and, with permission, gets the applicant's credit score.[3]

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[2] The specific petitioners are subsidiary companies of the GEICO Corporation; for the sake of convenience, we call them "GEICO" collectively.

[3] The Act defines a "credit score" as "a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors, including default." 15 U. S. C. § 1681g(f)(2)(A) (2000 ed., Supp. IV). Under its contract with its credit information providers, GEICO learned credit scores and facts in the credit reports that significantly

This information goes into GEICO's computer system, which selects any appropriate company and the particular rate at which a policy may be issued.

For some time after FCRA went into effect, GEICO sent adverse action notices to all applicants who were not offered "preferred" policies from GEICO General or Government Employees. GEICO changed its practice, however, after a method to "neutralize" an applicant's credit score was devised: the applicant's company and tier placement is compared with the company and tier placement he would have been assigned with a "neutral" credit score, that is, one calculated without reliance on credit history.[4] Under this new scheme, it is only if using a neutral credit score would have put the applicant in a lower priced tier or company that GEICO sends an adverse action notice; the applicant is not otherwise told if he would have gotten better terms with a better credit score.

Respondent Ajene Edo applied for auto insurance with GEICO. After obtaining Edo's credit score, GEICO offered him a standard policy with GEICO Indemnity (at rates higher than the most favorable), which he accepted. Because Edo's company and tier placement would have been the same with a neutral score, GEICO did not give Edo an adverse action notice. Edo later filed this proposed class action against GEICO, alleging willful failure to give notice in violation of § 1681m(a); he claimed no actual harm, but sought statutory and punitive damages under § 1681n(a). The District Court granted summary judgment for GEICO, finding

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influenced the scores, but did not have access to the credit reports themselves.

[4] A number of States permit the use of such "neutral" credit scores to ensure that consumers with thin or unidentifiable credit histories are not treated disadvantageously. See, *e. g.*, N. Y. Ins. Law Ann. §§ 2802(e), (e)(1) (West 2006) (generally prohibiting an insurer from "consider[ing] an absence of credit information," but allowing it to do so if it "treats the consumer as if the applicant or insured had neutral credit information, as defined by the insurer").

there was no adverse action when "the premium charged to [Edo] . . . would have been the same even if GEICO Indemnity did not consider information in [his] consumer credit history." *Edo* v. *GEICO Casualty Co.*, CV 02–678–BR, 2004 U. S. Dist. LEXIS 28522, *12 (D. Ore., Feb. 23, 2004), App. to Pet. for Cert. in No. 06–100, p. 46a.

Like GEICO, petitioner Safeco[5] relies on credit reports to set initial insurance premiums,[6] as it did for respondents Charles Burr and Shannon Massey, who were offered higher rates than the best rates possible. Safeco sent them no adverse action notices, and they later joined a proposed class action against the company, alleging willful violation of § 1681m(a) and seeking statutory and punitive damages under § 1681n(a). The District Court ordered summary judgment for Safeco, on the understanding that offering a single, initial rate for insurance cannot be "adverse action."

The Court of Appeals for the Ninth Circuit reversed both judgments. In GEICO's case, it held that whenever a consumer "would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken against him." *Reynolds* v. *Hartford Financial Servs. Group, Inc.*, 435 F. 3d 1081, 1093 (2006). Since a better credit score would have placed Edo with GEICO General, not GEICO Indemnity, the appeals court held that GEICO's failure to give notice was an adverse action.

The Ninth Circuit also held that an insurer "willfully" fails to comply with FCRA if it acts with "reckless disregard" of a consumer's rights under the Act. *Id.*, at 1099. It explained that a company would not be acting recklessly if it "diligently and in good faith attempted to fulfill its statutory

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[5] Again, the actual petitioners are subsidiary companies, of Safeco Corporation in this case; for convenience, we call them "Safeco" collectively.

[6] The parties do not dispute that the credit scores and credit reports relied on by GEICO and Safeco are "consumer reports" under 15 U. S. C. § 1681a(d)(1).

obligations" and came to a "tenable, albeit erroneous, interpretation of the statute." *Ibid.* The court went on to say that "a deliberate failure to determine the extent of its obligations" would not ordinarily escape liability under § 1681n, any more than "reliance on creative lawyering that provides indefensible answers." *Ibid.* Because the court believed that the enquiry into GEICO's reckless disregard might turn on undisclosed circumstances surrounding GEICO's revision of its notification policy, the Court of Appeals remanded the company's case for further proceedings.[7]

In the action against Safeco, the Court of Appeals rejected the District Court's position, relying on its reasoning in GEICO's case (where it had held that the notice requirement applies to a single statement of an initial charge for a new policy). *Spano* v. *Safeco Corp.*, 140 Fed. Appx. 746 (2005). The Court of Appeals also rejected Safeco's argument that its conduct was not willful, again citing the GEICO case, and remanded for further proceedings.

We consolidated the two matters and granted certiorari to resolve a conflict in the Circuits as to whether § 1681n(a) reaches reckless disregard of FCRA's obligations,[8] and to clarify the notice requirement in § 1681m(a). 548 U. S. 942 (2006). We now reverse in both cases.

II

GEICO and Safeco argue that liability under § 1681n(a) for "willfully fail[ing] to comply" with FCRA goes only to acts

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[7] Prior to issuing its final opinion in this case, the Court of Appeals had issued, then withdrawn, two opinions in which it held that GEICO had "willfully" violated FCRA as a matter of law. *Reynolds* v. *Hartford Financial Servs. Group, Inc.*, 416 F. 3d 1097 (CA9 2005); *Reynolds* v. *Hartford Financial Servs. Group, Inc.*, 426 F. 3d 1020 (CA9 2005).

[8] Compare, *e. g.*, *Cushman* v. *Trans Union Corp.*, 115 F. 3d 220, 227 (CA3 1997) (adopting the "reckless disregard" standard), with *Wantz* v. *Experian Information Solutions*, 386 F. 3d 829, 834 (CA7 2004) (construing "willfully" to require that a user "knowingly and intentionally violate the Act"); *Phillips* v. *Grendahl*, 312 F. 3d 357, 368 (CA8 2002) (same).

known to violate the Act, not to reckless disregard of statutory duty, but we think they are wrong. We have said before that "willfully" is a "word of many meanings whose construction is often dependent on the context in which it appears," *Bryan* v. *United States*, 524 U. S. 184, 191 (1998) (internal quotation marks omitted); and where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well, see *McLaughlin* v. *Richland Shoe Co.*, 486 U. S. 128, 132–133 (1988) ("willful," as used in a limitation provision for actions under the Fair Labor Standards Act, covers claims of reckless violation); *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 125–126 (1985) (same, as to a liquidated damages provision of the Age Discrimination in Employment Act of 1967); cf. *United States* v. *Illinois Central R. Co.*, 303 U. S. 239, 242–243 (1938) ("willfully," as used in a civil penalty provision, includes " 'conduct marked by careless disregard whether or not one has the right so to act' " (quoting *United States* v. *Murdock*, 290 U. S. 389, 395 (1933))). This construction reflects common law usage, which treated actions in "reckless disregard" of the law as "willful" violations. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 34, p. 212 (5th ed. 1984) (hereinafter Prosser and Keeton) ("Although efforts have been made to distinguish" the terms "willful," "wanton," and "reckless," "such distinctions have consistently been ignored, and the three terms have been treated as meaning the same thing, or at least as coming out at the same legal exit"). The standard civil usage thus counsels reading the phrase "willfully fails to comply" in § 1681n(a) as reaching reckless FCRA violations,[9] and this is so both on

[9] It is different in the criminal law. When the term "willful" or "willfully" has been used in a criminal statute, we have regularly read the modifier as limiting liability to knowing violations. See *Ratzlaf* v. *United States*, 510 U. S. 135, 137 (1994); *Bryan* v. *United States*, 524 U. S. 184, 191–192 (1998); *Cheek* v. *United States*, 498 U. S. 192, 200–201 (1991). This

the interpretive assumption that Congress knows how we construe statutes and expects us to run true to form, see *Commissioner* v. *Keystone Consol. Industries, Inc.*, 508 U. S. 152, 159 (1993), and under the general rule that a common law term in a statute comes with a common law meaning, absent anything pointing another way, *Beck* v. *Prupis*, 529 U. S. 494, 500–501 (2000).

GEICO and Safeco argue that Congress did point to something different in FCRA, by a drafting history of § 1681n(a) said to show that liability was supposed to attach only to knowing violations. The original version of the Senate bill that turned out as FCRA had two standards of liability to victims: grossly negligent violation (supporting actual damages) and willful violation (supporting actual, statutory, and punitive damages). S. 823, 91st Cong., 1st Sess., § 1 (1969). GEICO and Safeco argue that since a "gross negligence" standard is effectively the same as a "reckless disregard" standard, the original bill's "willfulness" standard must have meant a level of culpability higher than "reckless disregard," or there would have been no requirement to show a different state of mind as a condition of the potentially much greater liability; thus, "willfully fails to comply" must have referred to a knowing violation. Although the gross negligence standard was reduced later in the legislative process to simple negligence (as it now appears in § 1681*o*), the provision

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reading of the term, however, is tailored to the criminal law, where it is characteristically used to require a criminal intent beyond the purpose otherwise required for guilt, *Ratzlaf, supra,* at 136–137; or an additional "'bad purpose,'" *Bryan, supra,* at 191; or specific intent to violate a known legal duty created by highly technical statutes, *Cheek, supra,* at 200–201. Thus we have consistently held that a defendant cannot harbor such criminal intent unless he "acted with knowledge that his conduct was unlawful." *Bryan, supra,* at 193. Civil use of the term, however, typically presents neither the textual nor the substantive reasons for pegging the threshold of liability at knowledge of wrongdoing. Cf. *Farmer* v. *Brennan*, 511 U. S. 825, 836–837 (1994) (contrasting the different uses of the term "recklessness" in civil and criminal contexts).

for willful liability remains unchanged and so must require knowing action, just as it did originally in the draft of § 1681n.

Perhaps. But Congress may have scaled the standard for actual damages down to simple negligence because it thought gross negligence, being like reckless action, was covered by willfulness. Because this alternative reading is possible, any inference from the drafting sequence is shaky, and certainly no match for the following clue in the text as finally adopted, which points to the traditional understanding of willfulness in the civil sphere.

The phrase in question appears in the preamble sentence of § 1681n(a): "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer . . . ." Then come the details, in paragraphs (1)(A) and (1)(B), spelling out two distinct measures of damages chargeable against the willful violator. As a general matter, the consumer may get either actual damages or "damages of not less than $100 and not more than $1,000." § 1681n(a)(1)(A). But where the offender is liable "for obtaining a consumer report under false pretenses or knowingly without a permissible purpose," the statute sets liability higher: "actual damages . . . or $1,000, whichever is greater." § 1681n(a)(1)(B).

If the companies were right that "willfully" limits liability under § 1681n(a) to knowing violations, the modifier "knowingly" in § 1681n(a)(1)(B) would be superfluous and incongruous; it would have made no sense for Congress to condition the higher damages under § 1681n(a) on knowingly obtaining a report without a permissible purpose if the general threshold of any liability under the section were knowing misconduct. If, on the other hand, "willfully" covers both knowing and reckless disregard of the law, knowing violations are sensibly understood as a more serious subcategory of willful ones, and both the preamble and the subsection have distinct jobs to do. See *United States* v. *Menasche*, 348 U. S. 528,

538–539 (1955) ("'[G]ive effect, if possible, to every clause and word of a statute'" (quoting *Montclair* v. *Ramsdell*, 107 U. S. 147, 152 (1883))).

The companies make other textual and structural arguments for their view, but none is persuasive. Safeco thinks our reading would lead to the absurd result that one could, with reckless disregard, knowingly obtain a consumer report without a permissible purpose. But this is not so; action falling within the knowing subcategory does not simultaneously fall within the reckless alternative. Then both GEICO and Safeco argue that the reference to acting "knowingly and willfully" in FCRA's criminal enforcement provisions, §§ 1681q and 1681r, indicates that "willfully" cannot include recklessness. But we are now on the criminal side of the law, where the paired modifiers are often found, see, *e. g.*, 18 U. S. C. § 1001 (2000 ed. and Supp. IV) (false statements to federal investigators); 20 U. S. C. § 1097(a) (embezzlement of student loan funds); 18 U. S. C. § 1542 (2000 ed. and Supp. IV) (false statements in a passport application). As we said before, in the criminal law "willfully" typically narrows the otherwise sufficient intent, making the government prove something extra, in contrast to its civil law usage, giving a plaintiff a choice of mental states to show in making a case for liability, see n. 9, *supra*. The vocabulary of the criminal side of FCRA is consequently beside the point in construing the civil side.

III

A

Before getting to the claims that the companies acted recklessly, we have the antecedent question whether either company violated the adverse action notice requirement at all. In both cases, respondent-plaintiffs' claims are premised on initial rates charged for new insurance policies, which are not "adverse" actions unless quoting or charging a first-time

premium is "an increase in any charge for . . . any insurance, existing or applied for." 15 U. S. C. § 1681a(k)(1)(B)(i).

In Safeco's case, the District Court held that the initial rate for a new insurance policy cannot be an "increase" because there is no prior dealing. The phrase "increase in any charge for . . . insurance" is readily understood to mean a change in treatment for an insured, which assumes a previous charge for comparison. See Webster's New International Dictionary 1260 (2d ed. 1957) (defining "increase" as "[a]ddition or enlargement in size, extent, quantity, number, intensity, value, substance, etc.; augmentation; growth; multiplication"). Since the District Court understood "increase" to speak of change just as much as of comparative size or quantity, it reasoned that the statute's "increase" never touches the initial rate offer, where there is no change.

The Government takes the part of the Court of Appeals in construing "increase" to reach a first-time rate. It says that regular usage of the term is not as narrow as the District Court thought: the point from which to measure difference can just as easily be understood without referring to prior individual dealing. The Government gives the example of a gas station owner who charges more than the posted price for gas to customers he does not like; it makes sense to say that the owner increases the price and that the driver pays an increased price, even if he never pulled in there for gas before. See Brief for United States as *Amicus Curiae* 26.[10] The Government implies, then, that reading "increase" requires a choice, and the chosen reading should be the broad one in order to conform to what Congress had in mind.

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[10] Since the posted price seems to be addressed to the world in general, one could argue that the increased gas price is not the initial quote. But the same usage point can be made with the example of the clothing model who gets a call from a ritzy store after posing for a discount retailer. If she quotes a higher fee, it would be natural to say that the uptown store will have to pay the "increase" to have her in its ad.

We think the Government's reading has the better fit with the ambitious objective set out in the Act's statement of purpose, which uses expansive terms to describe the adverse effects of unfair and inaccurate credit reporting and the responsibilities of consumer reporting agencies. See § 1681(a) (inaccurate reports "directly impair the efficiency of the banking system"; unfair reporting methods undermine public confidence "essential to the continued functioning of the banking system"; need to "insure" that reporting agencies "exercise their grave responsibilities" fairly, impartially, and with respect for privacy). The descriptions of systemic problem and systemic need as Congress saw them do nothing to suggest that remedies for consumers placed at a disadvantage by unsound credit ratings should be denied to first-time victims, and the legislative histories of FCRA's original enactment and of the 1996 amendment reveal no reason to confine attention to customers and businesses with prior dealings. Quite the contrary.[11] Finally, there is nothing about insurance contracts to suggest that Congress might have meant to differentiate applicants from existing customers when it set the notice requirement; the newly insured who gets charged more owing to an erroneous report is in the same boat with the renewal applicant.[12] We therefore hold

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[11] See S. Rep. No. 91–517, p. 7 (1969) ("Those who . . . charge a higher rate for credit or insurance wholly or partly because of a consumer report must, upon written request, so advise the consumer . . . "); S. Rep. No. 103–209, p. 4 (1993) (adverse action notice is required "any time the permissible use of a report results in an outcome adverse to the interests of the consumer"); H. R. Rep. No. 103–486, p. 26 (1994) ("[W]henever a consumer report is obtained for a permissible purpose . . . , any action taken based on that report that is adverse to the interests of the consumer triggers the adverse action notice requirements").

[12] In fact, notice in the context of an initially offered rate may be of greater significance than notice in the context of a renewal rate; if, for instance, insurance is offered on the basis of a single, long-term guaranteed rate, a consumer who is not given notice during the initial application process may never have an opportunity to learn of any adverse treatment.

that the "increase" required for "adverse action," 15 U. S. C. § 1681a(k)(1)(B)(i), speaks to a disadvantageous rate even with no prior dealing; the term reaches initial rates for new applicants.

B

Although offering the initial rate for new insurance can be an "adverse action," respondent-plaintiffs have another hurdle to clear, for § 1681m(a) calls for notice only when the adverse action is "based in whole or in part on" a credit report. GEICO argues that in order to have adverse action "based on" a credit report, consideration of the report must be a necessary condition for the increased rate. The Government and respondent-plaintiffs do not explicitly take a position on this point.

To the extent there is any disagreement on the issue, we accept GEICO's reading. In common talk, the phrase "based on" indicates a but-for causal relationship and thus a necessary logical condition. Under this most natural reading of § 1681m(a), then, an increased rate is not "based in whole or in part on" the credit report unless the report was a necessary condition of the increase.

As before, there are textual arguments pointing another way. The statute speaks in terms of basing the action "in part" as well as wholly on the credit report, and this phrasing could mean that adverse action is "based on" a credit report whenever the report was considered in the rate-setting process, even without being a necessary condition for the rate increase. But there are good reasons to think Congress preferred GEICO's necessary-condition reading.

If the statute has any claim to lucidity, not all "adverse actions" require notice, only those "based . . . on" information in a credit report. Since the statute does not explicitly call for notice when a business acts adversely merely after consulting a report, conditioning the requirement on action "based . . . on" a report suggests that the duty to report arises from some practical consequence of reading the re-

port, not merely some subsequent adverse occurrence that would have happened anyway. If the credit report has no identifiable effect on the rate, the consumer has no immediately practical reason to worry about it (unless he has the power to change every other fact that stands between himself and the best possible deal); both the company and the consumer are just where they would have been if the company had never seen the report.[13] And if examining reports that make no difference was supposed to trigger a reporting requirement, it would be hard to find any practical point in imposing the "based . . . on" restriction. So it makes more sense to suspect that Congress meant to require notice and prompt a challenge by the consumer only when the consumer would gain something if the challenge succeeded.[14]

C

To sum up, the difference required for an increase can be understood without reference to prior dealing (allowing a

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[13] For instance, if a consumer's driving record is so poor that no insurer would give him anything but the highest possible rate regardless of his credit report, whether or not an insurer happened to look at his credit report should have no bearing on whether the consumer must receive notice, since he has not been treated differently as a result of it.

[14] The history of the Act provides further support for this reading. The originally enacted version of the notice requirement stated: "Whenever . . . the charge for . . . insurance is increased either wholly or partly because of information contained in a consumer report . . . , the user of the consumer report shall so advise the consumer . . . ." 15 U. S. C. § 1681m(a) (1976 ed.). The "because of" language in the original statute emphasized that the consumer report must actually have caused the adverse action for the notice requirement to apply. When Congress amended FCRA in 1996, it sought to define "adverse action" with greater particularity, and thus split the notice provision into two separate subsections. See 110 Stat. 3009–426 to 3009–427, 3009–443 to 3009–444. In the revised version of § 1681m(a), the original "because of" phrasing changed to "based . . . on," but there was no indication that this change was meant to be a substantive alteration of the statute's scope.

first-time applicant to sue), and considering the credit report must be a necessary condition for the difference. The remaining step in determining a duty to notify in cases like these is identifying the benchmark for determining whether a first-time rate is a disadvantageous increase. And in dealing with this issue, the pragmatic reading of "based . . . on" as a condition necessary to make a practical difference carries a helpful suggestion.

The Government and respondent-plaintiffs argue that the baseline should be the rate that the applicant would have received with the best possible credit score, while GEICO contends it is what the applicant would have had if the company had not taken his credit score into account (the "neutral score" rate GEICO used in Edo's case). We think GEICO has the better position, primarily because its "increase" baseline is more comfortable with the understanding of causation just discussed, which requires notice under § 1681m(a) only when the effect of the credit report on the initial rate offered is necessary to put the consumer in a worse position than other relevant facts would have decreed anyway. If Congress was this concerned with practical consequences when it adopted a "based . . . on" causation standard, it presumably thought in equally practical terms when it spoke of an "increase" that must be defined by a baseline to measure from. Congress was therefore more likely concerned with the practical question whether the consumer's rate actually suffered when the company took his credit report into account than the theoretical question whether the consumer would have gotten a better rate with perfect credit.[15]

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[15] While it might seem odd, under the current statutory structure, to interpret the definition of "adverse action" (in § 1681a(k)(1)(B)(i)) in conjunction with § 1681m(a), which simply applies the notice requirement to a particular subset of "adverse actions," there are strong indications that Congress intended these provisions to be construed in tandem. When FCRA was initially enacted, the link between the definition of "adverse action" and the notice requirement was clear, since "adverse action" was

The Government objects that this reading leaves a loophole, since it keeps first-time applicants who actually deserve better-than-neutral credit scores from getting notice, even when errors in credit reports saddle them with unfair rates. This is true; the neutral-score baseline will leave some consumers without a notice that might lead to discovering errors. But we do not know how often these cases will occur, whereas we see a more demonstrable and serious disadvantage inhering in the Government's position.

Since the best rates (the Government's preferred baseline) presumably go only to a minority of consumers, adopting the Government's view would require insurers to send slews of adverse action notices; every young applicant who had yet to establish a gilt-edged credit report, for example, would get a notice that his charge had been "increased" based on his credit report. We think that the consequence of sending out notices on this scale would undercut the obvious policy behind the notice requirement, for notices as common as these would take on the character of formalities, and formalities tend to be ignored. It would get around that new insurance usually comes with an adverse action notice, owing to some legal quirk, and instead of piquing an applicant's interest about the accuracy of his credit record, the commonplace notices would mean just about nothing and go the way of junk mail. Assuming that Congress meant a notice of adverse

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defined within § 1681m(a). See 15 U. S. C. § 1681m(a) (1976 ed.). Though Congress eventually split the provision into two parts (with the definition of "adverse action" now located at § 1681a(k)(1)(B)(i)), the legislative history suggests that this change was not meant to alter Congress's intent to define "adverse action" in light of the notice requirement. See S. Rep. No. 103–209, at 4 ("The Committee bill . . . defines an 'adverse action' as any action that is adverse to the interests of the consumer and is based in whole or in part on a consumer report"); H. R. Rep. No. 103–486, at 26 ("[A]ny action based on [a consumer] report that is adverse to the interests of the consumer triggers the adverse action notice requirements").

action to get some attention, we think the cost of closing the loophole would be too high.

While on the subject of hypernotification, we should add a word on another point of practical significance. Although the rate initially offered for new insurance is an "increase" calling for notice if it exceeds the neutral rate, did Congress intend the same baseline to apply if the quoted rate remains the same over a course of dealing, being repeated at each renewal date?

We cannot believe so. Once a consumer has learned that his credit report led the insurer to charge more, he has no need to be told over again with each renewal if his rate has not changed. For that matter, any other construction would probably stretch the word "increase" more than it could bear. Once the gas station owner had charged the customer the above-market price, it would be strange to speak of the same price as an increase every time the customer pulled in. Once buyer and seller have begun a course of dealing, customary usage does demand a change for "increase" to make sense.[16] Thus, after initial dealing between the consumer and the insurer, the baseline for "increase" is the previous rate or charge, not the "neutral" baseline that applies at the start.

IV

A

In GEICO's case, the initial rate offered to Edo was the one he would have received if his credit score had not been

[16] Consider, too, a consumer who, at the initial application stage, had a perfect credit score and thus obtained the best insurance rate, but, at the renewal stage, was charged at a higher rate (but still lower than the rate he would have received had his credit report not been taken into account) solely because his credit score fell during the interim. Although the consumer clearly suffered an "increase" in his insurance rate that was "based on" his credit score, he would not be entitled to an adverse action notice under the baseline used for initial applications.

taken into account, and GEICO owed him no adverse action notice under § 1681m(a).[17]

B

Safeco did not give Burr and Massey any notice because it thought § 1681m(a) did not apply to initial applications, a mistake that left the company in violation of the statute if Burr and Massey received higher rates "based in whole or in part" on their credit reports; if they did, Safeco would be liable to them on a showing of reckless conduct (or worse). The first issue we can forget, however, for although the record does not reliably indicate what rates they would have obtained if their credit reports had not been considered, it is clear enough that if Safeco did violate the statute, the company was not reckless in falling down in its duty.

While "the term recklessness is not self-defining," the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing "an unjustifiably high risk of harm that is either known or so obvious that it should be known."[18] *Farmer* v. *Brennan*, 511 U. S. 825, 836 (1994); see Prosser and Keeton

[17] We reject Edo's alternative argument that GEICO's offer of a standard insurance policy with GEICO Indemnity was an "adverse action" requiring notice because it amounted to a "denial" of insurance through a lower cost, "preferred" policy with GEICO General. See § 1681a(k)(1)(B)(i) (defining "adverse action" to include a "denial . . . of . . . insurance"). An applicant calling GEICO for insurance talks with a sales representative who acts for all the GEICO companies. The record has no indication that GEICO tells applicants about its corporate structure, or that applicants request insurance from one of the several companies or even know of their separate existence. The salesperson takes information from the applicant and obtains his credit score, then either denies any insurance or assigns him to one of the companies willing to provide it; the other companies receive no application and take no separate action. This way of accepting new business is clearly outside the natural meaning of "denial" of insurance.

[18] Unlike civil recklessness, criminal recklessness also requires subjective knowledge on the part of the offender. *Brennan*, 511 U. S., at 836–837; ALI, Model Penal Code § 2.02(2)(c) (1985).

§ 34, at 213–214. The Restatement, for example, defines reckless disregard of a person's physical safety this way:

> "The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." 2 Restatement (Second) of Torts § 500, p. 587 (1963–1964).

It is this high risk of harm, objectively assessed, that is the essence of recklessness at common law. See Prosser and Keeton § 34, at 213 (recklessness requires "a known or obvious risk that was so great as to make it highly probable that harm would follow").

There being no indication that Congress had something different in mind, we have no reason to deviate from the common law understanding in applying the statute. See *Prupis*, 529 U. S., at 500–501. Thus, a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.

Here, there is no need to pinpoint the negligence/recklessness line, for Safeco's reading of the statute, albeit erroneous, was not objectively unreasonable. As we said, § 1681a(k)(1)(B)(i) is silent on the point from which to measure "increase." On the rationale that "increase" presupposes prior dealing, Safeco took the definition as excluding initial rate offers for new insurance, and so sent no adverse action notices to Burr and Massey. While we disagree with Safeco's analysis, we recognize that its reading has a founda-

tion in the statutory text, see *supra*, at 61, and a sufficiently convincing justification to have persuaded the District Court to adopt it and rule in Safeco's favor.

This is not a case in which the business subject to the Act had the benefit of guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took. Before these cases, no court of appeals had spoken on the issue, and no authoritative guidance has yet come from the FTC[19] (which in any case has only enforcement responsibility, not substantive rulemaking authority, for the provisions in question, see 15 U. S. C. §§ 1681s(a)(1), (e)). Cf. *Saucier* v. *Katz*, 533 U. S. 194, 202 (2001) (assessing, for qualified immunity purposes, whether an action was reasonable in light of legal rules that were "clearly established" at the time). Given this dearth of guidance and the less-than-pellucid statutory text, Safeco's reading was not objectively unreasonable, and so falls well short of raising the "unjustifiably high risk" of violating the statute necessary for reckless liability.[20]

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[19] Respondent-plaintiffs point to a letter, written by an FTC staff member to an insurance company lawyer, that suggests that an "adverse action" occurs when "the applicant will have to pay more for insurance at the inception of the policy than he or she would have been charged if the consumer report had been more favorable." Letter from Hannah A. Stires to James M. Ball (Mar. 1, 2000), http://www.ftc.gov/os/statutes/fcra/ball.htm (as visited May 17, 2007, and available in Clerk of Court's case file). But the letter did not canvass the issue, and it explicitly indicated that it was merely "an informal staff opinion . . . not binding on the Commission." *Ibid.*

[20] Respondent-plaintiffs argue that evidence of subjective bad faith must be taken into account in determining whether a company acted knowingly or recklessly for purposes of § 1681n(a). To the extent that they argue that evidence of subjective bad faith can support a willfulness finding even when the company's reading of the statute is objectively reasonable, their argument is unsound. Where, as here, the statutory text and relevant court and agency guidance allow for more than one reasonable interpreta-

The Court of Appeals correctly held that reckless disregard of a requirement of FCRA would qualify as a willful violation within the meaning of § 1681n(a). But there was no need for that court to remand the cases for factual development. GEICO's decision to issue no adverse action notice to Edo was not a violation of § 1681m(a), and Safeco's misreading of the statute was not reckless. The judgments of the Court of Appeals are therefore reversed in both cases, which are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring in part and concurring in the judgment.

While I join the Court's judgment and Parts I, II, III–A, and IV–B of the Court's opinion, I disagree with the reasoning in Parts III–B and III–C, as well as with Part IV–A, which relies on that reasoning.

An adverse action taken after reviewing a credit report "is based in whole or in part on" that report within the meaning of 15 U. S. C. § 1681m(a). That is true even if the company would have made the same decision without looking at the report, because what the company actually did is more relevant than what it might have done. I find nothing in the statute making the examination of a credit report a "necessary condition" of any resulting increase. *Ante*, at 63. The more natural reading is that reviewing a report is only a sufficient condition.

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tion, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator. Congress could not have intended such a result for those who followed an interpretation that could reasonably have found support in the courts, whatever their subjective intent may have been.

Both Safeco and GEICO argue that good-faith reliance on legal advice should render companies immune to claims raised under § 1681n(a). While we do not foreclose this possibility, we need not address the issue here in light of our present holdings.

The Court's contrary position leads to a serious anomaly. As a matter of federal law, companies are free to adopt whatever "neutral" credit scores they want. That score need not (and probably will not) reflect the median consumer credit score. More likely, it will reflect a company's assessment of the creditworthiness of a run-of-the-mill applicant who lacks a credit report. Because those who have yet to develop a credit history are unlikely to be good credit risks, "neutral" credit scores will in many cases be quite low. Yet under the Court's reasoning, only those consumers with credit scores even lower than what may already be a very low "neutral" score will ever receive adverse action notices.[1]

While the Court acknowledges that "the neutral-score baseline will leave some consumers without a notice that might lead to discovering errors," *ante*, at 66, it finds this unobjectionable because Congress was likely uninterested in "the theoretical question whether the consumer would have gotten a better rate with perfect credit," *ante*, at 65.[2] The Court's decision, however, disserves not only those consumers with "gilt-edged credit report[s]," *ante*, at 66, but also the much larger category of consumers with better-than-"neutral" scores. I find it difficult to believe that Congress

[1] Stranger still, companies that automatically disqualify consumers who lack credit reports will never need to send any adverse action notices. After all, the Court's baseline is "what the applicant would have had if the company had not taken his credit score into account," *ante*, at 65, but from such companies, what the applicant "would have had" is no insurance at all. An offer of insurance at *any* price, however inflated by a poor and perhaps incorrect credit score, will therefore never constitute an adverse action.

[2] The Court also justifies its deviation from the statute's text by reasoning that frequent adverse action notices would be ignored. See *ante*, at 66–67. To borrow a sentence from the Court's opinion: "Perhaps." *Ante*, at 59. But rather than speculate about the likely effect of "hypernotification," *ante*, at 67, I would defer to the Solicitor General's position, informed by the Federal Trade Commission's expert judgment, that consumers by and large benefit from adverse action notices, however common. See Brief for United States as *Amicus Curiae* 27–29.

could have intended for a company's unrestrained adoption of a "neutral" score to keep many (if not most) consumers from ever hearing that their credit reports are costing them money. In my view, the statute's text is amenable to a more sensible interpretation.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, concurring in part.

I agree with the Court's disposition and most of its reasoning. Safeco did not send notices to new customers because it took the position that the initial insurance rate it offered a customer could not be an "increase in any charge for . . . insurance" under 15 U. S. C. § 1681a(k)(1)(B)(i). The Court properly holds that regardless of the merits of this interpretation, it is not an unreasonable one, and Safeco therefore did not act willfully. *Ante*, at 68–70. I do not join Part III–A of the Court's opinion, however, because it resolves the merits of Safeco's interpretation of § 1681a(k)(1)(B)(i)—an issue not necessary to the Court's conclusion and not briefed or argued by the parties.

Syllabus

SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL. *v.* WYNER ET AL.

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

No. 06–531. Argued April 17, 2007—Decided June 4, 2007

In private actions under 42 U. S. C. § 1983, federal district courts may "allow the prevailing party . . . a reasonable attorney's fee as part of the costs." § 1988(b). Plaintiff-respondent Wyner notified the Florida Department of Environmental Protection (DEP), in mid-January 2003, of her intention to create on Valentine's Day, within MacArthur State Beach Park, an antiwar artwork consisting of nude individuals assembled into a peace sign. Responding on February 6, DEP informed Wyner that her display would be lawful only if the participants complied with Florida's "Bathing Suit Rule," which requires patrons of state parks to wear, at a minimum, a thong and, if female, a bikini top. To safeguard her display, and future nude expressive activities, against police interference, Wyner and a coplaintiff (collectively Wyner or plaintiff) sued Florida officials in the Federal District Court on February 12. Invoking the First Amendment's protection of expressive conduct, Wyner requested immediate injunctive relief against interference with the peace sign display and permanent injunctive relief against interference with future activities similarly involving nudity. An attachment to the complaint set out a 1995 settlement with DEP permitting Wyner to stage a play with nude performers at MacArthur Beach provided the area was screened off to shield beachgoers who did not wish to see the play. Although disconcerted by the hurried character of the proceeding, the District Court granted Wyner a preliminary injunction on February 13, suggesting that a curtain or screen could satisfy the interests of both the State and Wyner. The peace symbol display that took place the next day was set up outside a barrier apparently put up by the State. Once disassembled from the peace symbol formation, participants went into the water in the nude. Thereafter, Wyner pursued her demand for a permanent injunction, noting that she intended to put on another Valentine's Day production at MacArthur Beach, again involving nudity. After discovery, both sides moved for summary judgment. At a January 21, 2004 hearing, Wyner's counsel acknowledged that the participants had set up the peace symbol display in front of the barrier. The court denied plaintiff's motion for summary judgment and granted defendants' motion for summary final judgment. The deliberate failure

of Wyner and her coparticipants to stay behind the screen at the 2003 Valentine's Day display, the court concluded, demonstrated that the Bathing Suit Rule's prohibition of nudity was essential to protect the visiting public. While Wyner ultimately failed to prevail on the merits, the court added, she did obtain a preliminary injunction, and therefore qualified as a prevailing party to that extent. Reasoning that the preliminary injunction could not be revisited at the second stage of the litigation because it had expired, the court awarded plaintiff counsel fees covering the first phase of the litigation. The Florida officials appealed, challenging both the preliminary injunction and the counsel fees award. The Eleventh Circuit held first that defendants' challenges to the preliminary injunction were moot. The court then affirmed the counsel fees award, reasoning that the preliminary order allowed Wyner to present the peace symbol display unimpeded by adverse state action.

Held: Prevailing party status does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case. Pp. 82–86.

(a) "The touchstone of the prevailing party inquiry," this Court has stated, is "the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782, 792–793. At the preliminary injunction stage, the court is called upon to assess the probability of the plaintiff's ultimate success on the merits. The foundation for that assessment will be more or less secure depending on the thoroughness of the exploration undertaken by the parties and the court. In this case, the preliminary injunction hearing was necessarily hasty and abbreviated. There was no time for discovery, nor for adequate review of documents or preparation and presentation of witnesses. The provisional relief granted expired before appellate review could be gained, and the court's threshold ruling would have no preclusive effect in the continuing litigation, as both the District Court and the Court of Appeals considered the preliminary injunction moot once the display took place. The provisional relief's tentative character, in view of the continuation of the litigation to definitively resolve the controversy, would have made a fee request at the initial stage premature. Of controlling importance, the eventual ruling on the merits for defendants, after both sides considered the case fit for final adjudication, superseded the preliminary ruling. Wyner's temporary success rested on a premise—the understanding that a curtain or screen would adequately serve Florida's interest in shielding the public from nudity—that the District Court, with the benefit of a fuller record, ultimately rejected. Wyner contends that the preliminary injunction was

Syllabus

not undermined by the subsequent merits adjudication because the decision to grant preliminary relief was an "as applied" ruling based on the officials' impermissible content-based administration of the Bathing Suit Rule. But the District Court assumed content neutrality for purposes of its preliminary order. The final decision in Wyner's case rejected the same claim she advanced in her preliminary injunction motion: that the state law banning nudity in parks was unconstitutional as applied to expressive, nonerotic nudity. At the end of the fray, Florida's Bathing Suit Rule remained intact. Wyner had gained no enduring "chang[e] [in] the legal relationship" between herself and the state officials she sued. See *id.*, at 792. Pp. 82–86.

(b) Wyner is not a prevailing party, for her initial victory was ephemeral. This Court expresses no view on whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees. It decides only that a plaintiff who gains a preliminary injunction does not qualify for an award of counsel fees under § 1988(b) if the merits of the case are ultimately decided against her. P. 86.

179 Fed. Appx. 566, reversed and remanded.

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

Virginia A. Seitz argued the cause for petitioners. With her on the briefs were *Carri S. Leininger* and *James O. Williams, Jr.*

Patricia A. Millett argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Clement*, *Deputy Solicitor General Garre*, *Michael Jay Singer*, and *Michael E. Robinson.*

Seth M. Galanter argued the cause for respondents. With him on the brief were *Beth S. Brinkmann*, *Randall C. Marshall*, *James K. Green*, and *Steven R. Shapiro.**

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*Briefs of *amici curiae* urging reversal were filed for the Commonwealth of Virginia et al. by *Robert F. McDonnell*, Attorney General of Virginia, *William C. Mims*, Chief Deputy Attorney General, *William E. Thro*, State Solicitor General, *Stephen R. McCullough*, Deputy State Solicitor General, and *Dan Schweitzer*, by *Roberto J. Sánchez-Ramos*, Secretary of Justice of Puerto Rico, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Talis J. Colberg* of

JUSTICE GINSBURG delivered the opinion of the Court.

For private actions brought under 42 U. S. C. § 1983 and other specified measures designed to secure civil rights, Congress established an exception to the "American Rule" that "the prevailing litigant is ordinarily not entitled to collect [counsel fees] from the loser." *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 247 (1975). That exception, codified in 42 U. S. C. § 1988(b), authorizes federal district courts, in their discretion, to "allow the prevailing party . . . a reasonable attorney's fee as part of the costs." This case presents a sole question: Does a plaintiff who gains a preliminary injunction after an abbreviated hearing, but is denied a permanent injunction after a dispositive adjudication on the merits, qualify as a "prevailing party" within the compass of § 1988(b)?

Viewing the two stages of the litigation as discrete episodes, plaintiffs below, respondents here, maintain that they prevailed at the preliminary injunction stage, and therefore

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Alaska, *Terry Goddard* of Arizona, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Mike Cox* of Michigan, *Jeremiah W. (Jay) Nixon* of Missouri, *George J. Chanos* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Wayne Stenehjem* of North Dakota, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry McMaster* of South Carolina, *Larry Long* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, *J. B. Van Hollen* of Wisconsin, and *Patrick J. Crank* of Wyoming; and for the National League of Cities et al. by *Richard Ruda* and *Lawrence Rosenthal.*

Briefs of *amici curiae* urging affirmance were filed for Americans United for Separation of Church and State et al. by *Andrew J. Pincus, Charles A. Rothfeld, Dana Berliner, John W. Whitehead, Giovanna Shay, Ayesha N. Khan, Richard B. Katskee, Alex J. Luchenitser, Ronald A. Lindsay, Brian Wolfman, Steven Schwartz,* and *Judith E. Schaeffer;* for the Brennan Center for Justice by *Laura W. Brill* and *Wendy R. Weiser;* for the Center for Individual Rights by *Michael E. Rosman;* and for the Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity et al. by *Catherine R. Albiston.*

qualify for a fee award for their counsels' efforts to obtain that interim relief. Defendants below, petitioners here, regard the case as a unit; they urge that a preliminary injunction holds no sway once fuller consideration yields rejection of the provisional order's legal or factual underpinnings. We agree with the latter position and hold that a final decision on the merits denying permanent injunctive relief ordinarily determines who prevails in the action for purposes of § 1988(b). A plaintiff who achieves a transient victory at the threshold of an action can gain no award under that fee-shifting provision if, at the end of the litigation, her initial success is undone and she leaves the courthouse emptyhanded.

I

In mid-January 2003, plaintiff-respondent T. A. Wyner notified the Florida Department of Environmental Protection (DEP) of her intention to create on Valentine's Day, February 14, 2003, within John D. MacArthur Beach State Park, an antiwar artwork. The work would consist of nude individuals assembled into a peace sign. By letter dated February 6, DEP informed Wyner that her peace sign display would be lawful only if the participants complied with the "Bathing Suit Rule" set out in Fla. Admin. Code Ann. § 62D–2.014(7)(b) (2005). That rule required patrons, in all areas of Florida's state parks, to wear, at a minimum, a thong and, if female, a bikini top.[1]

To safeguard the Valentine's Day display, and future expressive activities of the same order, against police interference, Wyner filed suit in the United States District Court for the Southern District of Florida on February 12, 2003. She invoked the First Amendment's protection of expressive conduct, and named as defendants the Secretary of DEP and

[1] The rule reads: "In every area of a park including bathing areas no individual shall expose the human, male or female genitals, pubic area, the entire buttocks or female breast below the top of the nipple, with less than a fully opaque covering." Fla. Admin. Code Ann. § 62D–2.014(7)(b) (2005).

the Manager of MacArthur Beach Park.[2] Her complaint requested immediate injunctive relief against interference with the peace sign display, App. 18, and permanent injunctive relief against interference with "future expressive activities that may include non-erotic displays of nude human bodies," *id.*, at 19. An exhibit attached to the complaint set out a May 12, 1995 Stipulation for Settlement with DEP. *Id.*, at 22–23. That settlement had facilitated a February 19, 1996 play Wyner coordinated at MacArthur Beach, a production involving nude performers. A term of the settlement provided that Wyner would "arrange for placement of a bolt of cloth in a semi-circle around the area where the play [would] be performed," *id.*, at 23, so that beachgoers who did not wish to see the play would be shielded from the nude performers.

The day after the complaint was filed, on February 13, 2003, the District Court heard Wyner's emergency motion for a preliminary injunction. Although disconcerted by the hurried character of the proceeding, see *id.*, at 37, 93, 95, the court granted the preliminary injunction. "The choice," the court explained, "need not be either/or." *Wyner* v. *Struhs*, 254 F. Supp. 2d 1297, 1303 (SD Fla. 2003). Pointing to the May 1995 settlement laying out "agreed-upon manner restrictions," the court determined that "[p]laintiff['s] desired expression and the interests of the state may both be satisfied simultaneously." *Ibid.* In this regard, the court had inquired of DEP's counsel at the preliminary injunction hearing: "Why wouldn't the curtain or screen solve the problem of somebody [who] doesn't want to see . . . nudity? Seems like that would solve [the] problem, wouldn't it?" App. 86. Counsel for DEP responded: "That's an option. I don't think necessarily [defendants] would be opposed to that . . . ."

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[2] Wyner was joined by coplaintiff George Simon, who served as a videographer for expressive activities Wyner previously organized at MacArthur Beach. See App. 13. For convenience, we refer to the coplaintiffs collectively as Wyner or plaintiff.

Ibid.; see *id.*, at 74 (testimony of Chief of Operations for Florida Park Service at the preliminary injunction hearing that the Service's counsel, on prior occasions, had advised: "[I]f they go behind the screen and they liv[e] up to the agreement then it's okay. If they don't go behind the screen and they don't live up to the agreement then it's not okay.").

The peace symbol display took place at MacArthur Beach the next day. A screen was put up, apparently by the State, as the District Court anticipated. See *id.*, at 108. See also *id.*, at 94 (District Judge's statement at the conclusion of the preliminary injunction hearing: "I want to make it clear . . . that the [preliminary] injunction doesn't preclude the department, if it chooses, from using . . . some sort of barrier . . . ."). But the display was set up outside the barrier, and participants, once disassembled from the peace symbol formation, went into the water in the nude. See *id.*, at 108; Deposition of T. A. Wyner in Case No. 03–80103–CIV (SD Fla., Nov. 14, 2003), pp. 99–100.

Thereafter, Wyner pursued her demand for a permanent injunction. Her counsel represented that on February 14, 2004, Wyner intended to put on another production at MacArthur Beach, again involving nudity. See App. 107. After discovery, both sides moved for summary judgment. At the hearing on the motions, held January 21, 2004, the District Court asked Wyner's counsel about the screen put up around the preceding year's peace symbol display. Counsel acknowledged that the participants in that display ignored the barrier and set up in front of the screen. *Id.*, at 108.

A week later, having unsuccessfully urged the parties to resolve the case as "[they] did before in [the 1995] settlement," *id.*, at 143, the court denied plaintiff's motion for summary judgment and granted defendants' motion for summary final judgment. The deliberate failure of Wyner and her coparticipants to remain behind the screen at the 2003 Valentine's Day display, the court concluded, demonstrated that the Bathing Suit Rule's prohibition of nudity was "no greater

than is essential . . . to protect the experiences of the visiting public." *Wyner* v. *Struhs*, Case No. 03–80103–CIV (SD Fla., Jan. 28, 2004) (Summary Judgment Order), App. to Pet. for Cert. 42a. While Wyner ultimately failed to prevail on the merits, the court added, she did obtain a preliminary injunction prohibiting police interference with the Valentine's Day 2003 temporary art installation, *id.*, at 45a, and therefore qualified as a prevailing party to that extent, see *Wyner* v. *Struhs*, Case No. 03–80103–CIV (SD Fla., Aug. 16, 2004) (Omnibus Order), App. to Brief in Opposition 5a–13a. The preliminary injunction could not be revisited at the second stage of the litigation, the court noted, for it had "expired on its own terms." *Id.*, at 4a. So reasoning, the court awarded plaintiff counsel fees covering the first phase of the litigation.

The Florida officials appealed, challenging both the order granting a preliminary injunction and the award of counsel fees. Wyner, however, pursued no appeal from the final order denying a permanent injunction. The Court of Appeals for the Eleventh Circuit held first that defendants' challenges to the preliminary injunction were moot because they addressed "a finite event that occurred and ended on a specific, past date." *Wyner* v. *Struhs*, 179 Fed. Appx. 566, 567, n. 1 (2006) *(per curiam)*. The court then affirmed the counsel fees award, reasoning that plaintiff had gained through the preliminary injunction "the primary relief [she] sought," *i. e.*, the preliminary order allowed her to present the peace symbol display unimpeded by adverse state action. *Id.*, at 569.

Wyner would not have qualified for an award of counsel fees, the court recognized, had the preliminary injunction rested on a mistake of law. *Id.*, at 568, 569–570. But it was "new developments," the court said, *id.*, at 569, not any legal error, that accounted for her failure "to achieve actual success on the merits at the permanent injunction stage," *id.*, at 569, n. 7. Plaintiff and others participating in the display,

as Wyner's counsel admitted, did not stay behind the barrier at the peace symbol display, *id.*, at 569; further, the court noted, "a fair reading of the record show[ed] that [p]laintif[f] had no intention of remaining behind a [barrier] during future nude expressive works," *ibid.* The likelihood of success shown at the preliminary injunction stage, the court explained, *id.*, at 569, n. 7, had been overtaken by the subsequent "demonstrat[ion] that the less restrictive alternative," *i. e.*, a cloth screen or other barrier, "was not sufficient to protect the government's interest," *id.*, at 569. But that demonstration, the court concluded, did not bar an award of fees, because the "new facts" emerged only at the summary judgment stage. *Ibid.* We granted certiorari, *Struhs* v. *Wyner*, 549 U. S. 1162 (2007), and now reverse.

II

"The touchstone of the prevailing party inquiry," this Court has stated, is "the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782, 792–793 (1989). See *Hewitt* v. *Helms*, 482 U. S. 755, 760 (1987) (plaintiff must "receive at least some relief on the merits of his claim before he can be said to prevail"); *Maher* v. *Gagne*, 448 U. S. 122, 129 (1980) (upholding fees where plaintiffs settled and obtained a consent decree); cf. *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 605 (2001) (precedent "counsel[s] against holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties").[3] The

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[3] *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 600 (2001), held that the term "prevailing party" in the fee-shifting provisions of the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990

petitioning state officials maintain that plaintiff here does not satisfy that standard for, as a consequence of the final summary judgment, "[t]he state law whose constitutionality [Wyner] attacked[, *i. e.*, the Bathing Suit Rule,] remains valid and enforceable today." Brief for Petitioners 3. The District Court left no doubt on that score, the state officials emphasize; ordering final judgment for defendants, the court expressed, in the bottom line of its opinion, its "hope" that plaintiff would continue to use the park, "albeit not in the nude." Summary Judgment Order, App. to Pet. for Cert. 46a.

Wyner, on the other hand, urges that despite the denial of a permanent injunction, she got precisely what she wanted when she commenced this litigation: permission to create the nude peace symbol without state interference. That fleeting success, however, did not establish that she prevailed on the gravamen of her plea for injunctive relief, *i. e.*, her charge that the state officials had denied her and other participants in the peace symbol display "the right to engage in constitutionally protected expressive activities." App. 18. Prevailing party status, we hold, does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case.[4]

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does not "includ[e] a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." The dissent in *Buckhannon* would have deemed such a plaintiff "prevailing," not because of any *temporary* relief gained (in that case, a consent stay pending litigation), but because the lawsuit caused the State to amend its laws, terminating the controversy between the parties, and *permanently* giving plaintiff the real-world outcome it sought. See *id.*, at 622, 624–625 (opinion of GINSBURG, J.). Our decision today is consistent with the views of both the majority and the dissenters in *Buckhannon*.

[4] In resolving Wyner's claim for counsel fees, we express no opinion on the dimensions of the First Amendment's protection for artworks that involve nudity.

At the preliminary injunction stage, the court is called upon to assess the probability of the plaintiff's ultimate success on the merits. See, *e. g.*, *Ashcroft* v. *American Civil Liberties Union*, 542 U. S. 656, 666 (2004); *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931 (1975). The foundation for that assessment will be more or less secure depending on the thoroughness of the exploration undertaken by the parties and the court. In some cases, the proceedings prior to a grant of temporary relief are searching; in others, little time and resources are spent on the threshold contest.

In this case, the preliminary injunction hearing was necessarily hasty and abbreviated. Held one day after the complaint was filed and one day before the event, the timing afforded the state officer defendants little opportunity to oppose Wyner's emergency motion. Counsel for the state defendants appeared only by telephone. App. 36. The emergency proceeding allowed no time for discovery, nor for adequate review of documents or preparation and presentation of witnesses. See *id.*, at 38–39. The provisional relief immediately granted expired before appellate review could be gained, and the court's threshold ruling would have no preclusive effect in the continuing litigation. Both the District Court and the Court of Appeals considered the preliminary injunction a moot issue, not fit for reexamination or review, once the display took place. See Summary Judgment Order, App. to Pet. for Cert. 34a; Omnibus Order, App. to Brief in Opposition 3a–4a; 179 Fed. Appx., at 567, n. 1; cf. *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472, 477–479 (1990). In short, the provisional relief granted terminated only the parties' opening engagement. Its tentative character, in view of the continuation of the litigation to definitively resolve the controversy, would have made a fee request at the initial stage premature.

Of controlling importance to our decision, the eventual ruling on the merits for defendants, after both sides considered the case fit for final adjudication, superseded the preliminary

ruling. Wyner's temporary success rested on a premise the District Court ultimately rejected. That court granted preliminary relief on the understanding that a curtain or screen would adequately serve Florida's interest in shielding the public from nudity that recreational beach users did not wish to see. See *supra*, at 79–80; 254 F. Supp. 2d, at 1303 (noting that the parties had previously agreed upon "a number of . . . manner restrictions that are far less restrictive than the total ban on nudity"). At the summary judgment stage, with the benefit of a fuller record, the District Court recognized that its initial assessment was incorrect. Participants in the peace symbol display were in fact unwilling to stay behind a screen that separated them from other park visitors. See Summary Judgment Order, App. to Pet. for Cert. 42a. See also App. 108 (acknowledgment by Wyner's counsel that participants in the February 14, 2003 protest "in effec[t] ignored the screen"). In light of the demonstrated inadequacy of the screen to contain the nude display, the District Court determined that enforcement of the Bathing Suit Rule was necessary to "preserv[e] park aesthetics" and "protect the experiences of the visiting public." Summary Judgment Order, App. to Pet. for Cert. 41a, 42a.

Wyner contends that the preliminary injunction was not undermined by the subsequent adjudication on the merits because the decision to grant preliminary relief was an "as applied" ruling. In developing this argument, she asserts that the officials engaged in impermissible content-based administration of the Bathing Suit Rule. But the District Court assumed, "for the purposes of [its initial] order," the content neutrality of the state officials' conduct. See 254 F. Supp. 2d, at 1302. See also 179 Fed. Appx., at 568, and n. 4 (reiterating that, "for the sake of the preliminary injunction order," the District Court "assumed content neutrality"). That specification is controlling. See Fed. Rule Civ. Proc. 65(d) (requiring every injunction to "set forth the reasons for its issuance" and "be specific in terms"). See also

Schmidt v. *Lessard*, 414 U. S. 473, 476 (1974) *(per curiam)* (Rule 65(d) "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders.").

The final decision in Wyner's case rejected the same claim she advanced in her preliminary injunction motion: that the state law banning nudity in parks was unconstitutional as applied to expressive, nonerotic nudity. At the end of the fray, Florida's Bathing Suit Rule remained intact, and Wyner had gained no enduring "chang[e] [in] the legal relationship" between herself and the state officials she sued. See *Texas State Teachers Assn.*, 489 U. S., at 792.

III

Wyner is not a prevailing party, we conclude, for her initial victory was ephemeral. A plaintiff who "secur[es] a preliminary injunction, then loses on the merits as the case plays out and judgment is entered against [her]," has "[won] a battle but los[t] the war." *Watson* v. *County of Riverside*, 300 F. 3d 1092, 1096 (CA9 2002). We are presented with, and therefore decide, no broader issue in this case.

We express no view on whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees. We decide only that a plaintiff who gains a preliminary injunction does not qualify for an award of counsel fees under § 1988(b) if the merits of the case are ultimately decided against her.

* * *

For the reasons stated, 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.

Per Curiam

CLAIBORNE *v.* UNITED STATES

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

No. 06–5618. Argued February 20, 2007—Decided June 4, 2007

439 F. 3d 479, vacated as moot.

Michael Dwyer argued the cause for petitioner. With him on the briefs were *Lee T. Lawless* and *David Hemingway.*

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Fisher*, *Dan Himmelfarb*, *Matthew D. Roberts*, *Nina Goodman*, and *Jeffrey P. Singdahlsen.**

PER CURIAM.

The Court is advised that the petitioner died in St. Louis, Missouri, on May 30, 2007. The judgment of the United States Court of Appeals for the Eighth Circuit is therefore

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*Briefs of *amici curiae* urging reversal were filed for Families Against Mandatory Minimums by *Gregory L. Poe*, *Mary Price*, and *Peter Goldberger;* for Federal Public and Community Defenders et al. by *Thomas W. Hillier II*, *Amy Baron-Evans*, *Laura E. Mate*, and *Sara E. Noonan;* for the National Association of Criminal Defense Lawyers by *Miguel A. Estrada*, *David Debold*, and *Jeffrey L. Fisher;* for the New York Council of Defense Lawyers by *Alexandra A. E. Shapiro* and *Paul H. Schwartz;* for the Sentencing Project et al. by *Matthew M. Shors* and *Pammela Quinn;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Paul D. Kamenar.*

Robert E. Toone and *Katherine J. Fick* filed a brief for Senator Edward M. Kennedy et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for Law Professors Who Study Sentencing Reform by *Edward S. Lee;* and for the United States Sentencing Commission by *David C. Frederick* and *Pamela O. Barron.*

vacated as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

It is so ordered.

Per Curiam

ERICKSON *v.* PARDUS ET AL.

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

No. 06–7317. Decided June 4, 2007

Petitioner filed suit alleging that respondents, Colorado prison officials, violated the Eighth Amendment when they terminated his hepatitis C treatment program, with life-threatening consequences. The District Court granted respondents' motion to dismiss, and the Tenth Circuit affirmed, holding that petitioner's allegations were too conclusory to establish for pleading purposes that he had suffered a cognizable independent harm from the termination.

Held: Petitioner's case cannot be dismissed on the ground that his harm allegations were too conclusory to put these matters in issue. The complaint—which contains allegations that the decision to remove petitioner from his medication endangered his life, that the medication was withheld shortly after he had commenced a 1-year treatment program, that he still needed the treatment, and that the prison officials were refusing it—was enough to satisfy Federal Rule of Civil Procedure 8(a)(2), which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Petitioner, in addition, bolstered his claim with more specific allegations in documents attached to the complaint and in later filings. The Tenth Circuit's departure from Rule 8(a)(2)'s liberal pleading requirements is especially pronounced here, where petitioner has been proceeding, from the litigation's outset, without counsel. Whether the complaint is sufficient in all respects is yet to be determined, for respondents have raised multiple arguments in their motion to dismiss.

Certiorari granted; 198 Fed. Appx. 694, vacated and remanded.

PER CURIAM.

Imprisoned by the State of Colorado and alleging violations of his Eighth and Fourteenth Amendment protections against cruel and unusual punishment, William Erickson, the petitioner in this Court, filed suit against prison officials in the United States District Court for the District of Colorado. He alleged that a liver condition resulting from hepatitis C required a treatment program that officials had commenced

but then wrongfully terminated, with life-threatening consequences. Deeming these allegations, and others to be noted, to be "conclusory," the Court of Appeals for the Tenth Circuit affirmed the District Court's dismissal of petitioner's complaint. 198 Fed. Appx. 694, 698 (2006). The holding departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure that we grant review. We vacate the court's judgment and remand the case for further consideration.

Petitioner was incarcerated in the Limon Correctional Facility in Limon, Colorado, where respondents Barry Pardus and Dr. Anita Bloor were working as prison officials. After Dr. Bloor removed petitioner from the hepatitis C treatment he had been receiving, petitioner sued under Rev. Stat. § 1979, 42 U. S. C. § 1983, complaining, *inter alia*, that Dr. Bloor had violated his Eighth Amendment rights by demonstrating deliberate indifference to his serious medical needs. See, *e. g.*, *Estelle* v. *Gamble*, 429 U. S. 97, 104–105 (1976) ("[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment," and this includes "indifference . . . manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed" (footnotes and internal quotation marks omitted)); see also *Helling* v. *McKinney*, 509 U. S. 25, 35–37 (1993).

Petitioner based his claim on the following allegations, which we assume to be true for purposes of review here: Officials at Colorado's Department of Corrections (Department) diagnosed petitioner as requiring treatment for hepatitis C. After completing the necessary classes and otherwise complying with the protocols set forth by the Department, petitioner began treatment for the disease. The treatment, which would take a year to complete, involved weekly self-injections of medication by use of a sy-

ringe. Soon after petitioner began this treatment, prison officials were unable to account for one of the syringes made available to petitioner (and other prisoners) for medical purposes. Upon searching, they found it in a communal trash can, modified in a manner suggestive of use for injection of illegal drugs. Prisoner Complaint in Civ. Action No. 05–CV–00405–LTB–MJW (D. Colo.), p. 3 (hereinafter Petitioner's Complaint).

Prison officials, disbelieving petitioner's claim not to have taken the syringe, found that his conduct constituted a violation of the Colorado Code of Penal Discipline for possession of drug paraphernalia. Letter from Anthony A. DeCesaro to William Erickson (Sept. 30, 2004), attached to Petitioner's Complaint. This conduct, according to the officials, led to the "reasonable inference" that petitioner had intended to use drugs, so the officials removed petitioner from his hepatitis C treatment. *Ibid.* "The successful treatment of Hepatitis C is incumbent upon the individual remaining drug and alcohol free to give the liver a better chance of recovery," they indicated, *ibid.*, an explanation they later offered to defend against petitioner's allegations of cruel and unusual punishment, see Defendants' Motion to Dismiss in Civ. Action No. 05–CV–00405–LTB–MJW, p. 10. Assuming that a person in the course of this treatment takes illicit drugs, the prison's protocol mandates a waiting period of one year followed by a mandatory drug education class lasting six months. Brief in Opposition 4. Petitioner therefore could face a delay of some 18 months before he would be able to restart treatment.

In his complaint petitioner alleged Dr. Bloor had "removed [him] from [his] hepatitis C treatment" in violation of Department protocol, "thus endangering [his] life." Petitioner's Complaint 2. Petitioner attached to the complaint certain grievance forms. In these he claimed, among other things, he was suffering from "continued damage to [his] liver" as a result of the nontreatment. Colorado Dept. of Corrections

Offender Grievance Form (June 30, 2004). The complaint requested relief including damages and an injunction requiring that the Department treat petitioner for hepatitis C "under the standards of the treatment [protocol] established by [the Department]." Petitioner's Complaint 8.

Three months after filing his complaint, and well before the District Court entered a judgment against him, petitioner filed a Motion for Expedited Review Due to Imminent Danger in Civ. Action No. 05–B–405 (MJW) (D. Colo.). Indicating it was "undisputed" that he had hepatitis C, that he met the Department's standards for treatment of the disease, and that "furtherance of this disease can cause irreversible damage to [his] liver and possible death," petitioner alleged that "numerous inmates" in his prison community had died of the disease and that he was "in imminent danger" himself "due to [the Department's] refusal to treat him." *Ibid.* He had identified similar allegations in an earlier filing, explaining that "his liver is suffering irreversible damage" due to the decision to remove him from treatment and that he "will suffer irreparable damage if his disease goes untreated." Plaintiff's Objections to the Magistrate's Recommendations in Civ. Action No. 05–CV–00405–LTB–MJW (Feb. 27, 2005), p. 3.

Respondents answered these filings with a motion to dismiss. The Magistrate Judge recommended, as relevant, that the District Court dismiss the complaint on the ground it failed to allege Dr. Bloor's actions had caused petitioner "substantial harm." Recommendation on Defendants' Motion to Dismiss (Feb. 9, 2006), p. 12. The District Court issued a short order indicating its agreement with the Magistrate Judge and dismissing the complaint.

The Court of Appeals affirmed. It quoted extensively from the Magistrate Judge's discussion of "substantial harm" before holding that petitioner had made "only conclusory allegations to the effect that he has suffered a cognizable independent harm as a result of his removal from the [hep-

atitis C] treatment program." 198 Fed. Appx., at 698. Acknowledging decisions by courts that have found Eighth Amendment violations when delays in medical treatment have involved "life-threatening situations and instances in which it is apparent that delay would exacerbate the prisoner's medical problems" (and that have, moreover, indicated the Eighth Amendment "protects against future harm to an inmate"), *id.*, at 697 (internal quotation marks omitted), the court nevertheless found petitioner's complaint deficient: Petitioner had, according to the court, failed to "allege that as a result of the discontinuance of the treatment itself shortly after it began or the interruption of treatment for approximately eighteen months he suffered any harm, let alone substantial harm, [other] than what he already faced from the Hepatitis C itself," *id.*, at 698 (internal quotation marks omitted). Having reached this conclusion, the court saw no need to address whether the complaint alleged facts sufficient to support a finding that Dr. Bloor had made her decisions with a "sufficiently culpable state of mind." *Id.*, at 697, 698 (internal quotation marks omitted).

It may in the final analysis be shown that the District Court was correct to grant respondents' motion to dismiss. That is not the issue here, however. It was error for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory to establish for pleading purposes that petitioner had suffered "a cognizable independent harm" as a result of his removal from the hepatitis C treatment program. *Id.*, at 698.

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, 555 (2007) (quoting *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957)). In

addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp.*, *supra*, at 555–556 (citing *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 508, n. 1 (2002); *Neitzke* v. *Williams*, 490 U. S. 319, 327 (1989); *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974)).

The complaint stated that Dr. Bloor's decision to remove petitioner from his prescribed hepatitis C medication was "endangering [his] life." Petitioner's Complaint 2. It alleged this medication was withheld "shortly after" petitioner had commenced a treatment program that would take one year, that he was "still in need of treatment for this disease," and that the prison officials were in the meantime refusing to provide treatment. *Id.*, at 3, 4. This alone was enough to satisfy Rule 8(a)(2). Petitioner, in addition, bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings.

The Court of Appeals' departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation's outset, without counsel. A document filed *pro se* is "to be liberally construed," *Estelle*, 429 U. S., at 106, and "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," *ibid.* (internal quotation marks omitted). Cf. Fed. Rule Civ. Proc. 8(f) ("All pleadings shall be so construed as to do substantial justice").

Whether petitioner's complaint is sufficient in all respects is a matter yet to be determined, for respondents raised multiple arguments in their motion to dismiss. In particular, the proper application of the controlling legal principles to the facts is yet to be determined. The case cannot, however, be dismissed on the ground that petitioner's allegations of harm were too conclusory to put these matters in issue. Certiorari and leave to proceed *in forma pauperis* are granted, 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 SCALIA would deny the petition for a writ of certiorari.

JUSTICE THOMAS, dissenting.

I have repeatedly stated that the Eighth Amendment's prohibition on cruel and unusual punishment historically concerned only injuries relating to a criminal sentence. *Farmer* v. *Brennan*, 511 U. S. 825, 861 (1994) (opinion concurring in judgment); *Helling* v. *McKinney*, 509 U. S. 25, 42 (1993) (dissenting opinion); *Hudson* v. *McMillian*, 503 U. S. 1, 18–20 (1992) (same). But even applying the Court's flawed Eighth Amendment jurisprudence, "I would draw the line at actual, serious injuries and reject the claim that exposure to the *risk* of injury can violate the Eighth Amendment." *Helling*, *supra*, at 42 (THOMAS, J., dissenting). Consistent with these views, I would affirm the judgment of the Court of Appeals. I respectfully dissent.

Syllabus

BECK, LIQUIDATING TRUSTEE OF ESTATES OF CROWN VANTAGE, INC., ET AL. *v.* PACE INTERNATIONAL UNION ET AL.

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

No. 05–1448. Argued April 24, 2007—Decided June 11, 2007

Respondent PACE International Union represented employees covered by single-employer defined-benefit pension plans sponsored and administered by Crown, which had filed for bankruptcy. Crown rejected the union's proposal to terminate the plans by merging them with the union's own multiemployer plan, opting instead for a standard termination through the purchase of annuities, which would allow Crown to retain a $5 million reversion after satisfying its obligations to plan participants and beneficiaries. The union and respondent plan participants (hereinafter, collectively, PACE) filed an adversary action in the Bankruptcy Court, alleging that Crown's directors had breached their fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1001 *et seq.*, by neglecting to give diligent consideration to PACE's merger proposal. The court ruled for PACE, and petitioner bankruptcy trustee appealed to the District Court, which affirmed in relevant part, as did the Ninth Circuit. The Ninth Circuit acknowledged that the decision to terminate a pension plan is a business decision not subject to ERISA's fiduciary obligations, but reasoned that the implementation of a termination decision is fiduciary in nature. It then determined that merger was a permissible termination method and that Crown therefore had a fiduciary obligation to consider PACE's merger proposal seriously, which it had failed to do.

Held: Crown did not breach its fiduciary obligations in failing to consider PACE's merger proposal because merger is not a permissible form of plan termination under ERISA. Section 1341(b)(3)(A) provides: "In . . . any final distribution of assets pursuant to . . . standard termination . . . , the plan administrator shall . . . (i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or . . . (ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan." The parties agree that clause (i) refers to the purchase of annuities, and that clause (ii) allows for lump-sum distributions. These are by far the most common distribution methods. To decide that merger

is also a permissible method, the Court would have to disagree with the Pension Benefit Guaranty Corporation (PBGC), the entity administering the federal insurance program that protects plan benefits, which takes the position that § 1341(b)(3)(A) does *not* permit merger as a method of termination because merger is an *alternative* to (rather than an example of) plan termination. The Court has traditionally deferred to the PBGC when interpreting ERISA. Here, the Court believes that the PBGC's policy is based upon a construction of the statute that is permissible, and indeed the more plausible.

PACE argues that § 1341(b)(3)(A)(ii)'s residual provision referring to an asset distribution that "*otherwise* fully provide[s] all benefit liabilities under the plan" covers merger because annuities (covered by § 1341(b)(3)(A)(i)) are an example of a permissible means of "provid[ing] . . . benefit liabilities," and merger is the legal equivalent of annuitization. Even assuming that PACE is right about the meaning of the word "otherwise," the clarity necessary to disregard the PBGC's considered views is lacking for three reasons. First, terminating a plan through purchase of annuities formally severs ERISA's applicability to plan assets and employer obligations, whereas merging the Crown plans into PACE's multiemployer plan would result in the former plans' assets remaining *within* ERISA's purview, where they could be used to satisfy the benefit liabilities of the multiemployer plan's other participants and beneficiaries. Second, although ERISA expressly allows the employer to (under certain circumstances) recoup surplus funds in a standard termination, § 1344(d)(1), (3), as Crown sought to do here, merger would preclude the receipt of such funds by reason of § 1103(c), which prohibits employers from misappropriating plan assets for their own benefit. Third, merger is nowhere mentioned in § 1341, but is instead dealt with in an entirely different set of statutory sections setting forth entirely different rules and procedures, §§ 1058, 1411, and 1412. PACE's argument that the procedural differences could be reconciled by requiring a plan sponsor intending to use merger as a termination method to follow the rules for both merger and termination is condemned by the confusion it would engender and by the fact that it has no apparent basis in ERISA. Even from a policy standpoint, the PBGC's construction of the statute is eminently reasonable because termination by merger could have detrimental consequences for the participants and beneficiaries of a single-employer plan, as well as for plan sponsors. Pp. 101–111.

427 F. 3d 668, reversed and remanded.

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

M. Miller Baker argued the cause for petitioner. With him on the briefs were *David E. Rogers*, *Wilber H. Boies*, and *Michael T. Graham.*

Matthew D. Roberts argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement*, *Deputy Solicitor General Kneedler*, *Jonathan L. Snare*, *Edward D. Sieger*, *Israel Goldowitz*, and *Karen L. Morris.*

Julia Penny Clark argued the cause for respondents. With her on the brief were *Laurence Gold*, *Douglas L. Greenfield*, *Leon Dayan*, and *Christian L. Raisner.**

JUSTICE SCALIA delivered the opinion of the Court.

We decide in this case whether an employer that sponsors and administers a single-employer defined-benefit pension plan has a fiduciary obligation under the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.*, to consider a merger with a multiemployer plan as a method of terminating the plan.

I

Crown Paper and its parent entity, Crown Vantage (the two hereinafter referred to in the singular as Crown), employed 2,600 persons in seven paper mills. PACE International Union, a respondent here, represented employees covered by 17 of Crown's defined-benefit pension plans. A defined-benefit plan, "as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment." *Commissioner* v. *Keystone Consol. Industries, Inc.*, 508 U. S. 152, 154 (1993). In such a plan, the employer generally shoulders the investment risk. It is the employer who must make up for any deficits, but also the employer

*A brief of *amici curiae* urging reversal was filed for the Chamber of Commerce of the United States of America et al. by *W. Stephen Cannon*, *Raymond C. Fay*, *Laura C. Fentonmiller*, *James J. Keightley*, *Harold J. Ashner*, and *Shane Brennan.*

who enjoys the fruits (whether in the form of lower plan contributions or sometimes a reversion of assets) if plan investments perform beyond expectations. See *Hughes Aircraft Co.* v. *Jacobson*, 525 U. S. 432, 439–440 (1999). In this case, Crown served as both plan sponsor and plan administrator.

In March 2000, Crown filed for bankruptcy and proceeded to liquidate its assets. ERISA allows employers to terminate their pension plans voluntarily, see *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 638 (1990), and in the summer of 2001, Crown began to consider a "standard termination," a condition of which is that the terminated plans have sufficient assets to cover benefit liabilities. § 1341(b)(1)(D); *id.*, at 638–639. Crown focused in particular on the possibility of a standard termination through purchase of annuities, one statutorily specified method of plan termination. See § 1341(b)(3)(A)(i). PACE, however, had ideas of its own. It interjected itself into Crown's termination discussions and proposed that, rather than buy annuities, Crown instead merge the plans covering PACE union members with the PACE Industrial Union Management Pension Fund (PIUMPF), a multiemployer or "Taft-Hartley" plan. See § 1002(37). Under the terms of the PACE-proposed agreement, Crown would be required to convey all plan assets to PIUMPF; PIUMPF would assume all plan liabilities.

Crown took PACE's merger offer under advisement. As it reviewed annuitization bids, however, it discovered that it had overfunded certain of its pension plans, so that purchasing annuities would allow it to retain a projected $5 million reversion for its creditors after satisfying its obligations to plan participants and beneficiaries. See § 1344(d)(1) (providing for reversion upon plan termination where certain conditions are met). Under PACE's merger proposal, by contrast, the $5 million would go to PIUMPF. What is more, the Pension Benefit Guaranty Corporation (PBGC), which

administers an insurance program to protect plan benefits, agreed to withdraw the proofs of claim it had filed against Crown in the bankruptcy proceedings if Crown went ahead with an annuity purchase. Crown had evidently heard enough. It consolidated 12 of its pension plans[1] into a single plan, and terminated that plan through the purchase of an $84 million annuity. That annuity fully satisfied Crown's obligations to plan participants and beneficiaries and allowed Crown to reap the $5 million reversion in surplus funds.

PACE and two plan participants, also respondents here (we will refer to all respondents collectively as PACE), thereafter filed an adversary action against Crown in the Bankruptcy Court, alleging that Crown's directors had breached their fiduciary duties under ERISA by neglecting to give diligent consideration to PACE's merger proposal. The Bankruptcy Court sided with PACE. It found that the decision whether to purchase annuities or merge with PIUMPF was a fiduciary decision, and that Crown had breached its fiduciary obligations by giving insufficient study to the PIUMPF proposal. Rather than ordering Crown to cancel its annuity (which would have resulted in a substantial penalty payable to Crown's annuity provider), the Bankruptcy Court instead issued a preliminary injunction preventing Crown from obtaining the $5 million reversion. It subsequently approved a distribution of that reversion for the benefit of plan participants and beneficiaries, which distribution was stayed pending appeal.[2]

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[1] Crown's various other pension plans are not at issue in this case.

[2] PACE now suggests that it would have been willing to agree to a merger in which Crown kept its surplus funds. Brief for Respondents 17, n. 7. But this is belied not only by the terms of the proposed merger agreement, but by the fact that PACE actively sought and obtained a preliminary injunction freezing Crown's $5 million reversion. The Bankruptcy Court having rejected PACE's request to undo the annuity contract, PACE has provided no reason for pursuing this litigation other than to obtain the $5 million that remained after Crown satisfied its benefit commitments. Moreover, as PACE concedes, whether the parties would

Petitioner, the trustee of the Crown bankruptcy estates, appealed the Bankruptcy-Court decision to the District Court, which affirmed in relevant part, as did the Court of Appeals for the Ninth Circuit. The Ninth Circuit acknowledged that "the decision to terminate a pension plan is a business decision not subject to ERISA's fiduciary obligations," but reasoned that "the *implementation* of a decision to terminate" is fiduciary in nature. 427 F. 3d 668, 673 (2005). It then determined that merger was a permissible means of plan termination and that Crown therefore had a fiduciary obligation to consider PACE's merger proposal seriously, which it had failed to do. Petitioner thereafter sought rehearing in the Court of Appeals, this time with the support of the PBGC and the Department of Labor, who agreed with petitioner that the Ninth Circuit's judgment was in error. The Ninth Circuit held to its original decision, and we granted certiorari. 549 U. S. 1177 (2007).

II

Crown's operation of its defined-benefit pension plans placed it in dual roles as plan sponsor and plan administrator; an employer's fiduciary duties under ERISA are implicated only when it acts in the latter capacity. Which hat the employer is proverbially wearing depends upon the nature of the function performed, see *Hughes Aircraft Co.*, *supra*, at 444, and is an inquiry that is aided by the common law of trusts which serves as ERISA's backdrop, see *Pegram* v. *Herdrich*, 530 U. S. 211, 224 (2000); *Lockheed Corp.* v. *Spink*, 517 U. S. 882, 890 (1996).

It is well established in this Court's cases that an employer's decision *whether* to terminate an ERISA plan is a settlor function immune from ERISA's fiduciary obligations. See, *e. g.*, *ibid.*; *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U. S. 73, 78 (1995). And because "decision[s] regarding the form

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have agreed to a merger arrangement that did not include the $5 million is "speculation." Tr. of Oral Arg. 42.

or structure" of a plan are generally settlor functions, *Hughes Aircraft Co.*, 525 U. S., at 444, PACE acknowledges that the decision to merge plans is "normally [a] plan sponsor decisio[n]" as well. Brief for Respondents 13–14, n. 5, 20–21; see also *Malia* v. *General Electric Co.*, 23 F. 3d 828, 833 (CA3 1994) (holding that employer's decision to merge plans "d[id] not invoke the fiduciary duty provisions of ERISA"). But PACE says that its proposed merger was different, because the PIUMPF merger represented a *method of terminating* the Crown plans. And just as ERISA imposed on Crown a fiduciary obligation in its selection of an appropriate annuity provider when terminating through annuities, see 29 CFR §§ 2509.95–1, 4041.28(c)(3) (2006), so too, PACE argues, did it require Crown to consider merger.

The idea that the decision whether to merge could switch from a settlor to a fiduciary function depending upon the context in which the merger proposal is raised is an odd one. But once it is realized that a merger is simply a transfer of assets and liabilities, PACE's argument becomes somewhat more plausible: The purchase of an annuity is akin to a transfer of assets and liabilities (to an insurance company), and if Crown was subject to fiduciary duties in selecting an annuity provider, why could it automatically disregard PIUMPF simply because PIUMPF happened to be a multiemployer plan rather than an insurer? There is, however, an antecedent question. In order to affirm the judgment below, we would have to conclude (as the Ninth Circuit did) that merger is, in the first place, a *permissible* form of plan termination under ERISA. That requires us to delve into the statute's provisions for plan termination.

ERISA sets forth the exclusive procedures for the standard termination of single-employer pension plans. § 1341(a)(1); *Hughes Aircraft Co.*, *supra*, at 446. Those procedures are exhaustive, setting detailed rules for, *inter alia*, notice by the plan to affected parties, § 1341(a)(2), review by the PBGC, § 1341(b)(2)(A), (C), and final distribution of plan

funds, § 1341(b)(2)(D), § 1344. See generally E. Veal & E. Mackiewicz, Pension Plan Terminations 43–61 (2d ed. 1998) (hereinafter Veal & Mackiewicz). At issue in this case is § 1341(b)(3)(A), the provision of ERISA setting forth the permissible *methods* of terminating a single-employer plan and distributing plan assets to participants and beneficiaries. Section 1341(b)(3)(A) provides as follows:

> "In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan administrator shall distribute the assets in accordance with section 1344 of this title. In distributing such assets, the plan administrator shall—
>
> "(i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or
>
> "(ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan. . . . "

The PBGC's regulations impose in substance the same requirements. See 29 CFR § 4041.28(c)(1). Title 29 U. S. C. § 1344, which is referred to in § 1341(b)(3)(A), sets forth a specific order of priority for asset distribution, including (under certain circumstances) reversions of excess funds to the plan sponsor, see § 1344(d)(1).

The parties to this case all agree that § 1341(b)(3)(A)(i) refers to the purchase of annuities, see 29 CFR § 4001.2 (defining "irrevocable commitment"), and that § 1341(b)(3)(A)(ii) allows for lump-sum distributions at present discounted value (including rollovers into individual retirement accounts). As PACE concedes, purchase of annuity contracts and lump-sum payments are "by far the most common distribution methods." Brief for Respondents 45; see also Veal & Mackiewicz 72–73 ("The basic alternatives are the purchase of annuity contracts or some form of lump-sum cashout"). To affirm the Ninth Circuit, we would have to decide that

merger is a permissible method as well.[3] And we would have to do that over the objection of the PBGC, which (joined by the Department of Labor) disagrees with the Ninth Circuit, taking the position that § 1341(b)(3)(A) does *not* permit merger as a method of termination because (in its view) merger is an *alternative* to (rather than an example of) plan termination. See Brief for United States as *Amicus Curiae* 8, 17–30. We have traditionally deferred to the PBGC when interpreting ERISA, for "to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embar[k] upon a voyage without a compass." *Mead Corp.* v. *Tilley*, 490 U. S. 714, 722, 725–726 (1989) (internal quotation marks omitted); see also *LTV Corp.*, 496 U. S., at 648, 651. In reviewing the judgment below, we thus must examine "whether the PBGC's policy is based upon a permissible construction of the statute." *Id.*, at 648.[4]

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[3] We would not have to decide that question of statutory interpretation if Crown's pension plans disallowed merger. Any method of termination permitted by § 1341(b)(3)(A)(ii) must also be one that is "in accordance with the provisions of the plan." Crown thus could have drafted its plan documents to limit the available methods of termination, so that merger was not permitted. Petitioner argued below that Crown had done just that. Though the District Court concluded that the plan terms allowed for merger, App. to Pet. for Cert. 47, the Ninth Circuit declined to consider the plan language because it held that petitioner had failed to preserve the argument in the Bankruptcy Court. Petitioner did not seek certiorari on the factbound issues of waiver and plan interpretation, and we accordingly do not address them here.

[4] PACE argues that the PBGC took an inconsistent approach in several opinion letters from the 1980's concerning the applicability of certain joint guidelines for asset reversions during complex termination transactions. See App. to Brief in Opposition 6a–9a (Opinion Letter 85–11 (May 14, 1985)); *id.*, at 10a–13a (Opinion Letter 85–21 (Aug. 26, 1985)); *id.*, at 14a–16a (Opinion Letter 85–25 (Oct. 11, 1985)). But insofar as the PBGC's consistency is even relevant to whether we should accord deference to its presently held views, none of those letters so much as hints that the PBGC treated merger as a permissible form of plan termination. In fact, to the extent they even speak to the question, they clearly show the oppo-

We believe it is. PACE has "failed to persuade us that the PBGC's views are unreasonable," *Mead Corp.*, *supra*, at 725. At the outset, it must be acknowledged that the statute, with its general residual clause in § 1341(b)(3)(A)(ii), is potentially more embracing of alternative methods of plan termination (whatever they may be) than longstanding ERISA practice, which appears to have employed almost exclusively annuities and lump-sum payments. But we think that the statutory text need not be read to include mergers, and indeed that the PBGC offers the better reading in excluding them. Most obviously, Congress nowhere expressly provided for merger as a permissible means of termination. Merger is not mentioned in § 1341(b)(3)(A), much less in any of § 1341's many subsections. Indeed, merger is expressly provided for in an entirely separate set of statutory sections (of which more in a moment, see *infra*, at 108–110). PACE nevertheless maintains that merger is clearly covered under § 1341(b)(3)(A)(ii)'s residual clause, which refers to a distribution of assets that "otherwise fully provide[s] all benefit liabilities under the plan." By PACE's reasoning, annuities are covered under § 1341(b)(3)(A)(i); annuities are—by virtue of the word "otherwise"—an *example* of a means by which a plan may "fully provide all benefit liabilities under the plan," § 1341(b)(3)(A)(ii); and therefore, "at the least," any method of termination that is the "legal equivalent" of annuitization is permitted, Brief for Respondents 23. Merger, PACE argues, is such a legal equivalent.

We do not find the statute so clear. Even assuming that PACE is right about "otherwise"—that the word indicates

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site. In Opinion Letter 85–25, for example, the PBGC explained that the joint guidelines for asset reversions did not apply to "a transfer [of assets and liabilities] from a single-employer plan to an ongoing multiemployer plan *followed by* the termination of the single-employer plan." *Id.*, at 15a (emphasis added). By characterizing the proposed transaction as one that took place in two separate steps (merger *and then* termination), this letter fully contemplated that merger was *not* an *example of* plan termination.

that annuities are *one example* of satisfying the residual clause in § 1341(b)(3)(A)(ii)—we still do not find mergers covered with the clarity necessary to disregard the PBGC's considered views. Surely the phrase "otherwise fully provide all benefit liabilities under the plan" is not without some teeth. And we think it would be reasonable for the PBGC to determine both that merger is not like the purchase of annuities in its ability to "fully provide all benefit liabilities under the plan," and that the statute's distinct treatment of merger and termination provides clear evidence that one is not an example of the other. Three points strike us as especially persuasive in these regards.

First, terminating a plan through purchase of annuities (like terminating through distribution of lump-sum payments) formally severs the applicability of ERISA to plan assets and employer obligations. Upon purchasing annuities, the employer is no longer subject to ERISA's multitudinous requirements, such as (to name just one) payment of insurance premiums to the PBGC, § 1307(a). And the PBGC is likewise no longer liable for the deficiency in the event that the plan becomes insolvent; there *are* no more benefits for it to guarantee. The assets of the plan are wholly removed from the ERISA system, and plan participants and beneficiaries must rely primarily (if not exclusively) on state contract remedies if they do not receive proper payments or are otherwise denied access to their funds. Further, from the standpoint of the participants and beneficiaries, the risk associated with an annuity relates solely to the solvency of an insurance company, and not the performance of the merged plan's investments.

Merger is fundamentally different: It represents a *continuation* rather than a *cessation* of the ERISA regime. If Crown were to have merged its pension plans into PIUMPF, the plan assets would have been combined with the assets of the multiemployer plan, where they could then be used to satisfy the benefit liabilities of participants and beneficiaries

other than those from the original Crown plans. Those assets would remain *within* ERISA's purview, the PBGC would maintain responsibility for them, and if Crown continued to employ the plan participants it too would remain subject to ERISA. Finally, plan participants and beneficiaries would have their recourse not through state contract law, but through the ERISA system, just as they had prior to merger.

Second, in a standard termination ERISA allows the employer to (under certain circumstances) recoup surplus funds, § 1344(d)(1), (3), as Crown sought to do here. But ERISA forbids employers to obtain a reversion *in the absence of a termination:* "A valid plan termination is a prerequisite to a reversion of surplus plan assets to an employer." App. to Brief in Opposition 15a (PBGC Opinion Letter 85–25 (Oct. 11, 1985)); see also Veal & Mackiewicz 164–165. Crown could not simply extract the $5 million surplus from its plans, nor could it have done so once those assets had transferred to PIUMPF. This would have run up against ERISA's anti-inurement provision, which prohibits employers from misappropriating plan assets for their own benefit. See § 1103(c). Consequently, we think the PBGC was entirely reasonable in declining to recognize as a form of termination a mechanism that would preclude the receipt of surplus funds, which is specifically authorized upon termination.[5]

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[5] This inability to recover surplus funds through a merger could not be remedied, as PACE now suggests, by structuring the transaction so that Crown provided to PIUMPF only assets sufficient to cover plan liabilities (effectively creating a spinoff from Crown's plans and merging that spinoff plan with PIUMPF). Under that arrangement, Crown could indeed obtain the $5 million reversion—not, however, by reason of the merger-called-termination, but only by subsequent termination of the *residual* plan. See, *e. g.*, *id.*, at 14a–16a (PBGC Opinion Letter 85–25 (Oct. 11, 1985)) (describing such a sequence of transactions). This falls short of rendering the *merger* a termination permitting recovery of surplus funds. That a transfer of assets can occur in anticipation of a future termination does not render that transfer itself a termination.

Third, the structure of ERISA amply (if not conclusively) supports the conclusion that § 1341(b)(3)(A)(ii) does not cover merger. As noted above, merger is nowhere mentioned in § 1341, and is instead dealt with in an entirely different set of statutory sections setting forth entirely different rules and procedures. Compare § 1058 (general merger provision), § 1411 (mergers between multiemployer plans), and § 1412 (mergers between multiemployer and single-employer plans) with § 1341 (termination of single-employer plans), § 1341a (termination of multiemployer plans); see generally Veal & Mackiewicz 31–40 (describing merger as an alternative to plan termination). Section 1058, the general merger provision, in fact quite clearly contemplates that merger and termination are not one and the same, forbidding merger "unless each participant in the plan would *(if the plan then terminated)* receive a benefit immediately after the merger . . . which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger . . . *(if the plan had then terminated).*" (Emphasis added.)

As for the different rules and procedures governing termination and merger: Most critically, plans seeking to terminate must provide advance notice to the PBGC, as well as extensive actuarial information. § 1341(b)(2)(A). The PBGC has the authority to halt the termination if it determines that plan assets are insufficient to cover plan liabilities. § 1341(b)(2)(C). Merger, by contrast, involves considerably less PBGC oversight, and the PBGC has no similar ability to cancel, see Brief for United States as *Amicus Curiae* 24. And the rules governing notice to the PBGC are either different or nonexistent. Section 1412, the provision governing merger between a single and multiemployer plan (the form of merger contemplated by PACE's proposal) makes no mention of early notice to the PBGC. And while mergers between multiemployer plans do require 120-days

advance notice, § 1411(b)(1), this still differs from the general notice provision for termination of single-employer plans, which requires notice to the PBGC "[a]s soon as practicable" after notice is given to affected parties, § 1341(b)(2)(A). Relatedly, § 1341(a)(2) also requires that, in a standard termination, written notice to plan participants and beneficiaries include "any related additional information required in regulations of the [PBGC]." Those regulations require, among other things, that the plan inform participants and beneficiaries that upon distribution, "the PBGC no longer guarantees . . . plan benefits." 29 CFR § 4041.23(b)(9). (This requirement of course has no relevance to a merger, because after a merger the PBGC *continues* to guarantee plan benefits.)

PACE believes that these procedural differences can be ironed over rather easily. It insists:

> "Many plan mergers take place without intent to terminate a plan; in those cases, the requirements for plan merger can be followed without consulting the requirements for plan termination. Conversely, many plan terminations take place without an associated merger; in those cases there is no need to consult the requirements for mergers. But if a plan sponsor intends to use merger as a method of implementing a plan termination, it simply must follow the rules for both merger and termination." Brief for Respondents 36.

PACE similarly explains that while the PBGC does not approve "ordinary merger[s]," PBGC approval would be necessary when a merger is designed to terminate a plan. *Id.*, at 37. The confusion invited by PACE's proposed framework is alone enough to condemn it. How could a plan be sure that it was in one box rather than the other? To avoid the risk of liability, should it simply follow both sets of rules all of the time? PACE's proposal is flawed for another rea-

son as well: It has no apparent basis in the statute. The separate provisions governing termination and merger quite clearly treat the two as wholly different transactions, with no exception for the case where merger is used for termination.

For all of the foregoing reasons, we believe that the PBGC's construction of the statute is a permissible one, and indeed the more plausible. Crown did not breach its fiduciary obligations in failing to consider PACE's merger proposal because merger is not a permissible form of termination. Even from a policy standpoint, the PBGC's choice is an eminently reasonable one, since termination by merger could have detrimental consequences for plan beneficiaries and plan sponsors alike. When a single-employer plan is merged into a multiemployer plan, the original participants and beneficiaries become dependent upon the financial well-being of the multiemployer plan and its contributing members. Assets of the single-employer plan (which in this case were capable of fully funding plan liabilities) may be used to satisfy commitments owed to *other* participants and beneficiaries of the (possibly underfunded) multiemployer plan. The PBGC believes that this arrangement creates added risk for participants and beneficiaries of the original plan, particularly in view of the lesser guarantees that the PBGC provides to multiemployer plans, compare § 1322 with § 1322a. See Brief for United States as *Amicus Curiae* 29, and n. 11. For employers, the ill effects are demonstrated by the facts of this very case: By diligently funding its pension plans, Crown became the bait for a union bent on obtaining a surplus that was rightfully Crown's. All this after Crown purchased an annuity that none dispute was sufficient to satisfy its commitments to plan participants and beneficiaries.

* * *

We hold that merger is not a permissible method of terminating a single-employer defined-benefit pension plan. 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

FRY *v.* PLILER, WARDEN

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

No. 06–5247. Argued March 20, 2007—Decided June 11, 2007

The trial judge presiding over petitioner's criminal trial excluded the testimony of defense-witness Pamela Maples. After his conviction, petitioner argued on appeal, *inter alia*, that the exclusion of Maples' testimony violated *Chambers* v. *Mississippi*, 410 U. S. 284, which held that a combination of erroneous evidentiary rulings rose to the level of a due process violation. The California Court of Appeal did not explicitly address that argument in affirming, but stated, without specifying which harmless-error standard it was applying, that "no possible prejudice" could have resulted in light of the cumulative nature of Maples' testimony. The State Supreme Court denied discretionary review. Petitioner then filed a federal habeas petition raising the due process and other claims. The Magistrate Judge found the state appellate court's failure to recognize *Chambers* error an unreasonable application of clearly established law as set forth by this Court, and disagreed with the finding of "no possible prejudice," but concluded there was an insufficient showing that the improper exclusion of Maples' testimony had a "substantial and injurious effect" on the jury's verdict under *Brecht* v. *Abrahamson*, 507 U. S. 619, 631. Agreeing, the District Court denied relief, and the Ninth Circuit affirmed.

Held: In 28 U. S. C. § 2254 proceedings, a federal court must assess the prejudicial impact of constitutional error in a state-court criminal trial under *Brecht*'s "substantial and injurious effect" standard, whether or not the state appellate court recognized the error and reviewed it for harmlessness under the "harmless beyond a reasonable doubt" standard set forth in *Chapman* v. *California*, 386 U. S. 18, 24. Pp. 116–122.

(a) That *Brecht* applies in § 2254 cases even if the state appellate court has not found, as did the state appellate court in *Brecht*, that the error was harmless under *Chapman*, is indicated by this Court's *Brecht* opinion, which did not turn on whether the state court itself conducted *Chapman* review, but instead cited concerns about finality, comity, and federalism as the primary reasons for adopting a less onerous standard on collateral review. 507 U. S., at 637. Since each of these concerns applies with equal force whether or not the state court reaches the *Chapman* question, it would be illogical to make the standard of review turn upon that contingency. *Brecht*, *supra*, at 636, distinguished.

Syllabus

Petitioner presents a false analogy in arguing that, if *Brecht* applies whether or not the state appellate court conducted *Chapman* review, then *Brecht* would apply even if a State eliminated appellate review altogether. The Court also rejects petitioner's contention that, even if *Brecht* adopted a categorical rule, post-*Brecht* developments—the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), as interpreted in *Mitchell* v. *Esparza*, 540 U. S. 12—require a different review standard. That result is not suggested by *Esparza*, which had no reason to decide the point, nor by AEDPA, which sets forth a precondition, not an entitlement, to the grant of habeas relief. Pp. 116–120.

(b) Petitioner's argument that the judgment below must still be reversed because excluding Maples' testimony substantially and injuriously affected the jury's verdict is rejected as not fairly encompassed by the question presented. Pp. 120–122.

Affirmed.

SCALIA, J., delivered the opinion for a unanimous Court as to all but footnote 1 and Part II–B. ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined that opinion in full; STEVENS, SOUTER, and GINSBURG, JJ., joined it as to all but Part II–B; and BREYER, J., joined as to all but footnote 1 and Part II–B. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which SOUTER and GINSBURG, JJ., joined, and in which BREYER, J., joined in part, *post*, p. 122. BREYER, J., filed an opinion concurring in part and dissenting in part, *post*, p. 126.

Victor S. Haltom, by appointment of the Court, 549 U. S. 1165, argued the cause for petitioner. With him on the briefs was *John R. Duree, Jr.*

Ross C. Moody, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Edmund G. Brown, Jr.*, Attorney General, *Dane R. Gillette*, Chief Assistant Attorney General, *Manuel M. Medeiros*, State Solicitor General, *Gerald A. Engler*, Senior Assistant Attorney General, *Donald E. de Nicola*, Deputy Solicitor General, and *Peggy S. Ruffra*, Supervising Deputy Attorney General.

Patricia A. Millett argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Clement*, *Assistant Attorney General*

Fisher, *Deputy Solicitor General Dreeben*, *Jonathan L. Marcus*, and *Joel M. Gershowitz*.*

JUSTICE SCALIA delivered the opinion of the Court.

We decide whether a federal habeas court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the "substantial and injurious effect" standard set forth in *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), when the state appellate court failed to recognize the error and did not review it for harmlessness under the "harmless beyond a reasonable doubt" standard set forth in *Chapman* v. *California*, 386 U. S. 18 (1967).

I

After two mistrials on account of hung juries, a third jury convicted petitioner of the 1992 murders of James and Cynthia Bell. At trial, petitioner sought to attribute the murders to one or more other persons. To that end, he offered testimony of several witnesses who linked one Anthony Hurtz to the killings. But the trial court excluded the testimony of one additional witness, Pamela Maples, who was

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Lori R. E. Ploeger, *Maureen P. Alger*, and *Matthew D. Brown* filed a brief for the Innocence Network as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Missouri et al. by *Jeremiah W. (Jay) Nixon*, Attorney General of Missouri, *James R. Layton*, State Solicitor, and *Heidi C. Doerhoff* and *Ronald S. Ribaudo*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Tom Miller* of Iowa, *Gregory D. Stumbo* of Kentucky, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Mike McGrath* of Montana, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, and *Darrell V. McGraw, Jr.*, of West Virginia; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

prepared to testify that she had heard Hurtz discussing homicides bearing some resemblance to the murder of the Bells. In the trial court's view, the defense had provided insufficient evidence to link the incidents described by Hurtz to the murders for which petitioner was charged.

Following his conviction, petitioner appealed to the California Court of Appeal, arguing (among other things) that the trial court's exclusion of Maples' testimony deprived him of a fair opportunity to defend himself, in violation of *Chambers* v. *Mississippi*, 410 U. S. 284 (1973) (holding that a combination of erroneous evidentiary rulings rose to the level of a due process violation). Without explicitly addressing petitioner's *Chambers* argument, the state appellate court held that the trial court had not abused its discretion in excluding Maples' testimony under California's evidentiary rules, adding that "no possible prejudice" could have resulted in light of the "merely cumulative" nature of the testimony. *People* v. *Fry*, No. A072396 (Ct. App. Cal., 1st App. Dist., Mar. 30, 2000), App. 97, n. 17. The court did not specify which harmless-error standard it was applying in concluding that petitioner suffered "no possible prejudice." The Supreme Court of California denied discretionary review, and petitioner did not then seek a writ of certiorari from this Court.

Petitioner next filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California, raising the aforementioned due process claim (among others). The case was initially assigned to a Magistrate Judge, who ultimately recommended denying relief. He found the state appellate court's failure to recognize error under *Chambers* to be "an unreasonable application of clearly established law as set forth by the Supreme Court," App. 180, and disagreed with the state appellate court's finding of "no possible prejudice." But he nevertheless concluded that "there ha[d] been an insufficient showing that the improper exclusion of the testimony of Ms. Maples had a

substantial and injurious effect on the jury's verdict" under the standard set forth in *Brecht*. App. 181–182. The District Court adopted the Magistrate Judge's findings and recommendations in full, and a divided panel of the United States Court of Appeals for the Ninth Circuit affirmed. We granted certiorari. 549 U. S. 1092 (2006).

II

A

In *Chapman*, *supra*, a case that reached this Court *on direct review* of a state-court criminal judgment, we held that a federal constitutional error can be considered harmless only if a court is "able to declare a belief that it was harmless beyond a reasonable doubt." *Id.*, at 24. In *Brecht*, *supra*, we considered whether the *Chapman* standard of review applies *on collateral review* of a state-court criminal judgment under 28 U. S. C. § 2254. Citing concerns about finality, comity, and federalism, we rejected the *Chapman* standard in favor of the more forgiving standard of review applied to nonconstitutional errors on direct appeal from federal convictions. See *Kotteakos* v. *United States*, 328 U. S. 750 (1946). Under that standard, an error is harmless unless it "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, *supra*, at 631 (quoting *Kotteakos*, *supra*, at 776). The question in this case is whether a federal court must assess the prejudicial impact of the unconstitutional exclusion of evidence during a state-court criminal trial under *Brecht* even if the state appellate court has not found, as the state appellate court in *Brecht* had found, that the error was harmless beyond a reasonable doubt under *Chapman*.[1]

[1] As this case comes to the Court, we assume (without deciding) that the state appellate court's decision affirming the exclusion of Maples' testimony was an unreasonable application of *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973). We also assume that the state appellate court did not determine the harmlessness of the error under the *Chapman* standard,

We begin with the Court's opinion in *Brecht*. The primary reasons it gave for adopting a less onerous standard on collateral review of state-court criminal judgments did not turn on whether the state court itself conducted *Chapman* review. The opinion explained that application of *Chapman* would "undermin[e] the States' interest in finality," 507 U. S., at 637; would "infring[e] upon [the States'] sovereignty over criminal matters," *ibid.;* would undercut the historic limitation of habeas relief to those "'grievously wronged,'" *ibid.;* and would "impos[e] significant 'social costs,'" *ibid.* (quoting *United States* v. *Mechanik*, 475 U. S. 66, 72 (1986)). Since each of these concerns applies with equal force whether or not the state court reaches the *Chapman* question, it would be illogical to make the standard of review turn upon that contingency.

The opinion in *Brecht* clearly assumed that the *Kotteakos* standard would apply in virtually all § 2254 cases. It suggested an exception only for the "unusual case" in which "a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, . . . infect[s] the integrity of the proceeding." 507 U. S., at 638, n. 9. This, of course, has nothing to do with whether the state court conducted harmless-error review. The concurring and dissenting opinions shared the assumption that *Kotteakos* would almost always be the standard on collateral review. The former stated in categorical terms that the "*Kotteakos* standard" "will now apply on collateral review" of state convictions, 507 U. S., at 643 (STEVENS, J., concurring). Justice White's dissent complained that under the Court's opinion *Kotteakos* would apply even where (as in this case) the state court found that "no violation had occurred," 507 U. S., at 644; and Justice O'Connor's dissent stated that *Chapman* would "no longer appl[y] to *any* trial error asserted on habeas," 507 U. S., at 651. Later cases

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notwithstanding its ambiguous conclusion that the exclusion of Maples' testimony resulted in "no possible prejudice."

also assumed that *Brecht*'s applicability does not turn on whether the state appellate court recognized the constitutional error and reached the *Chapman* question. See *Penry* v. *Johnson*, 532 U. S. 782, 795 (2001); *Calderon* v. *Coleman*, 525 U. S. 141, 145 (1998) *(per curiam)*.

Petitioner's contrary position misreads (or at least exaggerates the significance of) a lone passage from our *Brecht* opinion. In that passage, the Court explained:

> "State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. For these reasons, it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review." 507 U. S., at 636 (citation omitted).

But the quoted passage does little to advance petitioner's position. To say (a) that since state courts are *required* to evaluate constitutional error under *Chapman* it makes no sense to establish *Chapman* as the standard for federal habeas review is not at all to say (b) that whenever a state court fails in its responsibility to apply *Chapman* the federal habeas standard must change. It would be foolish to equate the two, in view of the other weighty reasons given in *Brecht* for applying a less onerous standard on collateral review—reasons having nothing to do with whether the state court actually applied *Chapman*.

Petitioner argues that, if *Brecht* applies whether or not the state appellate court conducted *Chapman* review, then *Brecht* would apply even if a State *eliminated appellate review altogether*. That is not necessarily so. The federal habeas review rule applied to the class of case in which state appellate review is available does not have to be the same rule applied to the class of case where it is not. We have no

occasion to resolve that hypothetical (and highly unrealistic) question now. In the case before us petitioner *did* obtain appellate review of his constitutional claim; the state court simply found the underlying claim weak and therefore did not measure its prejudicial impact under *Chapman*. The attempted analogy—between (1) eliminating appellate review altogether and (2) providing appellate review but rejecting a constitutional claim without assessing its prejudicial impact under *Chapman*—is a false one.

Petitioner contends that, even if *Brecht* adopted a categorical rule, post-*Brecht* developments require a different standard of review. Three years after we decided *Brecht*, Congress passed, and the President signed, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), under which a habeas petition may not be granted unless the state court's 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 . . . ." 28 U. S. C. § 2254(d)(1). In *Mitchell* v. *Esparza*, 540 U. S. 12 (2003) *(per curiam)*, we held that, when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable. Petitioner contends that § 2254(d)(1), as interpreted in *Esparza*, eliminates the requirement that a petitioner also satisfy *Brecht*'s standard. We think not. That conclusion is not suggested by *Esparza*, which had no reason to decide the point. Nor is it suggested by the text of AEDPA, which sets forth a precondition to the grant of habeas relief ("a writ of habeas corpus . . . shall not be granted" unless the conditions of § 2254(d) are met), not an entitlement to it. Given our frequent recognition that AEDPA limited rather than expanded the availability of habeas relief, see, *e. g.*, *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000), it is implausible that, without saying so, AEDPA replaced the *Brecht* standard of "'actual prejudice,'" 507

U. S., at 637 (quoting *United States* v. *Lane*, 474 U. S. 438, 449 (1986)), with the more liberal AEDPA/*Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable. That said, it certainly makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former. Accordingly, the Ninth Circuit was correct to apply the *Brecht* standard of review in assessing the prejudicial impact of federal constitutional error in a state-court criminal trial.[2]

B

Petitioner argues that, even if *Brecht* provides the standard of review, we must still reverse the judgment below because the exclusion of Maples' testimony substantially and injuriously affected the jury's verdict in this case. That argument, however, is not fairly encompassed within the question presented. We granted certiorari to decide a question that has divided the Courts of Appeals—whether *Brecht* or *Chapman* provides the appropriate standard of review when constitutional error in a state-court trial is first recognized by a federal court. Compare, *e. g.*, *Bains* v. *Cambra*, 204 F. 3d 964, 976–977 (CA9 2000), with *Orndorff* v. *Lockhart*, 998 F. 2d 1426, 1429–1430 (CA8 1993). It is true that the second sentence of the question presented asks: "Does it matter which harmless error standard is employed?" Pet. for Cert. I. But to ask whether *Brecht* makes any real difference is not to ask whether the Ninth Circuit misapplied

[2] We do not agree with petitioner's *amicus* that *Brecht*'s concerns regarding the finality of state-court criminal judgments and the difficulty of retrying a defendant years after the crime "have been largely alleviated by [AEDPA]," which "sets strict time limitations on habeas petitions and limits second or successive petitions as well." Brief for Innocence Network 7. Even cases governed by AEDPA can span a decade, as the nearly 12-year gap between petitioner's conviction and the issuance of this decision illustrates.

Brecht in this particular case. Petitioner seems to have understood this. Only in a brief footnote of his petition did he hint that the Ninth Circuit erred in its application of the *Brecht* standard. Pet. for Cert. 23, n. 19.[3] Indeed, if application of the *Brecht* standard to the facts of this case were encompassed within the question presented, so too would be the question of whether there was constitutional error in the first place. After all, it would not "matter which harmless error standard is employed" if there were no underlying constitutional error. Unlike the dissenting Justices, some of whom would reverse the decision below on the ground that the error was harmful under *Brecht*, and one of whom would vacate the decision below on the ground that it is unclear whether there was constitutional error in the first instance, we read the question presented to avoid these tangential and factbound questions, and limit our review to the question whether *Chapman* or *Brecht* provides the governing standard.

* * *

We hold that in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the "substantial and injurious effect" standard set forth in *Brecht*, *supra*, whether or not the state

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[3] The question presented included one additional issue: "[I]f the *Brecht* standard applies, does the petitioner or the State bear the burden of persuasion on the question of prejudice?" Pet. for Cert. I. We have previously held that, when a court is "in virtual equipoise as to the harmlessness of the error" under the *Brecht* standard, the court should "treat the error . . . as if it affected the verdict . . . ." *O'Neal* v. *McAninch*, 513 U. S. 432, 435 (1995). The majority opinion below did not refer to *O'Neal*, presumably because the majority harbored no grave doubt as to the harmlessness of the error. Neither did the dissenting judge refer to *O'Neal*, presumably because she did not think the majority harbored grave doubt as to the harmlessness of the error. Moreover, the State has conceded throughout this § 2254 proceeding that it bears the burden of persuasion. Thus, there is no basis on which to conclude that the court below ignored *O'Neal*.

appellate court recognized the error and reviewed it for harmlessness under the "harmless beyond a reasonable doubt" standard set forth in *Chapman*, 386 U. S. 18. Since the Ninth Circuit correctly applied the *Brecht* standard rather than the *Chapman* standard, we affirm the judgment below.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, and with whom JUSTICE BREYER joins in part, concurring in part and dissenting in part.

While I join all of the Court's opinion except Part II–B, I am persuaded that we should also answer the question whether the constitutional error was harmless under the standard announced in *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993). The parties and the Solicitor General as *amicus curiae* fully briefed and argued the question, presumably because it appears to fit within the awkwardly drafted question that we agreed to review.[1] Moreover, our answer to the question whether the error was harmless would emphasize the important point that the *Brecht* standard, as more fully explained in our opinion in *Kotteakos* v. *United States*, 328 U. S. 750 (1946), imposes a significant burden of persuasion on the State.

Both the history of this litigation and the nature of the constitutional error involved provide powerful support for the conclusion that if the jurors had heard the testimony of Pamela Maples, they would at least have had a reasonable doubt concerning petitioner's guilt. Petitioner was not found guilty until after he had been tried three times. The

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[1] In *Brecht* itself the application of the standard of *Kotteakos* v. *United States*, 328 U. S. 750 (1946), to the facts of the case was not even arguably encompassed within the question presented. We nonetheless found it appropriate to rule on whether the error was harmless under that standard. See *Brecht*, 507 U. S., at 638 ("All that remains to be decided is whether petitioner is entitled to relief").

first trial ended in a mistrial with the jury deadlocked 6 to 6. App. 121. The second trial also resulted in a mistrial due to a deadlocked jury, this time 7 to 5 in favor of conviction. *Ibid.* In the third trial, after the jurors had been deliberating for 11 days, the foreperson advised the judge that they were split 7 to 5 and "'hopelessly deadlocked.'" *Id.*, at 74–75. When the judge instructed the jury to continue its deliberations, the foreperson requested clarification on the definition of "reasonable doubt." *Id.*, at 75. The jury deliberated for an additional 23 days after that exchange—a total of *five weeks*—before finally returning a guilty verdict.[2]

It is not surprising that some jurors harbored a reasonable doubt as to petitioner's guilt weeks into their deliberations. The only person to offer eyewitness testimony, a disinterested truckdriver, described the killer as a man who was 5′7″ to 5′8″ tall, weighed about 140 pounds, and had a full head of hair. Tr. 4574 (Apr. 26, 1995). Petitioner is 6′2″ tall, weighed 300 pounds at the time of the murder, and is bald. Record, Doc. No. 13, Exh. L (arrest report); *ibid.*, Exh. M (petitioner's driver's license). Seven different witnesses linked the killings to a man named Anthony Hurtz, some testifying that Hurtz had admitted to them that he was in fact the killer. App. 60–64, 179. Each of those witnesses, unlike the truckdriver, was impeached by evidence of bias, either against Hurtz or for petitioner. *Id.*, at 61–64, 73, 179–180.

However, Pamela Maples, a cousin of Hurtz's who was in all other respects a disinterested witness, did not testify at

[2] According to data compiled by the National Center for State Courts, the average length of jury deliberations for a *capital* murder trial in California is 12 *hours*. See Judge and Attorney Survey (California), State of the States—Survey of Jury Improvement Efforts (2007), online at http://www.ncsconline.org/D_research/cjs/xls/SOSJAData/CA_JA_State.xls (as visited June 8, 2007, and available in Clerk of Court's case file). Three days before the jury reached a verdict in this noncapital case, the trial judge speculated that it was perhaps the longest deliberation in the history of Solano County. Tr. 5315 (June 5, 1995).

either of petitioner's first two trials. During the third trial, she testified out of the presence of the jury that she had overheard statements by Hurtz that he had committed a double murder strikingly similar to that witnessed by the truck-driver. As the Magistrate Judge found, the exclusion of Maples' testimony for lack of foundation was clear constitutional error under *Chambers* v. *Mississippi*, 410 U. S. 284 (1973), and the State does not argue otherwise.[3] Cf. *Skipper* v. *South Carolina*, 476 U. S. 1, 8 (1986) ("The testimony of more disinterested witnesses . . . would quite naturally be given much greater weight by the jury").

Chambers error is by nature prejudicial. We have said that *Chambers* "does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence." *United States* v. *Scheffer*, 523 U. S. 303, 316 (1998). Rather, due process considerations hold sway over state evidentiary rules only when the exclusion of evidence "undermine[s] fundamental elements of the defendant's defense." *Id.*, at 315. Hence, as a matter of law and logical inference, it is well-nigh impossible for a reviewing court to conclude that such error "did not influence the jury, or had but very slight effect" on its verdict. *Kotteakos*, 328 U. S., at 764; see also *O'Neal* v. *McAninch*, 513 U. S. 432, 445 (1995) ("[W]hen a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief").

It is difficult to imagine a less appropriate case for an exception to that commonsense proposition. We found in *Parker* v. *Gladden*, 385 U. S. 363 (1966) *(per curiam)*, that 26 hours of juror deliberations in a murder trial "indicat[ed] a difference among them as to the guilt of petitioner." *Id.*, at 365. Here, the jury was deprived of significant evidence of

[3] As the Magistrate Judge remarked, "[j]ust how many double execution style homicides involving a female driver shot in the head and a male passenger also shot in a parked car could there be in a community proximate to the victims' murder herein?" App. 179.

third-party guilt, and still we measure the length of deliberations by weeks, not hours. In light of the jurors' evident uncertainty, the prospect of rebutting the near-conclusive presumption that the *Chambers* error did substantial harm vanishes completely.[4]

We have not been shy in emphasizing that federal habeas courts do not lightly find constitutional error. See *Carey* v. *Musladin*, 549 U. S. 70 (2006). It follows that when they do find an error, they may not lightly discount its significance. Rather, a harmlessness finding requires "fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Kotteakos*, 328 U. S., at 765. Given "all that happened" in this case, and given the nature of the error, I cannot agree with the Ninth Circuit's conclusion that the erroneous exclusion of Maples' testimony was harmless under that standard.

Accordingly, I would reverse the judgment of the Court of Appeals.

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[4] See *United States* v. *Fields*, 483 F. 3d 313, 379 (CA5 2007) (Benavides, J., dissenting from Part II–A–1 and dissenting in part from the judgment) ("Courts often have been unwilling to find error harmless where the record, as in this case, affirmatively shows that the jurors struggled with their verdict"); *Kennedy* v. *Lockyer*, 379 F. 3d 1041, 1056, n. 18 (CA9 2004) ("From the fact that the first trial ended in a mistrial, as well as the fact that the jury deliberated for a considerable amount of time in the second trial, we infer that the question as to [the defendant's] guilt or innocence was a close one in both trials"); *Powell* v. *Collins*, 332 F. 3d 376, 401 (CA6 2003) (finding prejudicial error in a habeas case in part because the jury at one point told the court that it was "'at a stalemate'"); *United States* v. *Varoudakis*, 233 F. 3d 113, 127 (CA1 2000) (noting, in weighing harmlessness, that "the jury's 'impasse' note reveals uncertainty about [the defendant's] guilt"); *United States* v. *Ottersburg*, 76 F. 3d 137, 140 (CA7 1996) ("The length of the jury's deliberations makes clear that this case was not an easy one"); *Medina* v. *Barnes*, 71 F. 3d 363, 369 (CA10 1995) (basing prejudice determination in a habeas case in part on the fact that "at one point during their deliberations, the jurors indicated that they might be unable to reach a unanimous verdict").

JUSTICE BREYER, concurring in part and dissenting in part.

I agree with the Court that *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), sets forth the proper standard of review. Cf. *id.*, at 643 (STEVENS, J., concurring). At the same time, I agree with JUSTICE STEVENS that we should consider the application of the standard, that the error was not harmless, and that "*Chambers* error is by nature prejudicial." *Ante*, at 124 (opinion concurring in part and dissenting in part) (citing *Chambers* v. *Mississippi*, 410 U. S. 284 (1973)). Cf. *Kyles* v. *Whitley*, 514 U. S. 419, 435 (1995) (similar statement as to errors under *Brady* v. *Maryland*, 373 U. S. 83 (1963)). Nonetheless, I would remand this case rather than reversing the Court of Appeals.

My reason arises out of the fact that here, for purposes of deciding whether *Chambers* error exists, the question of harm is inextricably tied to other aspects of the trial court's determination. The underlying evidentiary judgment at issue involved a weighing of the probative value of proffered evidence against, *e. g.*, its cumulative nature, its tendency to confuse or to prejudice the jury, or the likelihood that it will simply waste the jury's time. See App. 96–97; Cal. Evid. Code Ann. § 352 (West 1995); cf. Fed. Rule Evid. 403. In this context, to find a *Chambers* error a court must take account *both* of the way in which (and extent to which) the trial court misweighed the relevant admissibility factors *and* of the extent to which doing so harmed the defendant. Moreover, to find this kind of error harmless, as the Court of Appeals found it, should preclude the possibility of a *Chambers* error; but to find this kind of error harmful does not guarantee the contrary. A garden-variety nonharmless misapplication of evidentiary principles normally will not rise to the level of a constitutional, *Chambers*, mistake. Cf., *e. g.*, *United States* v. *Scheffer*, 523 U. S. 303, 308 (1998).

All this, it seems to me, requires reconsideration by the Court of Appeals of its *Chambers* determination. I would

not consider the question whether that exclusion of evidence amounted to *Chambers* error because that question is not before us, see *ante*, at 116–117, n. 1 (opinion of the Court). But the logically inseparable question of harm is before us; and that, I believe, is sufficient.

I would remand the case to the Ninth Circuit so that, taking account of the points JUSTICE STEVENS raises, *ante*, at 122–125, it can reconsider whether there was an error of admissibility sufficiently serious to violate *Chambers*. I therefore join the Court's opinion except as to footnote 1 and Part II–B, and I join JUSTICE STEVENS' opinion in part.

Syllabus

UNITED STATES *v.* ATLANTIC RESEARCH CORP.

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

No. 06–562. Argued April 23, 2007—Decided June 11, 2007

Sections 107(a) and 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 allow private parties to recover expenses associated with cleaning up contaminated sites. Section 107(a) defines four categories of potentially responsible parties (PRPs) and makes them liable for, among other things, "(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan" and "(B) any other necessary costs of response incurred by any other person consistent with [such] plan," §§ 107(a)(4)(A)–(B). Originally, some courts interpreted § 107(a)(4)(B) as providing a cause of action for a private party to recover voluntarily incurred response costs and to seek contribution after having been sued. However, after the enactment of § 113(f), which authorizes one PRP to sue another for contribution, many courts held it to be the exclusive remedy for PRPs. In *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 161, this Court held that a private party could seek contribution under § 113(f) only after being sued under § 106 or § 107(a).

After respondent Atlantic Research cleaned up a Government site it leased and contaminated while doing Government work, it sued the Government to recover some of its costs under, as relevant here, § 107(a). The District Court dismissed the case, but the Eighth Circuit reversed, holding that § 113(f) does not provide the exclusive remedy for recovering cleanup costs and that § 107(a)(4)(B) provided a cause of action to any person other than those permitted to sue under § 107(a)(4)(A).

Held: Because § 107(a)(4)(B)'s plain terms allow a PRP to recover costs from other PRPs, the statute provides Atlantic Research with a cause of action. Pp. 134–141.

(a) Applying the maxim that statutes must "be read as a whole," *King* v. *St. Vincent's Hospital*, 502 U. S. 215, 221, subparagraph (B)'s language can be understood only with reference to subparagraph (A). The provisions are adjacent and have similar structures, and the text denotes a relationship between them. Subparagraph (B)'s phrase "other necessary costs" refers to and differentiates the relevant costs from those listed in subparagraph (A). Thus, it is natural to read the phrase "any other person" by referring to the immediately preceding subpara-

graph (A). Accepting the Government's interpretation—that "any other person" refers only to a person not identified as a PRP in §§ 107(a)(1)–(4)—would destroy the symmetry of subparagraphs (A) and (B) and render subparagraph (B) internally confusing. Moreover, because the statute defines PRPs so broadly as to sweep in virtually all persons likely to incur cleanup costs, accepting that interpretation would reduce the number of potential plaintiffs to almost zero, rendering subparagraph (B) a dead letter. Pp. 134–137.

(b) Contrary to the Government's argument, this interpretation will not create friction between §§ 107(a) and 113(f). Their two clearly distinct remedies complement each other: Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under § 106 or § 107(a), while § 107(a) permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs. Thus, at least in the case of reimbursement, a PRP cannot choose § 107(a)'s longer statute of limitations for recovery actions over § 113(f)'s shorter one for contribution claims. Similarly, a PRP could not avoid § 113(f)'s equitable distribution of reimbursement costs among PRPs by instead choosing to impose joint and several liability under § 107(a). That choice of remedies simply does not exist, and in any event, a defendant PRP in a § 107(a) suit could blunt any such distribution by filing a § 113(f) counterclaim. Finally, permitting PRPs to seek recovery under § 107(a) will not eviscerate § 113(f)(2), which prohibits § 113(f) contribution claims against "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement . . . ." Although that settlement bar does not by its terms protect against § 107(a) cost-recovery liability, a district court applying traditional equity rules would undoubtedly consider any prior settlement in the liability calculus; the settlement bar continues to provide significant protection from contribution suits by PRPs that have inequitably reimbursed costs incurred by another party; and settlement carries the inherent benefit of finally resolving liability as to the United States or a State. Pp. 137–141.

459 F. 3d 827, affirmed.

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

Deputy Solicitor General Hungar argued the cause for the United States. With him on the brief were *Solicitor General Clement*, *Acting Assistant Attorney General McKeown*, *Kannon K. Shanmugam*, *Ronald M. Spritzer*, and *Ellen J. Durkee*.

Counsel

Owen Thomas Armstrong, Jr., argued the cause for respondent. With him on the brief was *Frank L. Steeves.*

Jay D. Geck, Deputy Solicitor General of Washington, argued the cause for the State of Washington et al. as *amici curiae* urging affirmance. With him on the brief were *Robert M. McKenna*, Attorney General, *Maureen Hart*, Solicitor General, and *Michael L. Dunning*, Assistant Attorney General, *Linda Singer*, Acting Attorney General of the District of Columbia, *Salvador J. Antonetti Stutts*, Solicitor General of Puerto Rico, and the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Talis J. Colberg* of Alaska, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Richard Blumenthal* of Connecticut, *Bill McCollum* 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, *Tom Miller* of Iowa, *Gregory D. Stumbo* of Kentucky, *Charles C. Foti, Jr.*, of Louisiana, *Steven Rowe* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Jeremiah W. Nixon* of Missouri, *Mike McGrath* of Montana, *Catherine Cortez Masto* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Stuart Rabner* of New Jersey, *Gary K. King* of New Mexico, *Andrew M. Cuomo* of New York, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Marc Dann* of Ohio, *Hardy Myers* of Oregon, *Patrick Lynch* of Rhode Island, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, and *J. B. Van Hollen* of Wisconsin.*

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*Briefs of *amici curiae* urging reversal were filed for Cooper Industries, LLC, et al. by *Dale E. Stephenson, Allen A. Kacenjar, Jay N. Varon*, and *G. Michael Halfenger;* and for the Huron Valley Steel Corp. by *Jack D. Shumate* and *Karen Pilat.*

Briefs of *amici curiae* urging affirmance were filed for the City of New York by *Michael A. Cardozo, Leonard J. Koerner*, and *Daniel Greene;* for

JUSTICE THOMAS delivered the opinion of the Court.

Two provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)—§§ 107(a) and 113(f)—allow private parties to recover expenses associated with cleaning up contaminated sites. 42 U. S. C. §§ 9607(a), 9613(f). In this case, we must decide a question left open in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 161 (2004): whether § 107(a) provides so-called potentially responsible parties (PRPs), 42 U. S. C. §§ 9607(a)(1)–(4), with a cause of action to recover costs from other PRPs. We hold that it does.

I

A

Courts have frequently grappled with whether and how PRPs may recoup CERCLA-related costs from other PRPs. The questions lie at the intersection of two statutory provisions—CERCLA §§ 107(a) and 113(f). Section 107(a) de-

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the Association of California Water Agencies et al. by *Paul S. Weiland*, *Frederic A. Fudacz*, and *Alfred E. Smith;* for Aviall Services, Inc., by *Richard Faulk*, *Jeffrey M. Gaba*, and *Stacy R. Obenhaus;* for E. I. Du Pont de Nemours and Co. et al. by *Mark I. Levy* and *William H. Hyatt, Jr.;* for Ford Motor Co. et al. by *John McGahren;* for Consolidated Edison Co. of New York, Inc., by *Carter G. Phillips*, *Angus Macbeth*, *Stephen B. Kinnaird*, *Woody N. Peterson*, *Richard W. Babinecz*, and *Peter P. Garam;* for Lockheed Martin Corp. by *Miguel A. Estrada*, *Michael K. Murphy*, *Amir C. Tayrani*, and *James R. Buckley;* for the Metropolitan Water Reclamation District of Greater Chicago by *Harvey M. Sheldon*, *Joel D. Bertocchi*, *Stephen R. Swofford*, and *Frederick M. Feldman;* for the Natural Resources Defense Council et al. by *Jerry S. Phillips;* for the Superfund Settlements Project et al. by *Michael W. Steinberg;* for the United States Conference of Mayors by *Paul E. Gutermann* and *Thomas C. Goldstein;* and for Former Administrator of the United States Environmental Protection Agency Carol M. Browner et al. by *Joel M. Gross.*

Briefs of *amici curiae* were filed for Reading Co. by *James C. Martin;* and for James Kotrous by *Jacqueline L. McDonald* and *Michael E. Vergara.*

fines four categories of PRPs, 94 Stat. 2781, 42 U. S. C. §§ 9607(a)(1)–(4), and makes them liable for, among other things:

> "(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; [and]
>
> "(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan." §§ 9607(a)(4)(A)–(B).

Enacted as part of the Superfund Amendments and Reauthorization Act of 1986 (SARA), 100 Stat. 1613, § 113(f) authorizes one PRP to sue another for contribution in certain circumstances. 42 U. S. C. § 9613(f).[1]

Prior to the advent of § 113(f)'s express contribution right, some courts held that § 107(a)(4)(B) provided a cause of action for a private party to recover voluntarily incurred response costs and to seek contribution after having been sued. See *Cooper Industries*, *supra*, at 161–162 (collecting cases); *Key Tronic Corp.* v. *United States*, 511 U. S. 809, 816, n. 7 (1994) (same). After SARA's enactment, however, some Courts of Appeals believed it necessary to "direc[t] traffic between" §§ 107(a) and 113(f). 459 F. 3d 827, 832 (CA8 2006) (case below). As a result, many Courts of Appeals held that § 113(f) was the exclusive remedy for PRPs. See *Cooper Industries*, *supra*, at 169 (collecting cases). But as courts prevented PRPs from suing under § 107(a), they expanded § 113(f) to allow PRPs to seek "contribution" even in the absence of a suit under § 106 or § 107(a). *Aviall Servs., Inc.* v.

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[1] Section 113(f)(1) permits private parties to seek contribution during or following a civil action under § 106 or § 107(a). 42 U. S. C. § 9613(f)(1). Section 113(f)(3)(B) permits private parties to seek contribution after they have settled their liability with the Government. § 9613(f)(3)(B).

Cooper Industries, Inc., 312 F. 3d 677, 681 (CA5 2002) (en banc).

In *Cooper Industries*, we held that a private party could seek contribution from other liable parties only after having been sued under § 106 or § 107(a). 543 U. S., at 161. This narrower interpretation of § 113(f) caused several Courts of Appeals to reconsider whether PRPs have rights under § 107(a)(4)(B), an issue we declined to address in *Cooper Industries*. *Id.*, at 168. After revisiting the issue, some courts have permitted § 107(a) actions by PRPs. See *Consolidated Edison Co. of N. Y.* v. *UGI Utilities, Inc.*, 423 F. 3d 90 (CA2 2005); *Metropolitan Water Reclamation Dist. of Greater Chicago* v. *North American Galvanizing & Coatings, Inc.*, 473 F. 3d 824 (CA7 2007). However, at least one court continues to hold that § 113(f) provides the exclusive cause of action available to PRPs. *E. I. DuPont de Nemours & Co.* v. *United States*, 460 F. 3d 515 (CA3 2006). Today, we resolve this issue.

B

In this case, respondent Atlantic Research leased property at the Shumaker Naval Ammunition Depot, a facility operated by the Department of Defense. At the site, Atlantic Research retrofitted rocket motors for petitioner United States. Using a high-pressure water spray, Atlantic Research removed pieces of propellant from the motors. It then burned the propellant pieces. Some of the resultant wastewater and burned fuel contaminated soil and ground water at the site.

Atlantic Research cleaned the site at its own expense and then sought to recover some of its costs by suing the United States under both §§ 107(a) and 113(f). After our decision in *Cooper Industries* foreclosed relief under § 113(f), Atlantic Research amended its complaint to seek relief under § 107(a) and federal common law. The United States moved to dismiss, arguing that § 107(a) does not allow PRPs (such as

Atlantic Research) to recover costs. The District Court granted the motion to dismiss, relying on a case decided prior to our decision in *Cooper Industries, Dico, Inc.* v. *Amoco Oil Co.*, 340 F. 3d 525 (CA8 2003).

The Court of Appeals for the Eighth Circuit reversed. Recognizing that *Cooper Industries* undermined the reasoning of its prior precedent, 459 F. 3d, at 830, n. 4, the Court of Appeals joined the Second and Seventh Circuits in holding that § 113(f) does not provide "the exclusive route by which [PRPs] may recover cleanup costs." *Id.*, at 834 (citing *Consolidated Edison Co., supra*). The court reasoned that § 107(a)(4)(B) authorized suit by any person other than the persons permitted to sue under § 107(a)(4)(A). 459 F. 3d, at 835. Accordingly, it held that § 107(a)(4)(B) provides a cause of action to Atlantic Research. To prevent perceived conflict between §§ 107(a)(4)(B) and 113(f)(1), the Court of Appeals reasoned that PRPs that "have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality." *Id.*, at 836–837. We granted certiorari, 549 U. S. 1177 (2007), and now affirm.

II

A

The parties' dispute centers on what "other person[s]" may sue under § 107(a)(4)(B). The Government argues that "any other person" refers to any person not identified as a PRP in §§ 107(a)(1)–(4).[2] In other words, subparagraph (B) per-

[2] CERCLA § 107(a) lists four broad categories of persons as PRPs, by definition liable to other persons for various costs:

"(1) the owner and operator of a vessel or a facility,

"(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

"(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration

mits suit only by non-PRPs and thus bars Atlantic Research's claim. Atlantic Research counters that subparagraph (B) takes its cue from subparagraph (A), not the earlier paragraphs (1)–(4). In accord with the Court of Appeals, Atlantic Research believes that subparagraph (B) provides a cause of action to anyone except the United States, a State, or an Indian tribe—the persons listed in subparagraph (A). We agree with Atlantic Research.

Statutes must "be read as a whole." *King* v. *St. Vincent's Hospital*, 502 U. S. 215, 221 (1991). Applying that maxim, the language of subparagraph (B) can be understood only with reference to subparagraph (A). The provisions are adjacent and have remarkably similar structures. Each concerns certain costs that have been incurred by certain entities and that bear a specified relationship to the national contingency plan.[3] Bolstering the structural link, the text also denotes a relationship between the two provisions. By using the phrase "other necessary costs," subparagraph (B) refers to and differentiates the relevant costs from those listed in subparagraph (A).

In light of the relationship between the subparagraphs, it is natural to read the phrase "any other person" by referring to the immediately preceding subparagraph (A), which permits suit only by the United States, a State, or an Indian tribe. The phrase "any other person" therefore means any person other than those three. See 42 U. S. C. § 9601(21)

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vessel owned or operated by another party or entity and containing such hazardous substances, and

"(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for [various costs]." 42 U. S. C. §§ 9607(a)(1)–(4).

[3] "The national contingency plan specifies procedures for preparing and responding to contaminations and was promulgated by the Environmental Protection Agency . . . ." *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 161, n. 2 (2004) (citing 40 CFR pt. 300 (2004)).

(defining "person" to include the United States and the various States). Consequently, the plain language of subparagraph (B) authorizes cost-recovery actions by any private party, including PRPs. See *Key Tronic*, 511 U. S., at 818 (stating in dictum that § 107 "impliedly authorizes private parties to recover cleanup costs from *other* PRP[s]" (emphasis added)).

The Government's interpretation makes little textual sense. In subparagraph (B), the phrase "any other necessary costs" and the phrase "any other person" both refer to antecedents—"costs" and "person[s]"—located in some previous statutory provision. Although "any other necessary costs" clearly references the costs in subparagraph (A), the Government would inexplicably interpret "any other person" to refer not to the persons listed in subparagraph (A) but to the persons listed as PRPs in paragraphs (1)–(4). Nothing in the text of § 107(a)(4)(B) suggests an intent to refer to antecedents located in two different statutory provisions. Reading the statute in the manner suggested by the Government would destroy the symmetry of §§ 107(a)(4)(A) and (B) and render subparagraph (B) internally confusing.

Moreover, the statute defines PRPs so broadly as to sweep in virtually all persons likely to incur cleanup costs. Hence, if PRPs do not qualify as "any other person" for purposes of § 107(a)(4)(B), it is unclear what private party would. The Government posits that § 107(a)(4)(B) authorizes relief for "innocent" private parties—for instance, a landowner whose land has been contaminated by another. But even parties not responsible for contamination may fall within the broad definitions of PRPs in §§ 107(a)(1)–(4). See 42 U. S. C. § 9607(a)(1) (listing "the owner and operator of a . . . facility" as a PRP); see also *United States* v. *Alcan Aluminum Corp.*, 315 F. 3d 179, 184 (CA2 2003) ("CERCLA § 9607 is a strict liability statute"). The Government's reading of the text logically precludes all PRPs, innocent or not, from recovering cleanup costs. Accordingly, accepting the Government's

interpretation would reduce the number of potential plaintiffs to almost zero, rendering § 107(a)(4)(B) a dead letter.[4] See *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467, 475 (1911) ("We must have regard to all the words used by Congress, and as far as possible give effect to them").

According to the Government, our interpretation suffers from the same infirmity because it causes the phrase "any other person" to duplicate work done by other text. In the Government's view, the phrase "any other necessary costs" "already precludes governmental entities from recovering under" § 107(a)(4)(B). Brief for United States 20. Even assuming the Government is correct, it does not alter our conclusion. The phrase "any other person" performs a significant function simply by clarifying that subparagraph (B) excludes the persons enumerated in subparagraph (A). In any event, our hesitancy to construe statutes to render language superfluous does not require us to avoid surplusage at all costs. It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity.

B

The Government also argues that our interpretation will create friction between §§ 107(a) and 113(f), the very harm courts of appeals have previously tried to avoid. In particular, the Government maintains that our interpretation, by offering PRPs a choice between §§ 107(a) and 113(f), effectively allows PRPs to circumvent § 113(f)'s shorter statute

[4] Congress amended the statute in 2002 to exempt some bona fide prospective purchasers (BFPPs) from liability under § 107(a). See 42 U. S. C. § 9607(r)(1) (2000 ed., Supp. IV). The Government claims that these persons are non-PRPs and therefore qualify as "any other person" under its interpretation of § 107(a)(4)(B). Prior to 2002, however, the statute made this small set of persons liable as PRPs. Accordingly, even if BFPPs now give some life to the Government's interpretation of § 107(a)(4)(B), it would be implausible at best to conclude that § 107(a)(4)(B) lay dormant until the enactment of § 107(r)(1) in 2002.

of limitations. See 42 U. S. C. §§ 9613(g)(2)–(3). Furthermore, the Government argues, PRPs will eschew equitable apportionment under § 113(f) in favor of joint and several liability under § 107(a). Finally, the Government contends that our interpretation eviscerates the settlement bar set forth in § 113(f)(2).

We have previously recognized that §§ 107(a) and 113(f) provide two "clearly distinct" remedies. *Cooper Industries*, 543 U. S., at 163, n. 3. "CERCLA provide[s] for a *right to cost recovery* in certain circumstances, § 107(a), and *separate rights to contribution* in other circumstances, §§ 113(f)(1), 113(f)(3)(B)." *Id.*, at 163 (emphasis added). The Government, however, uses the word "contribution" as if it were synonymous with any apportionment of expenses among PRPs. Brief for United States 33, n. 14 ("Contribution is merely a form of cost recovery, not a wholly independent type of relief"); see also, *e. g.*, *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F. 3d 1298, 1301 (CA9 1997) ("Because all PRPs are liable under the statute, a claim by one PRP against another PRP necessarily is for contribution"). This imprecise usage confuses the complementary yet distinct nature of the rights established in §§ 107(a) and 113(f).

Section 113(f) explicitly grants PRPs a right to contribution. Contribution is defined as the "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault." Black's Law Dictionary 353 (8th ed. 2004). Nothing in § 113(f) suggests that Congress used the term "contribution" in anything other than this traditional sense. The statute authorizes a PRP to seek contribution "during or following" a suit under § 106 or § 107(a). 42 U. S. C. § 9613(f)(1).[5] Thus, § 113(f)(1) permits suit before or after the establish-

[5] Similarly, § 113(f)(3)(B) permits a PRP to seek contribution after it "has resolved its liability to the United States or a State . . . in an administrative or judicially approved settlement . . . ." 42 U. S. C. § 9613(f)(3)(B).

ment of common liability. In either case, a PRP's right to contribution under § 113(f)(1) is contingent upon an inequitable distribution of common liability among liable parties.

By contrast, § 107(a) permits recovery of cleanup costs but does not create a right to contribution. A private party may recover under § 107(a) without any establishment of liability to a third party. Moreover, § 107(a) permits a PRP to recover only the costs it has "incurred" in cleaning up a site. 42 U. S. C. § 9607(a)(4)(B). When a party pays to satisfy a settlement agreement or a court judgment, it does not incur its own costs of response. Rather, it reimburses other parties for costs that those parties incurred.

Accordingly, the remedies available in §§ 107(a) and 113(f) complement each other by providing causes of action "to persons in different procedural circumstances." *Consolidated Edison*, 423 F. 3d, at 99; see also *E. I. DuPont de Nemours*, 460 F. 3d, at 548 (Sloviter, J., dissenting). Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under § 106 or § 107(a). And § 107(a) permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs. Hence, a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a). As a result, though eligible to seek contribution under § 113(f)(1), the PRP cannot simultaneously seek to recover the same expenses under § 107(a). Thus, at least in the case of reimbursement, the PRP cannot choose the 6-year statute of limitations period for § 113(f) contribution claims.[6]

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[6] We do not suggest that §§ 107(a)(4)(B) and 113(f) have no overlap at all. *Key Tronic Corp.* v. *United States*, 511 U. S. 809, 816 (1994) (stating the statutes provide "similar and somewhat overlapping remed[ies]"). For instance, we recognize that a PRP may sustain expenses pursuant to

For similar reasons, a PRP could not avoid § 113(f)'s equitable distribution of reimbursement costs among PRPs by instead choosing to impose joint and several liability on another PRP in an action under § 107(a).[7] The choice of remedies simply does not exist. In any event, a defendant PRP in such a § 107(a) suit could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim. 459 F. 3d, at 835; see also *Consolidated Edison*, *supra*, at 100, n. 9 (collecting cases). Resolution of a § 113(f) counterclaim would necessitate the equitable apportionment of costs among the liable parties, including the PRP that filed the § 107(a) action. 42 U. S. C. § 9613(f)(1) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate").

Finally, permitting PRPs to seek recovery under § 107(a) will not eviscerate the settlement bar set forth in § 113(f)(2). That provision prohibits § 113(f) contribution claims against "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement . . . ." 42 U. S. C. § 9613(f)(2). The settlement bar does not by its terms protect against cost-recovery liability under § 107(a). For several reasons, we doubt this supposed loophole would discourage settlement. First, as stated above, a defendant PRP may trigger equitable appor-

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a consent decree following a suit under § 106 or § 107(a). See, *e. g.*, *United Technologies Corp.* v. *Browning-Ferris Industries, Inc.*, 33 F. 3d 96, 97 (CA1 1994). In such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party. We do not decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both. For our purposes, it suffices to demonstrate that costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f). Thus, at a minimum, neither remedy swallows the other, contrary to the Government's argument.

[7] We assume without deciding that § 107(a) provides for joint and several liability.

tionment by filing a § 113(f) counterclaim. A district court applying traditional rules of equity would undoubtedly consider any prior settlement as part of the liability calculus. Cf. 4 Restatement (Second) of Torts § 886A(2), p. 337 (1977) ("No tortfeasor can be required to make contribution beyond his own equitable share of the liability"). Second, the settlement bar continues to provide significant protection from contribution suits by PRPs that have inequitably reimbursed the costs incurred by another party. Third, settlement carries the inherent benefit of finally resolving liability as to the United States or a State.[8]

III

Because the plain terms of § 107(a)(4)(B) allow a PRP to recover costs from other PRPs, the statute provides Atlantic Research with a cause of action. We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

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[8] Because § 107(a) expressly permits PRPs to seek cost recovery, we need not address the alternative holding of the Court of Appeals that § 107(a) contains an additional implied right to contribution for PRPs who are not eligible for relief under § 113(f). Cf. *Cooper Industries*, 543 U. S., at 171 (citing *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630 (1981); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77 (1981)).

Syllabus

WATSON ET AL. *v.* PHILIP MORRIS COS., INC., ET AL.

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

No. 05–1284. Argued April 25, 2007—Decided June 11, 2007

Petitioners filed a state-court suit claiming that respondents (Philip Morris) violated Arkansas unfair business practice laws by advertising certain cigarette brands as "light" when, in fact, Philip Morris had manipulated testing results to register lower levels of tar and nicotine in the advertised cigarettes than would be delivered to consumers. Philip Morris removed the case to Federal District Court under the federal officer removal statute, which permits removal of an action against "any officer *(or any person acting under that officer)* of the United States or of any agency thereof," 28 U. S. C. § 1442(a)(1) (emphasis added). The federal court upheld the removal, ruling that the complaint attacked Philip Morris' use of the *Government's* method of testing cigarettes and thus that petitioners had sued Philip Morris for "acting under" the Federal Trade Commission. The Eighth Circuit affirmed, emphasizing the FTC's detailed supervision of the cigarette testing process and likening the case to others in which lower courts permitted removal by heavily supervised Government contractors.

Held: The fact that a federal agency directs, supervises, and monitors a company's activities in considerable detail does not bring that company within § 1442(a)(1)'s scope and thereby permit removal. Pp. 147–157.

(a) Section 1442(a)(1)'s words "acting under" are broad, and the statute must be "liberally construed." *Colorado* v. *Symes*, 286 U. S. 510, 517. But broad language is not limitless. And a liberal construction nonetheless can find limits in a text's language, context, history, and purposes. The statute's history and this Court's cases demonstrate that its basic purpose is to protect the Federal Government from the interference with its "operations" that would ensue were a State able, for example, to "arres[t]" and bring "to trial in a State cour[t] for an alleged offense against the law of the State," "officers and agents" of the Government "acting . . . within the scope of their authority." *Willingham* v. *Morgan*, 395 U. S. 402, 406 (internal quotation marks omitted). State-court proceedings may reflect "local prejudice" against unpopular federal laws or officials, *e. g., Maryland* v. *Soper (No. 1)*, 270 U. S. 9, 32, and States hostile to the Government may impede enforcement of federal law, see, *e. g., Tennessee* v. *Davis*, 100 U. S. 257, 263, or deprive federal officials of a federal forum in which to assert federal

immunity defenses, see, *e. g.*, *Willingham*, *supra*, at 407. The removal statute applies to private persons "who lawfully assist" a federal officer "in the performance of his official duty," *Davis* v. *South Carolina*, 107 U. S. 597, 600, but "only" if the private parties were "authorized to act with or for [federal officers or agents] in affirmatively executing duties under . . . federal law," *City of Greenwood* v. *Peacock*, 384 U. S. 808, 824. Pp. 147–151.

(b) The relevant relationship here is that of a private person "*acting under*" a federal "officer" or "agency." § 1442(a)(1) (emphasis added). In this context, "under" must refer to what the dictionaries describe as a relationship involving acting in a certain capacity, considered in relation to one holding a superior position or office, and typically includes subjection, guidance, or control. Precedent and statutory purpose also make clear that the private person's "acting under" must involve an effort to *assist*, or to help *carry out*, the federal superior's duties or tasks. See, *e. g.*, *Davis* v. *South Carolina*, *supra*, at 600. Such aid does *not* include simply *complying* with the law. When a company complies with a regulatory order, it does not ordinarily create a significant risk of state-court "prejudice." Cf. *Soper*, *supra*, at 32. A state-court suit brought against such a company is not likely to disable federal officials from taking necessary action designed to enforce federal law, cf. *Tennessee* v. *Davis*, *supra*, at 262–263, nor to deny a federal forum to an individual entitled to assert a federal immunity claim, see, *e. g.*, *Willingham*, *supra*, at 407. Thus, a private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase "acting under" a federal "official," even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored. A contrary determination would expand the statute's scope considerably, potentially bringing within it state-court actions filed against private firms in many highly regulated industries. Nothing in the statute's language, history, or purpose indicates a congressional intent to do so. Pp. 151–153.

(c) Philip Morris' two arguments to the contrary are rejected. First, it contends that if close supervision is sufficient to turn a Government contractor into a private firm "acting under" a Government "agency" or "officer," as lower courts have held, it is sufficient to transform a company subjected to intense regulation. The answer to this argument is that the assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps the officers fulfill other basic governmental tasks. Second, Philip Morris argues that it is "acting under" FTC officers when it conducts cigarette testing because, after initially testing cigarettes for tar and nicotine, the FTC *delegated authority* for that task to the tobacco industry in 1987 and has thereaf-

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ter extensively supervised and closely monitored testing. This argument contains a fatal flaw of omission. Although it uses the word "delegation," there is no evidence of any delegation of legal authority from the FTC to the tobacco industry to undertake testing on the Government agency's behalf, or evidence of any contract, payment, employer/employee relationship, or principal/agent arrangement. The existence of detailed FTC rules indicates regulation, not delegation. The usual regulator/regulated relationship cannot be construed as bringing Philip Morris within the statute's terms. Pp. 153–157.

420 F. 3d 852, reversed and remanded.

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

David C. Frederick argued the cause for petitioners. With him on the briefs were *Mark L. Evans*, *Steven Eugene Cauley*, *James Allen Carney*, and *Marcus N. Bozeman*.

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Hungar*, *Mark B. Stern*, and *Dana J. Martin*.

Theodore B. Olson argued the cause for respondents. With him on the brief were *Mark A. Perry*, *Amir C. Tayrani*, *Murray R. Garnick*, and *Kenneth S. Geller*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Gary Feinerman*, Solicitor General, and *Michael Scodro*, Deputy Solicitor General, by *Linda Singer*, Acting Attorney General of the District of Columbia, and by the Attorneys General for their respective States as follows: *Talis J. Colberg* of Alaska, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *Edmund G. Brown, Jr.*, of California, *John W. Suthers* of Colorado, *Richard Blumenthal* of Connecticut, *Joseph R. Biden III* of Delaware, *Bill McCollum* of Florida, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Steve Carter* of Indiana, *Tom Miller* of Iowa, *Paul J. Morrison* of Kansas, *Gregory D. Stumbo* of Kentucky, *Charles C. Foti, Jr.*, of Louisiana, *G. Steven Rowe* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Catherine Cortez Masto* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Stuart*

JUSTICE BREYER delivered the opinion of the Court.

The federal officer removal statute permits a defendant to remove to federal court a state-court action brought against the

> "United States or any agency thereof or any officer *(or any person acting under that officer)* of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office . . . ." 28 U. S. C. § 1442(a)(1) (emphasis added).

The question before us is whether the fact that a federal regulatory agency directs, supervises, and monitors a company's activities in considerable detail brings that company within the scope of the italicized language ("*acting under*" an "*officer*" of the United States) and thereby permits removal. We hold that it does not.

Rabner of New Jersey, *Gary K. King* of New Mexico, *Andrew M. Cuomo* of New York, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Marc Dann* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Patrick Lynch* of Rhode Island, *Henry McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Robert F. McDonnell* of Virginia, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, *J. B. Van Hollen* of Wisconsin, and *Patrick J. Crank* of Wyoming; for the Campaign for Tobacco-Free Kids et al. by *Matthew L. Myers;* for Public Citizen, Inc., et al. by *Scott L. Nelson*, *Brian Wolfman*, *Stacy Canan*, *Bruce Vignery*, and *Michael Schuster;* and for Public Justice, P. C., et al. by *Gerson H. Smoger*, *Esther E. Berezofsky*, *Michael J. Quirk*, *Arthur H. Bryant*, *Leslie A. Brueckner*, and *Jeffrey R. White.*

Michael S. Fried and *Christian G. Vergonis* filed a brief for Former Commissioners and Senior Staff of the Federal Trade Commission as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the Blue Cross and Blue Shield Association by *Anthony F. Shelley;* for Defense Contractors et al. by *Seth P. Waxman*, *Stephen W. Preston*, *Paul R. Q. Wolfson*, and *John P. Janecek;* and for the Washington Legal Foundation by *Katharine R. Latimer*, *Rebecca A. Womeldorf*, *Michael L. Junk*, *Daniel J. Popeo*, and *Paul D. Kamenar.*

I

Lisa Watson and Loretta Lawson, the petitioners, filed a civil lawsuit in Arkansas state court claiming that the Philip Morris Companies, the respondents, violated state laws prohibiting unfair and deceptive business practices. The complaint focuses upon advertisements and packaging that describe certain Philip Morris brand cigarettes (Marlboro and Cambridge Lights) as "light," a term indicating lower tar and nicotine levels than those present in other cigarettes. More specifically, the complaint refers to the design and performance of Philip Morris cigarettes that are tested in accordance with the Cambridge Filter Method, a method that "the tobacco industry [uses] to 'measure' tar and nicotine levels in cigarettes." App. to Pet. for Cert. 63a–64a. The complaint charges that Philip Morris "manipulat[ed] the design" of its cigarettes, and "[e]mploy[ed] techniques that" would cause its cigarettes "to register lower levels of tar and nicotine on [the Cambridge Filter Method] than would be delivered to the consumers of the product." *Id.*, at 63a–65a. The complaint adds that the Philip Morris cigarettes delivered "greater amounts of tar and nicotine when smoked under actual conditions" than the adjective "'light'" as used in its advertising indicates. *Id.*, at 65a. In view of these and other related practices, the complaint concludes that Philip Morris' behavior was "deceptive and misleading" under Arkansas law. *Id.*, at 64a, 66a.

Philip Morris, referring to the federal officer removal statute, removed the case to Federal District Court. That court, in turn, held that the statute authorized the removal. The court wrote that the complaint attacked Philip Morris' use of the *Government's* method of testing cigarettes. For this reason (and others), it held that the petitioners had sued Philip Morris for "act[s]" taken "under" the Federal Trade Commission (FTC), a federal agency (staffed by federal "officer[s]").

The District Court certified the question for interlocutory review. And the United States Court of Appeals for the Eighth Circuit affirmed. Like the District Court, it emphasized the FTC's detailed supervision of the cigarette testing process. It also cited lower court cases permitting removal by heavily supervised Government contractors. See 420 F. 3d 852, 857 (2005); *Winters* v. *Diamond Shamrock Chemical Co.*, 149 F. 3d 387 (CA5 1998) (authorizing removal of a tort suit against private defense contractors that manufactured Agent Orange). The Eighth Circuit concluded that Philip Morris was "acting under" federal "officer[s]," namely, the FTC, with respect to the challenged conduct. 420 F. 3d, at 854.

We granted certiorari. 549 U. S. 1162 (2007). And we now reverse the Eighth Circuit's determination.

II

The federal statute permits removal only if Philip Morris, in carrying out the "act[s]" that are the subject of the petitioners' complaint, was "acting under" any "agency" or "officer" of "the United States." 28 U. S. C. § 1442(a)(1). The words "acting under" are broad, and this Court has made clear that the statute must be "liberally construed." *Colorado* v. *Symes*, 286 U. S. 510, 517 (1932); see *Arizona* v. *Manypenny*, 451 U. S. 232, 242 (1981); *Willingham* v. *Morgan*, 395 U. S. 402, 406–407 (1969). But broad language is not limitless. And a liberal construction nonetheless can find limits in a text's language, context, history, and purposes.

Beginning with history, we note that Congress enacted the original federal officer removal statute near the end of the War of 1812, a war that was not popular in New England. See *id.*, at 405. Indeed, shipowners from that region filed many state-court claims against federal customs officials charged with enforcing a trade embargo with England. See Wiecek, The Reconstruction of Federal Judicial Power, 1863–

1875, 13 Am. J. Legal Hist. 333, 337 (1969). Congress responded with a provision that permitted federal customs officers and "*any other person aiding or assisting*" those officers to remove a case filed against them "in any state court" to federal court. Customs Act of 1815, ch. 31, § 8, 3 Stat. 198 (emphasis added). This initial removal statute was "[o]bviously . . . an attempt to protect federal officers from interference by hostile state courts." *Willingham*, 395 U. S., at 405.

In the early 1830's, South Carolina passed a Nullification Act declaring federal tariff laws unconstitutional and authorizing prosecution of the federal agents who collected the tariffs. See *ibid.* Congress then enacted a new statute that permitted "any officer of the United States, *or other person,*" to remove to federal court a lawsuit filed against the officer "for or on account of any act done under the revenue laws of the United States." Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633 (emphasis added). As Senator Daniel Webster explained at the time, where state courts might prove hostile to federal law, and hence to those who enforced that law, the removal statute would "give a chance to the [federal] officer to defend himself where the authority of the law was recognised." 9 Cong. Deb. 461 (1833).

Soon after the Civil War, Congress enacted yet another officer removal statute, permitting removal of a suit against any revenue officer "on account of any act done under color of his office" by the revenue officer and "*any person acting under or by authority of any such officer.*" Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171 (emphasis added). Elsewhere the statute restricted these latter persons to those engaged in acts "for the collection of taxes." § 67, *id.*, at 172.

In 1948, Congress again revised the statute, dropping its limitation to the revenue context. And it included the rewritten statute within its 1948 recodification. See Act of June 25, 1948, ch. 646, § 1442(a), 62 Stat. 938, 28 U. S. C. § 1442(a). It is this version of the statute that, with the ex-

ception of a modification in response to this Court's decision in *International Primate Protection League* v. *Administrators of Tulane Ed. Fund*, 500 U. S. 72 (1991), is now before us. While Congress expanded the statute's coverage to include all federal officers, it nowhere indicated any intent to change the scope of words, such as "acting under," that described the triggering relationship between a private entity and a federal officer.

Turning to precedent, we point to three cases, all involving illegal liquor, which help to illustrate the need for, and the workings of, the pre-1948 removal statutes. In 1878, a federal revenue officer, James Davis, raided an illegal distillery in Tennessee; was ambushed by several armed men; returned the ambushers' gunfire; and shot one of his attackers dead. See *Tennessee* v. *Davis*, 100 U. S. 257, 261 (1880). Tennessee indicted Davis for murder. The Court held that the statute permitted Davis to remove the case to federal court, reasoning that the Federal Government "can act only through its officers and agents, and they must act within the States." *Id.*, at 263. Removal, the Court found, would help to prevent hostile States from "paralyz[ing]" the Federal Government and its initiatives. *Ibid.*

About the same time, a U. S. Army corporal (also called Davis, Lemuel Davis) along with several other soldiers helped a federal revenue officer try to arrest a distiller for violating the internal-revenue laws. The soldiers surrounded the house; the distiller escaped through a hole in a side wall; Corporal Davis shot the suspect; and South Carolina indicted Davis for murder. Davis removed the case, and this Court upheld the removal. The Court acknowledged that, although Davis was not a revenue officer, he was a person "who lawfully assist[ed]" a revenue officer "in the performance of his official duty." *Davis* v. *South Carolina*, 107 U. S. 597, 600 (1883).

In the 1920's, Maryland charged a group of prohibition agents and a private person acting as their driver with a

murder committed during a distillery raid. See *Maryland* v. *Soper (No. 1)*, 270 U. S. 9 (1926). The prohibition agents and their driver sought to remove the state murder trial to federal court. This Court ultimately rejected their removal efforts for reasons not relevant here. But in doing so it pointed out that the private person acting "as a chauffeur and helper to the four officers under their orders and . . . direction" had "the same right to the benefit of" the removal provision as did the federal agents. *Id.*, at 30.

Apart from demonstrating the dangers associated with working in the illegal alcohol business, these three cases—*Tennessee* v. *Davis*, *Davis* v. *South Carolina*, and *Maryland* v. *Soper*—illustrate that the removal statute's "basic" purpose is to protect the Federal Government from the interference with its "operations" that would ensue were a State able, for example, to "arres[t]" and bring "to trial in a State cour[t] for an alleged offense against the law of the State," "officers and agents" of the Federal Government "acting . . . within the scope of their authority." *Willingham*, 395 U. S., at 406 (internal quotation marks omitted). See also *ibid.* (noting that the "purpose" of the statute "is not hard to discern"). State-court proceedings may reflect "local prejudice" against unpopular federal laws or federal officials. *Soper*, *supra*, at 32; see *Manypenny*, 451 U. S., at 242 (noting that removal permits trials to occur free from "local . . . prejudice"). In addition, States hostile to the Federal Government may impede through delay federal revenue collection or the enforcement of other federal law. See *Tennessee* v. *Davis*, *supra*, at 263; cf. *Findley* v. *Satterfield*, 9 F. Cas. 67, 68 (No. 4,792) (CC ND Ga. 1877). And States may deprive federal officials of a federal forum in which to assert federal immunity defenses. See *International Primate Protection League*, *supra*, at 86–87; *Willingham*, *supra*, at 407 ("[O]ne of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court"); *Jefferson County* v. *Acker*, 527 U. S. 423,

447 (1999) (SCALIA, J., concurring in part and dissenting in part) (noting that "the main point" of the federal officer removal statute "is to give officers a federal forum in which to litigate the merits of immunity defenses").

Where a private person acts as an assistant to a federal official in helping that official to enforce federal law, some of these same considerations may apply. Regardless, in *Davis* v. *South Carolina* the Court wrote that the removal statute applies to private persons "who lawfully assist" the federal officer "in the performance of his official duty." 107 U. S., at 600. And in *City of Greenwood* v. *Peacock*, 384 U. S. 808, 824 (1966), in interpreting a related removal provision, the Court repeated that the statute authorized removal by private parties "only" if they were "authorized to act with or for [federal officers or agents] in affirmatively executing duties under . . . federal law." All the Court's relevant post-1948 federal officer removal cases that we have found reflect or are consistent with this Court's pre-1948 views. See *Mesa* v. *California*, 489 U. S. 121 (1989); *Manypenny*, *supra*; *Willingham*, *supra*; *Peacock*, *supra*.

III

With this history and precedent in mind, we return to the statute's language. The relevant relationship is that of a private person "*acting under*" a federal "officer" or "agency." 28 U. S. C. § 1442(a)(1) (emphasis added). In this context, the word "under" must refer to what has been described as a relationship that involves "acting in a certain capacity, considered in relation to one holding a superior position or office." 18 Oxford English Dictionary 948 (2d ed. 1989). That relationship typically involves "subjection, guidance, or control." Webster's New International Dictionary 2765 (2d ed. 1953). See also Funk & Wagnalls New Standard Dictionary of the English Language 2604 (1942) (defining "under" as meaning "[s]ubordinate or subservient to," "[s]ubject to guidance, tutorship, or direction of"); 18 Oxford English Diction-

ary, *supra*, at 949 ("[s]ubject to the instruction, direction, or guidance of"). In addition, precedent and statutory purpose make clear that the private person's "acting under" must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior. See, *e. g.*, *Davis* v. *South Carolina*, *supra*, at 600; see also *supra*, at 149–151.

In our view, the help or assistance necessary to bring a private person within the scope of the statute does *not* include simply *complying* with the law. We recognize that sometimes an English speaker might say that one who complies with the law "helps" or "assists" governmental law enforcement. Taxpayers who fill out complex federal tax forms, airline passengers who obey federal regulations prohibiting smoking, for that matter well-behaved federal prisoners, all "help" or "assist" federal law enforcement authorities in some sense of those words. But that is not the sense of "help" or "assist" that can bring a private action within the scope of this statute. That is in part a matter of language. One would usually describe the behavior of the taxpayers, airline passengers, and prisoners we have described as *compliance* with the law (or *acquiescence* to an order), not as "acting under" a federal official who is giving an order or enforcing the law. It is also in part a matter of the history and the precedent we have discussed. See *supra*, at 147–151.

Finally, it is a matter of statutory purpose. When a company subject to a regulatory order (even a highly complex order) complies with the order, it does not ordinarily create a significant risk of state-court "prejudice." Cf. *Soper*, *supra*, at 32; *Manypenny*, *supra*, at 241–242. Nor is a state-court lawsuit brought against such a company likely to disable federal officials from taking necessary action designed to enforce federal law. Cf. *Tennessee* v. *Davis*, 100 U. S., at 262–263. Nor is such a lawsuit likely to deny a federal forum to an individual entitled to assert a federal claim of immunity. See, *e. g.*, *Willingham*, *supra*, at 407.

The upshot is that a highly regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone. A private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase "acting under" a federal "official." And that is so even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored. A contrary determination would expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries. See, *e. g.*, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U. S. C. § 136a (2000 ed. and Supp. IV) (mandating disclosure of testing results in the context of pesticide registration). Neither language, nor history, nor purpose lead us to believe that Congress intended any such expansion.

IV

Philip Morris advances two important arguments to the contrary. First, it points out that lower courts have held that Government contractors fall within the terms of the federal officer removal statute, at least when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision. See, *e. g.*, *Winters*, 149 F. 3d 387. And it asks why, if close supervision is sufficient to turn a private contractor into a private firm "acting under" a Government "agency" or "officer," does it not do the same when a company is subjected to intense regulation.

The answer to this question lies in the fact that the private contractor in such cases is helping the Government to produce an item that it needs. The assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks. In the context of *Winters*, for example, Dow Chemical fulfilled the terms of a contractual agreement

by providing the Government with a product that it used to help conduct a war. Moreover, at least arguably, Dow performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform.

These circumstances distinguish *Winters* from this case. For present purposes that distinction is sufficient. And we need not further examine here (a case where private contracting is not at issue) whether and when particular circumstances may enable private contractors to invoke the statute.

Second, Philip Morris argues that its activities at issue here did not consist simply of compliance with regulatory laws, rules, and orders. It contends that the FTC, after initially testing cigarettes for tar and nicotine, *"delegated authority"* for that task to an industry-financed testing laboratory in 1987. *E. g.*, Brief for Respondents 31 (emphasis added). And Philip Morris asserts that (along with other cigarette companies) it was acting pursuant to that delegation. It adds that ever since this initial "delegation" the FTC has "extensive[ly] . . . supervis[ed]" and "closely monitored" the manner in which the laboratory tests cigarettes. *Id.*, at 37, 30, 39. Philip Morris concludes that, given all these circumstances, just as Dow was "acting under" officers of the Department of Defense when it manufactured Agent Orange, see *Winters*, *supra*, at 399, so Philip Morris is "acting under" officers of the FTC when it conducts cigarette testing. See Brief for Respondents 38.

For argument's sake we shall overlook the fact that the petitioners appear to challenge the way in which Philip Morris "designed" its *cigarettes*, not the way in which it (or the industry laboratory) conducted cigarette testing. We also shall assume the following testing-related facts that Philip Morris sets forth in its brief:

> (1) In the 1950's, the FTC ordered tobacco companies to stop advertising the amount of tar and nicotine contained in their cigarettes. See *id.*, at 3.

(2) In 1966, the FTC altered course. It permitted cigarette companies to advertise "tar and nicotine yields" provided that the company had substantiated its statement through use of the Cambridge Filter Method, a testing method developed by Dr. Clyde Ogg, a Department of Agriculture employee. *Id.*, at 4–5.

(3) The Cambridge Filter Method uses "a smoking machine that takes a 35 milliliter puff of two seconds' duration on a cigarette every 60 seconds until the cigarette is smoked to a specified butt length." *FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F. 2d 35, 37 (CADC 1985). It then measures the amount of tar and nicotine that is delivered. That data, in turn, determine whether a cigarette may be labeled as "light." This method, Dr. Ogg has testified, "will not tell a smoker how much tar and nicotine he will get from any given cigarette," but it "will indicate" whether a smoker "will get more from one than from another cigarette if there is a significant difference between the two and if he smokes the two in the same manner." Brief for Respondents 5–6 (internal quotation marks omitted).

(4) In 1967, the FTC began to use its own laboratory to perform these tests. See *id.*, at 6. And the Cambridge Filter Method began to be referred to as "the 'FTC Method.'" *Id.*, at 4.

(5) The FTC published the testing results periodically and sent the results annually to Congress. See *id.*, at 7.

(6) Due to cost considerations, the FTC stopped testing cigarettes for tar and nicotine in 1987. Simultaneously, the tobacco industry assumed responsibility for cigarette testing, running the tests according to FTC specifications and permitting the FTC to monitor the process closely. See *ibid.*

(7) The FTC continues to publish the testing results and to send them to Congress. See *ibid.*

> (8) The tobacco industry has followed the FTC's requirement that cigarette manufacturers disclose (and make claims about) tar and nicotine content based exclusively on the results of this testing. See *id.*, at 8–9.

Assuming this timeline, Philip Morris' argument nonetheless contains a fatal flaw—a flaw of omission. Although Philip Morris uses the word "delegation" or variations many times throughout its brief, we have found no evidence of any delegation of legal authority from the FTC to the industry association to undertake testing on the Government agency's behalf. Nor is there evidence of any contract, any payment, any employer/employee relationship, or any principal/agent arrangement.

We have examined all of the documents to which Philip Morris and certain supporting *amici* refer. Some of those documents refer to cigarette testing specifications, others refer to the FTC's inspection and supervision of the industry laboratory's testing, and still others refer to the FTC's prohibition of statements in cigarette advertising. But none of these documents establish the type of formal delegation that might authorize Philip Morris to remove the case.

Several former FTC officials, for example, filed an *amicus* brief in which they state that "[i]n 198[7] the FTC delegated testing responsibility to the private Tobacco Industry Testing Lab (the 'TITL')." Brief for Former Commissioners and Senior Staff of the FTC 11. But in support of this proposition the brief cites a single source, a letter from the cigarette manufacturers' lawyer to an FTC official. That letter states:

> "[M]ajor United States cigarette manufacturers, who are responsible for the TITL's operations and on whose behalf we are writing, do not believe that Commission oversight is needed . . . . Nevertheless, as an accommodation and in the spirit of cooperation, the manufacturers are prepared to permit Commission employees

> to monitor the TITL testing program . . . .” Letter from John P. Rupp to Judith P. Wilkenfeld (June 30, 1987), online at http://tobaccodocuments.org/nysa_ti_s1/TI57900738.html (as visited June 7, 2007, and available in Clerk of Court’s case file).

Nothing in this letter refers to a delegation of authority. And neither Congress nor federal agencies normally delegate legal authority to private entities without saying that they are doing so.

Without evidence of some such special relationship, Philip Morris’ analogy to Government contracting breaks down. We are left with the FTC’s detailed rules about advertising, specifications for testing, requirements about reporting results, and the like. This sounds to us like regulation, not delegation. If there is a difference between this kind of regulation and, say, that of Food and Drug Administration regulation of prescription drug marketing and advertising (which also involve testing requirements), see *Serono Labs., Inc.* v. *Shalala*, 158 F. 3d 1313, 1316 (CADC 1998), that difference is one of degree, not kind.

As we have pointed out, however, differences in the degree of regulatory detail or supervision cannot by themselves transform Philip Morris’ regulatory *compliance* into the kind of assistance that might bring the FTC within the scope of the statutory phrase “*acting under*” a federal “officer.” *Supra*, at 152. And, though we find considerable regulatory detail and supervision, we can find nothing that warrants treating the FTC/Philip Morris relationship as distinct from the usual regulator/regulated relationship. This relationship, as we have explained, cannot be construed as bringing Philip Morris within the terms of the statute.

For these reasons, the judgment of the Eighth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

LONG ISLAND CARE AT HOME, LTD., ET AL. *v.* COKE

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

No. 06–593. Argued April 16, 2007—Decided June 11, 2007

The Fair Labor Standards Amendments of 1974 exempted from the minimum wage and maximum hours rules of the Fair Labor Standards Act of 1938 (FLSA) persons "employed in domestic service employment to provide companionship services for individuals . . . unable to care for themselves." 29 U. S. C. § 213(a)(15). Under a Labor Department (DOL) regulation labeled an "Interpretatio[n]" (hereinafter third-party regulation), the exemption includes those "companionship" workers "employed by an . . . agency other than the family or household using their services." 29 CFR § 552.109(a). However, the DOL's "General Regulations" also define the statutory term "domestic service employment" as "services of a household nature performed by an employee in or about a private home . . . *of the person by whom he or she is employed.*" § 552.3 (emphasis added). Respondent, a "companionship services" provider to the elderly and infirm, sued petitioners, her former employer Long Island Care and its owner, seeking minimum and overtime wages they allegedly owed her. The parties assume the FLSA requires the payments only if its "companionship services" exemption does not apply to workers paid by third-party agencies such as Long Island Care. The District Court dismissed the suit, finding the third-party regulation valid and controlling. The Second Circuit found the regulation unenforceable and set the judgment aside.

Held: The third-party regulation is valid and binding. Pp. 165–176.

(a) An agency's power to administer a congressionally created program necessarily requires the making of rules to fill any "'gap'" left, implicitly or explicitly, by Congress. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843. When an agency fills such a gap reasonably, and in accordance with other applicable (*e. g.*, procedural) requirements, that result is legally binding. *Id.*, at 843–844. On its face, the third-party regulation seems to fill a statutory gap. Pp. 165–166.

(b) The regulation does not exceed the DOL's delegated rulemaking authority. The FLSA explicitly leaves gaps as to the scope and definition of its "domestic service employment" and "companionship services" terms, 29 U. S. C. § 213(a)(15), and empowers the DOL to fill these gaps through regulations, 1974 Amendments, § 29(b). Whether to include

workers paid by third parties is one of the details left to the DOL to work out. Although the pre-1974 FLSA already covered *some* third-party-paid companionship workers, *e. g.*, those employed by large private enterprises, it did not then cover others, *e. g.*, those employed directly by the aged person's family or by many smaller private agencies. Thus, whether, or how, the statutory definition should apply to such workers raises a set of complex questions, *e. g.*, should the FLSA cover *all* of them, some of them, or *none* of them? How should the need for a simple, uniform application of the exemption be weighed against the fact that some (but not all) of the workers were previously covered? Given the DOL's expertise, satisfactory answers to the foregoing questions may well turn upon its thorough knowledge of the area and ability to consult at length with affected parties. It is therefore reasonable to infer that Congress intended its broad grant of definitional authority to the DOL to include the authority to answer such questions. Respondent's reliance on the Social Security statute, whose text expressly answers a "third party" coverage question, and on conflicting statements in the 1974 Amendments' legislative history, is unavailing. Pp. 166–168.

(c) Although the literal language of the third-party regulation and the "General Regulation," § 552.3, conflicts as to whether third-party-paid workers are included within the statutory exemption, several reasons compel the Court to agree with the DOL's position, set forth in an "Advisory Memorandum" explaining (and defending) the third-party regulation, that that regulation governs here. First, a decision that § 552.3 controls would create serious problems as to the coverage of particular domestic service employees by the statutory exemption or by the FLSA as a whole. Second, given that the third-party regulation's *sole purpose* is to explain how the companionship services exemption applies to persons employed by third-party entities, whereas § 552.3's primary purpose is to describe the *kind of work* that must be performed to qualify someone as a "domestic service" employee, the third-party regulation is the more specific with respect to the question at issue and therefore governs, see, *e. g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 384–385. Third, that the DOL may have interpreted the two regulations differently at different times in their history is not a ground for disregarding the present interpretation, which the DOL reached after proposing a different interpretation through notice-and-comment rulemaking, making any unfair surprise unlikely, cf. *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 212. Fourth, while the Advisory Memorandum was issued only to DOL personnel and written in response to this litigation, this Court has accepted such an interpretation where, as here, an agency's course of action indicates that its interpretation of its own regulation reflects its considered views on the matter in question

and there is no reason to suspect that its interpretation is merely a *post hoc* rationalization. Pp. 168–171.

(d) Several factors compel the Court to reject respondent's argument that the third-party regulation is an "interpretation" not meant to fill a statutory "gap," but simply to describe the DOL's view of what the FLSA means, and thus is not entitled to *Chevron* deference, cf. *United States* v. *Mead Corp.*, 533 U. S. 218, 232. For one thing, the regulation directly governs the conduct of members of the public, "'affecting individual rights and obligations.'" *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 302. When promulgating the regulation and when considering amending it, the DOL has always employed full public notice-and-comment procedures, which under the Administrative Procedure Act (APA) need not be used when producing an "interpretive" rule, 5 U. S. C. § 553(b)(A). And for the past 30 years, according to the Advisory Memorandum (and not disputed by respondent), the DOL has treated the regulation as a legally binding exercise of its rulemaking authority. For another thing, the DOL may have placed the third-party regulation in Subpart B of Part 552, entitled "Interpretations," rather than in Subpart A, "General Regulations," because Subpart B contains matters of detail, interpreting and applying Subpart A's more general definitions. Indeed, Subpart B's other regulations—involving, *e. g.*, employer "credit[s]" against minimum wages for provision of "food," "lodging," and "drycleaning"—strongly indicate that such details, not a direct interpretation of the statute's language, are at issue. Finally, the Court assumes *Congress* meant and expected courts to treat a regulation as within a delegation of "gap-filling" authority where, as here, the rule sets forth important individual rights and duties, the agency focuses fully and directly upon the issue and uses full notice-and-comment procedures, and the resulting rule falls within the statutory grant of authority and is reasonable. *Mead*, *supra*, at 229–233. Pp. 171–174.

(e) The Court disagrees with respondent's claim that the DOL's 1974 notice-and-comment proceedings were legally "defective" because the DOL's notice and explanation were inadequate. Fair notice is the object of the APA requirement that a notice of proposed rulemaking contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved," 5 U. S. C. § 553(b)(3). The Circuits have generally interpreted this to mean that the final rule must be a logical outgrowth of the rule proposed. Initially, the DOL's proposed regulation would have placed outside the § 213(a)(15) exemption (and hence left subject to FLSA wage and hour rules) individuals employed by the large enterprise third-party employers covered before 1974. Since that was simply a proposal, however, its presence meant that the

DOL was *considering* the matter and might later choose to keep the proposal or to withdraw it. The DOL finally withdrew it, resulting in a determination exempting *all* third-party-employed companionship workers from the FLSA, and that possibility was reasonably foreseeable. There is also no significant legal problem with the DOL's explanation that its final interpretation is more consistent with FLSA language. No one seems to have objected to this explanation at the time, and it still remains a reasonable, albeit brief, explanation. Pp. 174–176.

462 F. 3d 48, reversed and remanded.

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

H. Bartow Farr III argued the cause for petitioners. With him on the briefs were *Richard G. Taranto* and *Daniel S. Alter.*

David B. Salmons argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement*, *Deputy Solicitor General Kneedler*, *Jonathan L. Snare*, *Steven J. Mandel*, and *Edward D. Sieger.*

Harold Craig Becker argued the cause for respondent. With him on the brief was *Michael Shen.**

JUSTICE BREYER delivered the opinion of the Court.

A provision of the Fair Labor Standards Act exempts from the statute's minimum wage and maximum hours rules

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*Briefs of *amici curiae* urging reversal were filed for the City of New York et al. by *Michael A. Cardozo*, *Stephen J. A. Acquario*, *Leonard J. Koerner*, and *Susan Choi-Hausman;* for the Continuing Care Leadership Coaltion, Inc., et al. by *Peter G. Bergmann*, *Kathy H. Chin*, *Aaron J. Schindel*, *John Longstreth*, *Joel L. Hodes*, and *Ellen M. Bach;* for the National Association for Home Care & Hospice, Inc., by *William A. Dombi;* and for the National Private Duty Association by *Trenten P. Bausch.*

Briefs of *amici curiae* urging affirmance were filed for AARP et al. by *Stacy Canan*, *Bruce Vignery*, and *Michael Schuster;* for the Alliance for Retired Americans et al. by *Jonathan P. Hiatt*, *James B. Coppess*, *Patrick J. Szymanski*, and *Carol R. Golubock;* for Law Professors et al. by *James Reif;* and for the Urban Justice Center et al. by *David T. Goldberg.*

> "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor])." 29 U. S. C. § 213(a)(15).

A Department of Labor regulation (labeled an "interpretation") says that this statutory exemption includes those "companionship" workers who "are employed by an employer or agency other than the family or household using their services." 29 CFR § 552.109(a) (2006). The question before us is whether, in light of the statute's text and history, and a different (apparently conflicting) regulation, the Department's regulation is valid and binding. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984). We conclude that it is.

I

A

In 1974, Congress amended the Fair Labor Standards Act of 1938 (FLSA or Act), 52 Stat. 1060, to include many "domestic service" employees not previously subject to its minimum wage and maximum hour requirements. See Fair Labor Standards Amendments of 1974 (1974 Amendments), §§ 7(b)(1), (2), 88 Stat. 62 (adding 29 U. S. C. § 206(f), which provides for a minimum wage for domestic service employees, and § 207(*l*), which extends overtime restrictions to domestic service employees). When doing so, Congress simultaneously created an exemption that *excluded* from FLSA coverage certain subsets of employees "employed in domestic service employment," including babysitters "employed on a casual basis" and the companionship workers described above. § 7(b)(3), 88 Stat. 62 (codified at 29 U. S. C. § 213(a)(15)).

The Department of Labor (Department or DOL) then promulgated a set of regulations that included two regulations at issue here. The first, set forth in a subpart of the proposed regulations entitled "General Regulations," defines the statutory term "domestic service employment" as

> "services of a household nature performed by an employee in or about a private home . . . *of the person by whom he or she is employed* . . . such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use [as well as] babysitters employed on other than a casual basis." 40 Fed. Reg. 7405 (1975) (emphasis added) (codified at 29 CFR § 552.3).

The second, set forth in a later subsection entitled "Interpretations," says that exempt companionship workers include those

> "who are employed by an employer or agency other than the family or household using their services . . . [whether or not] such an employee [is assigned] to more than one household or family in the same workweek . . . ." 40 Fed. Reg. 7407 (codified at 29 CFR § 552.109(a)).

This latter regulation (which we shall call the "third-party regulation") has proved controversial in recent years. On at least three separate occasions during the past 15 years, the Department considered changing the regulation and narrowing the exemption in order to bring within the scope of the FLSA's wage and hour coverage companionship workers paid by third parties (other than family members of persons receiving the services, who under the proposals were to remain exempt). 58 Fed. Reg. 69310–69312 (1993); 60 Fed. Reg. 46798 (1995); 66 Fed. Reg. 5481, 5485 (2001). But the

Department ultimately decided not to make any change. 67 Fed. Reg. 16668 (2002).

B

In April 2002, Evelyn Coke (respondent), a domestic worker who provides "companionship services" to elderly and infirm men and women, brought this lawsuit against her former employer, Long Island Care at Home, Ltd., and its owner, Maryann Osborne (petitioners). App. 1, 19; 267 F. Supp. 2d 332, 333–334 (EDNY 2003). She alleged that petitioners failed to pay her the minimum wages and overtime wages to which she was entitled under the FLSA and a New York statute, and she sought a judgment for those unpaid wages. App. 21–22. All parties assume for present purposes that the FLSA entitles Coke to the payments if, but only if, the statutory exemption for "companionship services" does not apply to companionship workers paid by third-party agencies such as Long Island Care. The District Court found the Department's third-party regulation valid and controlling, and it consequently dismissed Coke's lawsuit. 267 F. Supp. 2d, at 341.

On appeal, the Second Circuit found the Department's third-party regulation "unenforceable" and set aside the District Court's judgment. 376 F. 3d 118, 133, 135 (2004). Long Island Care and Osborne sought certiorari. At the Solicitor General's suggestion, we vacated the Second Circuit's decision and remanded the case so that the Circuit could consider a recent DOL "Advisory Memorandum" explaining (and defending) the regulation. 546 U. S. 1147 (2006); App. E to Pet. for Cert. 50a (Wage and Hour Advisory Memorandum No. 2005–1 (Dec. 1, 2005) (hereinafter Advisory Memorandum)). The Advisory Memorandum failed to convince the Second Circuit, which again held the regulation unenforceable. 462 F. 3d 48, 50–52 (2006) *(per curiam)*. Long Island Care and Osborne again sought certiorari. And this time, we granted their petition and set the case for argument.

II

We have previously pointed out that the "'power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" *Chevron*, 467 U. S., at 843 (quoting *Morton* v. *Ruiz*, 415 U. S. 199, 231 (1974); omission in original). When an agency fills such a "gap" reasonably, and in accordance with other applicable (*e. g.*, procedural) requirements, the courts accept the result as legally binding. 467 U. S., at 843–844; *United States* v. *Mead Corp.*, 533 U. S. 218, 227 (2001).

In this case, the FLSA explicitly leaves gaps, for example, as to the scope and definition of statutory terms such as "domestic service employment" and "companionship services." 29 U. S. C. § 213(a)(15). It provides the Department with the power to fill these gaps through rules and regulations. *Ibid.;* 1974 Amendments, § 29(b), 88 Stat. 76 (authorizing the Secretary of Labor "to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act"). The subject matter of the regulation in question concerns a matter in respect to which the agency is expert, and it concerns an interstitial matter, *i. e.*, a portion of a broader definition, the details of which, as we said, Congress entrusted the agency to work out.

The Department focused fully upon the matter in question. It gave notice, it proposed regulations, it received public comment, and it issued final regulations in light of that comment. 39 Fed. Reg. 35383 (1974); 40 Fed. Reg. 7404. See *Mead*, *supra*, at 230. The resulting regulation says that employees who provide "companionship services" fall within the terms of the statutory exemption irrespective of who pays them. Since on its face the regulation seems to fill a statutory gap, one might ask what precisely is it about the regulation that might make it unreasonable or otherwise unlawful?

Respondent argues, and the Second Circuit concluded, that a thorough examination of the regulation's content, its method of promulgation, and its context reveals serious legal problems—problems that led the Second Circuit to conclude that the regulation was unenforceable. In particular, respondent claims that the regulation falls outside the scope of Congress' delegation; that it is inconsistent with another, legally governing regulation; that it is an "interpretive" regulation not warranting judicial deference; and that it was improperly promulgated. We shall examine each of these claims in turn.

A

Respondent refers to the statute's language exempting from FLSA coverage those "employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves." 29 U. S. C. § 213(a)(15). She claims that the words "domestic service employment" limit the provision's scope to those workers employed by persons who themselves receive the services (or are part of that person's household) and exclude those who are employed by "third parties." And she advances several arguments in favor of this position.

Respondent points to the overall purpose of the 1974 Amendments, namely to *extend* FLSA coverage, see, *e. g.*, H. R. Rep. No. 93–232, pp. 2, 8 (1973); she notes that prior to the amendments the FLSA already covered companionship workers employed by certain third parties (*e. g.*, private agencies that were large enough, in terms of annual sales, to qualify for the FLSA's "enterprise coverage" provisions, 29 U. S. C. §§ 206(a), 207(a)(1) (1970 ed.), see §§ 203(r), (s)(1) (defining "enterprise" and "enterprise engaged in commerce or the production of goods for commerce")); and she concludes that Congress must therefore have meant its "domestic service employment" language in the exemption to apply only to persons not employed by third parties such as Long Island Care. Respondent tries to bolster this argument by point-

ing to statements made by some Members of Congress during floor debates over the 1974 Amendments. See, *e. g.*, 119 Cong. Rec. 24801 (1973) (statement of Sen. Burdick) ("I am not concerned about the professional domestic who does this as a daily living," but rather about "people who might have an aged father, an aged mother, an infirm father, an infirm mother, and a neighbor comes in and sits with them"). And she also points to a different statute, the Social Security statute, which defines "domestic service employment" as domestic work performed in "a private home *of the employer.*" 26 U. S. C. § 3510(c)(1) (2000 ed.) (emphasis added; internal quotation marks omitted).

We do not find these arguments convincing. The statutory language refers broadly to "domestic service employment" and to "companionship services." It expressly instructs the agency to work out the details of those broad definitions. And whether to include workers paid by third parties within the scope of the definitions is one of those details.

Although the FLSA in 1974 already covered *some* of the third-party-paid workers, it did not at that point cover others. It did not cover, for example, companionship workers employed directly by the aged person's family; nor did it cover workers employed by many smaller private agencies. The result is that whether, or how, the definition should apply to workers paid by third parties raises a set of complex questions. Should the FLSA cover *all* companionship workers paid by third parties? Or should the FLSA cover *some* such companionship workers, perhaps those working for some (say, large but not small) private agencies, or those hired by a son or daughter to help an aged or infirm mother living in a distant city? Should it cover *none?* How should one weigh the need for a simple, uniform application of the exemption against the fact that some (but not all) third-party employees were previously covered? Satisfactory answers to such questions may well turn upon the kind of thor-

ough knowledge of the subject matter and ability to consult at length with affected parties that an agency, such as the DOL, possesses. And it is consequently reasonable to infer (and we do infer) that Congress intended its broad grant of definitional authority to the Department to include the authority to answer these kinds of questions.

Because respondent refers to the Social Security statute and the legislative history, we add that unlike the text of the Social Security statute, the text of the FLSA does not expressly answer the third-party-employment question. Compare 26 U. S. C. § 3510(c)(1) with 29 U. S. C. § 213(a)(15). Nor can one find any clear answer in the statute's legislative history. Compare 119 Cong. Rec. 24801 (statement of Sen. Burdick, quoted above) with, *e. g.*, *id.*, at 24798 (statement of Sen. Johnston) (expressing concern that requiring payment of minimum wage to companionship workers might make such services so expensive that some people would be forced to leave the work force in order to take care of aged or infirm parents).

B

Respondent says that the third-party regulation conflicts with the Department's "General Regulation" that defines the statutory term "domestic service employment." Title 29 CFR § 552.3 says that the term covers services "of a household nature performed by . . . employee[s]" ranging from "maids" to "cooks" to "housekeepers" to "caretakers" and others, "in or about a private home . . . *of the person by whom he or she is employed.*" (Emphasis added.) See also § 552.101(a). A companionship worker employed by a third party to work at the home of an aged or infirm man or woman is not working at the "home . . . of the person by whom he or she is employed" (*i. e.*, she is not working at the home of the third-party employer). Hence, the two regulations are inconsistent, for the one limits the definition of "domestic service employee" for purposes of the 29 U. S. C. § 213(a)(15) exemption to workers employed by the house-

hold, but the other includes in the subclass of exempt companionship workers persons who are *not* employed by the household. Respondent adds that, given the conflict, the former "General Regulation" must govern (primarily because, in her view, only the former regulation is entitled to *Chevron* deference, an issue we address in Part II–C, *infra*).

Respondent is correct when she says that the literal language of the two regulations conflicts as to whether workers paid by third parties are included within the statutory exemption. The question remains, however, which regulation governs in light of this conflict. The Department, in its Advisory Memorandum, suggests that the third-party regulation governs, and we agree, for several reasons.

First, if we were to decide the contrary, *i. e.*, that the text of the General Regulation, 29 CFR § 552.3, controls on the issue of third-party employment, our interpretation would create serious problems. Although § 552.3 states that it is supplying a definition of "domestic service employment" only "[a]s [that term is] used" in the statutory exemption, 29 U. S. C. § 213(a)(15), the rule appears in other ways to have been meant to supply a definition of "domestic service employment" for the FLSA as a whole (a prospect the Department endorses in its Advisory Memorandum). Why else would the Department have included the extensive list of qualifying professions, virtually none of which have anything to do with the subjects of § 213(a)(15), babysitting and companionship services? But if we were to apply § 552.3's literal definition of "domestic service employment" (including the "home . . . of the [employer]" language) across the FLSA, that would place outside the scope of FLSA's wage and hour rules any butlers, chauffeurs, and so forth who are employed by *any* third party. That result seems clearly contrary to Congress' intent in enacting the 1974 Amendments, particularly if it would withdraw from FLSA coverage all domestic service employees previously covered by the "enterprise coverage" provisions of the Act.

If, on the other hand, § 552.3's definition of "domestic service employment" were limited to the statute's exemption provision, applying this definition literally (by removing all third-party employees from the exemption) would extend the Act's coverage not simply to third-party-employed companionship workers paid by large institutions, but also to those paid directly by a family member of an elderly or infirm person receiving such services whenever the family member lived in a different household than the invalid. Nothing in the statute suggests that Congress intended to make the exemption contingent on whether a family member chose to reside in the same household as the invalid, and it is a result that respondent herself seems to wish to avoid. See Brief for Respondent 34, n. 31.

Second, normally the specific governs the general. *E. g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 384–385 (1992); *Simpson* v. *United States*, 435 U. S. 6, 15 (1978). The *sole purpose* of the third-party regulation, § 552.109(a), is to explain how the companionship services exemption applies to persons employed by third-party entities, whereas the primary (if not sole) purpose of the conflicting general definitional regulation, § 552.3, is to describe the *kind of work* that must be performed by someone to qualify as a "domestic service" employee. Given that context, § 552.109(a) is the more specific regulation with respect to the third-party-employment question.

Third, we concede that the Department may have interpreted these regulations differently at different times in their history. See, *e. g.*, 58 Fed. Reg. 69311 (employees of a third-party employer qualify for the exemption only if they are also jointly employed "by the family or household using their services"); D. Sweeney, DOL Opinion Letter, Home Health Aides/Companionship Exemption, 6A LRR, Wages and Hours Manual 99:8205 (Jan. 6, 1999) (similar). But as long as interpretive changes create no unfair surprise—and the Department's recourse to notice-and-comment rule-

making in an attempt to codify its new interpretation, see 58 Fed. Reg. 69311, makes any such surprise unlikely here—the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation. Cf. *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 212 (1988).

Fourth, we must also concede, as respondent points out, that the Department set forth its most recent interpretation of these regulations in an "Advisory Memorandum" issued only to internal Department personnel and which the Department appears to have written in response to this litigation. We have "no reason," however, "to suspect that [this] interpretation" is merely a "'*post hoc* rationalizatio[n]'" of past agency action, or that it "does not reflect the agency's fair and considered judgment on the matter in question." *Auer* v. *Robbins,* 519 U. S. 452, 462 (1997) (quoting *Bowen, supra*). Where, as here, an agency's course of action indicates that the interpretation of its own regulation reflects its considered views—the Department has clearly struggled with the third-party-employment question since at least 1993—we have accepted that interpretation as the agency's own, even if the agency set those views forth in a legal brief. See 519 U. S., at 462.

For all these reasons, we conclude that the Department's interpretation of the two regulations falls well within the principle that an agency's interpretation of its own regulations is "controlling" unless "'"plainly erroneous or inconsistent with"'" the regulations being interpreted. *Id.*, at 461 (quoting *Robertson* v. *Methow Valley Citizens Council*, 490 U. S. 332, 359 (1989), in turn quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945)). See also *Udall* v. *Tallman*, 380 U. S. 1, 16–17 (1965).

C

Respondent also argues that, even if the third-party regulation is within the scope of the statute's delegation, is

perfectly reasonable, and otherwise complies with the law, courts still should not treat the regulation as legally binding. Her reason is a special one. She says that the regulation is an "interpretive" regulation, a kind of regulation that may be used, not to fill a statutory "gap," but simply to describe an agency's view of what a statute means. That kind of regulation may "persuade" a reviewing court, *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944), but will not necessarily "bind" a reviewing court. Cf. *Mead*, 533 U. S., at 232 ("interpretive rules . . . enjoy no *Chevron* status *as a class*" (emphasis added)).

Like respondent, the Court of Appeals concluded that the third-party regulation did not fill a statutory gap and hence was not legally binding. 376 F. 3d, at 131–133; 462 F. 3d, at 50–51. It based its conclusion upon three considerations: First, when the Department promulgated a series of regulations to implement the §213(a)(15) exemptions, 29 CFR pt. 552, it placed the third-party regulation in Subpart B, entitled "Interpretations," not in Subpart A, entitled "General Regulations." Second, the Department said that regulations 552.3, .4, .5, and .6, all in Subpart A, contained the "definitions" that the statute "require[s]." Third, the Department initially said in 1974 that Subpart A would "defin[e] and delimi[t] . . . the ter[m] 'domestic service employee,'" while Subpart B would "se[t] forth . . . a statement of general policy and interpretation concerning the application of the [FLSA] to domestic service employees." 376 F. 3d, at 131–132; 462 F. 3d, at 50–51 (quoting 39 Fed. Reg. 35382).

These reasons do not convince us that the Department intended its third-party regulation to carry no special legal weight. For one thing, other considerations strongly suggest the contrary, namely that the Department intended the third-party regulation as a binding application of its rulemaking authority. The regulation directly governs the conduct of members of the public, "'affecting individual rights and obligations.'" *Chrysler Corp.* v. *Brown*, 441 U. S. 281,

302 (1979) (quoting *Morton*, 415 U. S., at 232). When promulgating the rule, the agency used full public notice-and-comment procedures, which under the Administrative Procedure Act an agency need not use when producing an "interpretive" rule. 5 U. S. C. § 553(b)(A) (exempting "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" from notice-and-comment procedures). Each time the Department has considered amending the rule, it has similarly used full notice-and-comment rulemaking procedures. 58 Fed. Reg. 69310 (1993); 60 Fed. Reg. 46797 (1995); 66 Fed. Reg. 5485 (2001). And for the past 30 years, according to the Department's Advisory Memorandum (and not disputed by respondent), the Department has treated the third-party regulation like the others, *i. e.*, as a legally binding exercise of its rulemaking authority. App. E to Pet. for Cert. 63a–64a.

For another thing, the Subpart B heading "Interpretations" (and the other indicia upon which the Court of Appeals relied) could well refer to the fact that Subpart B contains matters of detail, interpreting and applying the more general definitions of Subpart A. Indeed, Subpart B's other regulations—involving such matters as employer "credit[s]" against minimum wage payments for provision of "food," "lodging," and "drycleaning," 29 CFR § 552.100(b), and so forth—strongly indicate that such details, not a direct interpretation of the statute's language, are at issue.

Finally, the ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of "gap-filling" authority. Where an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordi-

narily assumes that Congress intended it to defer to the agency's determination. See *Mead*, *supra*, at 229–233.

The three contrary considerations to which the Court of Appeals points are insufficient, in our view, to overcome the other factors we have mentioned, all of which suggest that courts should defer to the Department's rule. And that, in our view, is what the law requires.

D

Respondent's final claim is that the 1974 agency notice-and-comment procedure, leading to the promulgation of the third-party regulation, was legally "defective" because notice was inadequate and the Department's explanation also inadequate. Brief for Respondent 45–47. We do not agree.

The Administrative Procedure Act requires an agency conducting notice-and-comment rulemaking to publish in its notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U. S. C. § 553(b)(3). The Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be "a 'logical outgrowth' of the rule proposed." *National Black Media Coalition* v. *FCC*, 791 F. 2d 1016, 1022 (CA2 1986). See also, *e. g.*, *United Steelworkers of America, AFL–CIO–CLC* v. *Marshall*, 647 F. 2d 1189, 1221 (CADC 1980), cert. denied *sub nom. Lead Industries Assn., Inc.* v. *Donovan*, 453 U. S. 913 (1981); *South Terminal Corp.* v. *EPA*, 504 F. 2d 646, 659 (CA1 1974). The object, in short, is one of fair notice.

Initially the Department proposed a rule of the kind that respondent seeks, namely a rule that would have placed outside the exemption (and hence left subject to FLSA wage and hour rules) individuals employed by third-party employers whom the Act had covered prior to 1974. 39 Fed. Reg. 35385 (companionship workers "not exempt" if employed by a third party that already was a "covered enterprise" under the FLSA). The clear implication of the proposed rule was

that companionship workers employed by third-party enterprises that *were not* covered by the FLSA prior to the 1974 Amendments (*e. g.*, most smaller private agencies) *would* be included within the § 213(a)(15) exemption.

Since the proposed rule was simply a proposal, its presence meant that the Department was *considering* the matter; after that consideration the Department might choose to adopt the proposal or to withdraw it. As it turned out, the Department did withdraw the proposal for special treatment of employees of "covered enterprises." The result was a determination that exempted *all* third-party-employed companionship workers from the Act. We do not understand why such a possibility was not reasonably foreseeable. See, *e. g.*, *Arizona Public Serv. Co.* v. *EPA*, 211 F. 3d 1280, 1299–1300 (CADC 2000) (notice sufficient where agency first proposed that Indian tribes be required to meet the "'same requirements'" as States with respect to judicial review of Clean Air Act permitting actions, but then adopted a final rule that exempted tribes from certain, though not all, requirements), cert. denied *sub nom. Michigan* v. *EPA*, 532 U. S. 970 (2001).

Neither can we find any significant legal problem with the Department's explanation for the change. The agency said that it had "concluded that these exemptions can be available to such third party employers" because that interpretation is "more consistent" with statutory language that refers to "'any employee' engaged 'in' the enumerated services" and with "prior practices concerning other similarly worded exemptions." 40 Fed. Reg. 7405. There is no indication that anyone objected to this explanation at the time. And more than 30 years later it remains a reasonable, albeit brief, explanation. See *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications, Inc.*, 550 U. S. 45, 63–64 (2007).

Respondent's only contrary argument apparently consists of her claim that the explanation does not take proper ac-

count of the statute's reference to "domestic service employees," which term (given the Social Security statute and legislative history) must refer only to those who are paid by the household for whom they provide services. If so, she simply repeats in different form arguments that we have already considered and rejected. See Part II–A, *supra*.

III

For these reasons the Court of Appeals' judgment is reversed, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

DAVENPORT ET AL. *v.* WASHINGTON EDUCATION ASSOCIATION

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 05–1589. Argued January 10, 2007—Decided June 14, 2007*

The National Labor Relations Act permits States to regulate their labor relationships with public employees. Many States authorize public-sector unions to negotiate agency-shop agreements that entitle a union to levy fees on employees who are not union members but whom the union represents in collective bargaining. However, the First Amendment prohibits public-sector unions from using objecting nonmembers' fees for ideological purposes not germane to the union's collective-bargaining duties, *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 235–236, and such unions must therefore observe various procedural requirements to ensure that an objecting nonmember can keep his fees from being used for such purposes, *Teachers* v. *Hudson*, 475 U. S. 292, 304–310. Washington State allows public-sector unions to charge nonmembers an agency fee equivalent to membership dues and to have the employer collect that fee through payroll deductions. An initiative approved by state voters (hereinafter § 760) requires a union to obtain the nonmembers' affirmative authorization before using their fees for election-related purposes. Respondent, a public-sector union, sent a "*Hudson* packet" to all nonmembers twice a year detailing their right to object to the use of fees for nonchargeable expenditures; respondent held any disputed fees in escrow until the *Hudson* process was complete. In separate lawsuits, petitioners alleged that respondent had failed to obtain the affirmative authorization required by § 760 before spending nonmembers' agency fees for electoral purposes. In No. 05–1657, the trial court found a § 760 violation and awarded the State monetary and injunctive relief. In No. 05–1589, another judge held that § 760 provided a private right of action, certified a class of nonmembers, and stayed the proceedings pending interlocutory appeal. The State Supreme Court held that although a nonmember's failure to object after receiving the *Hudson* packet did not satisfy § 760's affirmative-authorization requirement, that requirement violated the First Amendment.

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*Together with No. 05–1657, *Washington* v. *Washington Education Association*, also on certiorari to the same court.

Syllabus

Held: It does not violate the First Amendment for a State to require its public-sector unions to receive affirmative authorization from a nonmember before spending that nonmember's agency fees for election-related purposes. Pp. 184–192.

(a) It is undeniably unusual for a government agency to give a private entity the power to tax government employees. The notion that § 760's modest limitation upon that extraordinary benefit violates the First Amendment is counterintuitive, because it is undisputed that Washington could have restricted public-sector agency fees to the portion of union dues devoted to collective bargaining, or even eliminated them entirely. Washington's far less restrictive limitation on respondent's authorization to exact money from government employees is of no greater constitutional concern. P. 184.

(b) The State Supreme Court extended this Court's agency-fee cases well beyond their proper ambit in concluding that those cases, having balanced the constitutional rights of unions and nonmembers, required a nonmember to shoulder the burden of objecting before a union can be barred from spending his fees for purposes impermissible under *Abood*. The agency-fee cases did not balance constitutional rights in such a manner because unions have no constitutional entitlement to nonmember-employees' fees. The Court has never suggested that the First Amendment is implicated whenever governments limit a union's entitlement to agency fees above and beyond what *Abood* and *Hudson* require. The constitutional floor for unions' collection and spending of agency fees is not also a constitutional ceiling for state-imposed restrictions. *Hudson*'s admonition that "'dissent is not to be presumed,'" 475 U. S., at 306, n. 16, means only that it would be improper for a court to enjoin the expenditures of all nonmembers' agency fees when a narrower remedy could satisfy statutory or constitutional limitations. Pp. 184–186.

(c) Contrary to respondent's argument, § 760 is not unconstitutional under this Court's campaign-finance cases. For First Amendment purposes, it is immaterial that § 760 restricts a union's use of funds only after they are within the union's possession. The fees are in the union's possession only because Washington and its union-contracting government agencies have compelled their employees to pay those fees. The campaign-finance cases deal instead with governmental restrictions on how a regulated entity may spend money that has come into its possession without such coercion. Pp. 186–188.

(d) While content-based speech regulations are presumptively invalid, see, *e. g.*, *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382, strict scrutiny is unwarranted when the risk that the government may drive ideas or viewpoints from the marketplace is attenuated, such as when the government acts in a capacity other than as regulator. Thus, the government

Syllabus

can make content-based distinctions when subsidizing speech, see, *e. g.*, *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 548–550, and can exclude speakers based on reasonable, viewpoint-neutral subject-matter grounds when permitting speech on government property that is a nonpublic forum, see, *e. g.*, *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 799–800, 806. The principle underlying those cases is applicable here. Washington voters did not impermissibly distort the marketplace of ideas when they placed a reasonable, viewpoint-neutral limitation on the State's authorization. They were seeking to protect the integrity of the election process, and their restriction was thus limited to the state-created harm that they sought to remedy. The First Amendment did not compel them to limit public-sector unions' extraordinary entitlement to nonmembers' agency fees more broadly than necessary to vindicate that concern. Pp. 188–190.

(e) Section 760 is constitutional as applied to public-sector unions. There is no need in these cases to consider its application to private-sector unions. Pp. 190–192.

156 Wash. 2d 543, 130 P. 3d 352, vacated and remanded.

SCALIA, J., delivered the opinion of the Court, Parts I and II–A and the second paragraph of footnote 2 of which were unanimous, and the remainder of which was joined by STEVENS, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ. BREYER, J., filed an opinion concurring in part and concurring in the judgment, in which ROBERTS, C. J., and ALITO, J., joined, *post,* p. 192.

Robert M. McKenna, Attorney General of Washington, argued the cause for petitioners in both cases. With him on the briefs in No. 05–1657 were *Maureen A. Hart*, Solicitor General, *William Berggren Collins*, Deputy Solicitor General, *Linda A. Dalton*, Senior Assistant Attorney General, and *D. Thomas Wendel*, Assistant Attorney General. *Milton L. Chappell*, *Glenn M. Taubman*, and *Steven T. O'Ban* filed briefs for petitioners in No. 05–1589.

Solicitor General Clement argued the cause for the United States in both cases as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Keisler*, *Deputy Solicitor General Garre*, *Daryl Josefer*, *Douglas N. Letter*, *August E. Flentje*, *Lawrence H.*

Norton, Richard B. Bader, David Kolker, Steve N. Hajjar, and *Howard M. Radzely.*

John M. West argued the cause for respondent in both cases. With him on the briefs were *Jeremiah A. Collins, Laurence S. Gold, Judith A. Lonnquist,* and *Harriet Strasberg.**

JUSTICE SCALIA delivered the opinion of the Court.

The State of Washington prohibits labor unions from using the agency-shop fees of a nonmember for election-related purposes unless the nonmember affirmatively consents. We decide whether this restriction, as applied to public-sector labor unions, violates the First Amendment.

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*Briefs of *amici curiae* urging reversal in both cases were filed for American Educators by *Robert K. Kelner, Keith A. Noreika,* and *Michael E. Paulhus;* for the American Legislative Exchange Council by *Donald M. Falk;* for the Campaign Legal Center by *Trevor Potter, J. Gerald Hebert,* and *Paul S. Ryan;* for the Cato Institute et al. by *Erik S. Jaffe* and *Manuel S. Klausner;* for the Evergreen Freedom Foundation et al. by *Eric B. Martin* and *Harry J. F. Korrell;* for the Institute for Justice by *William R. Maurer* and *William H. Mellor;* for the National Federation of Independent Business Legal Foundation by *James Bopp, Jr.,* and *Richard E. Coleson;* and for the Pacific Legal Foundation by *Deborah J. La Fetra* and *Timothy Sandefur.*

Briefs of *amici curiae* urging reversal in No. 05–1657 were filed for the State of Colorado et al. by *John W. Suthers,* Attorney General of Colorado, *Daniel D. Domenico,* Solicitor General, and *Jason Dunn,* Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Lawrence G. Wasden* of Idaho, *Jim Petro* of Ohio, *Mark L. Shurtleff* of Utah, and *Robert F. McDonnell* of Virginia; for the Mountain States Legal Foundation by *William Perry Pendley;* and for the Religious Objector Members of the Northwest Professional Educators by *Kevin T. Snider.*

Jonathan P. Hiatt, Laurence E. Gold, James B. Coppess, and *Patrick J. Szymanski* filed a brief for the American Federation of Labor and Congress of Industrial Organizations et al. as *amici curiae* urging affirmance in both cases.

Patrick J. Wright filed a brief for the Mackinac Center for Public Policy as *amicus curiae* in both cases.

I

The National Labor Relations Act leaves States free to regulate their labor relationships with their public employees. See 49 Stat. 450, as amended, 29 U. S. C. § 152(2). The labor laws of many States authorize a union and a government employer to enter into what is commonly known as an agency-shop agreement. This arrangement entitles the union to levy a fee on employees who are not union members but who are nevertheless represented by the union in collective bargaining. See, *e. g.*, *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 511 (1991). The primary purpose of such arrangements is to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred. See, *e. g.*, *Machinists* v. *Street*, 367 U. S. 740, 760–764 (1961). However, agency-shop arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment. Thus, in *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 235–236 (1977), we held that public-sector unions are constitutionally prohibited from using the fees of objecting nonmembers for ideological purposes that are not germane to the union's collective-bargaining duties. And in *Teachers* v. *Hudson*, 475 U. S. 292, 302, 304–310 (1986), we set forth various procedural requirements that public-sector unions collecting agency fees must observe in order to ensure that an objecting nonmember can prevent the use of his fees for impermissible purposes. Neither *Hudson* nor any of our other cases, however, has held that the First Amendment mandates that a public-sector union obtain affirmative consent before spending a nonmember's agency fees for purposes not chargeable under *Abood*.

The State of Washington has authorized public-sector unions to negotiate agency-shop agreements. Where such agreements are in effect, Washington law allows the union to charge nonmembers an agency fee equivalent to the full

membership dues of the union and to have this fee collected by the employer through payroll deductions. See, *e. g.*, Wash. Rev. Code §§ 41.56.122(1), 41.59.060(2), 41.59.100 (2006). However, § 42.17.760 (hereinafter § 760), which is a provision of the Fair Campaign Practices Act (a state initiative approved by the voters of Washington in 1992), restricts the union's ability to spend the agency fees that it collects. Section 760, as it stood when the decision under review was rendered, provided:

> "A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual."[1]

Respondent, the exclusive bargaining agent for approximately 70,000 public educational employees, collected agency fees from nonmembers that it represented in collective bargaining. Consistent with its responsibilities under *Abood* and *Hudson* (or so we assume for purposes of these cases), respondent sent a "*Hudson* packet" to all nonmembers twice a year, notifying them of their right to object to paying fees for nonchargeable expenditures, and giving them three options: (1) pay full agency fees by not objecting within 30 days; (2) object to paying for nonchargeable expenses and

[1] Washington has since amended § 760 to codify a narrower interpretation of "use" of agency-shop fees than the interpretation adopted below by the state trial court that passed on that question. See Supp. Brief for Respondent 2–3. As respondent concedes, however, *id.*, at 3, these cases are not moot. Because petitioners sought money damages for respondent's alleged violation of the prior version of § 760, it still matters whether the Supreme Court of Washington was correct to hold that that version was inconsistent with the First Amendment. Our analysis of whether § 760's affirmative-authorization requirement violates the constitutional rights of respondent is not affected by the amendment, which merely causes that requirement to be applicable less frequently than the state trial court thought.

receive a rebate as calculated by respondent; or (3) object to paying for nonchargeable expenses and receive a rebate as determined by an arbitrator. Respondent held in escrow any agency fees that were reasonably in dispute until the *Hudson* process was complete.

In 2001, respondent found itself in Washington state courts defending, in two separate lawsuits, its expenditures of nonmembers' agency fees. The first lawsuit was brought by the State of Washington, petitioner in No. 05–1657, and the second was brought as a putative class action by several nonmembers of the union, petitioners in No. 05–1589. Both suits claimed that respondent's use of agency fees was in violation of § 760. Petitioners alleged that respondent had failed to obtain affirmative authorization from nonmembers before using their agency fees for the election-related purposes specified in § 760. In No. 05–1657, after a trial on the merits, the trial court found that respondent had violated § 760 and awarded the State both monetary and injunctive relief. In No. 05–1589, a different trial judge held that § 760 provided a private right of action, certified the class, and stayed further proceedings pending interlocutory appeal.

After intermediate appellate court proceedings, a divided Supreme Court of Washington held that, although a nonmember's failure to object after receiving respondent's "*Hudson* packet" did not satisfy § 760's affirmative-authorization requirement as a matter of state law, the statute's imposition of such a requirement violated the First Amendment of the Federal Constitution. See *State ex rel. Washington State Public Disclosure Comm'n* v. *Washington Ed. Assn.*, 156 Wash. 2d 543, 553–571, 130 P. 3d 352, 356–365 (2006) (en banc). The court reasoned that this Court's agency-fee jurisprudence established a balance between the First Amendment rights of unions and of nonmembers, and that § 760 triggered heightened First Amendment scrutiny because it deviated from that balance by imposing on respondent the burden of confirming that a nonmember does

not object to the expenditure of his agency fees for electoral purposes. The court also held that § 760 interfered with respondent's expressive associational rights under *Boy Scouts of America* v. *Dale*, 530 U. S. 640 (2000). We granted certiorari. 548 U. S. 942 (2006).

II

The public-sector agency-shop arrangement authorizes a union to levy fees on government employees who do not wish to join the union. Regardless of one's views as to the desirability of agency-shop agreements, see *Abood*, 431 U. S., at 225, n. 20, it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees. As applied to agency-shop agreements with public-sector unions like respondent, § 760 is simply a condition on the union's exercise of this extraordinary power, prohibiting expenditure of a nonmember's agency fees for election-related purposes unless the nonmember affirmatively consents. The notion that this modest limitation upon an extraordinary benefit violates the First Amendment is, to say the least, counterintuitive. Respondent concedes that Washington could have gone much further, restricting public-sector agency fees to the portion of union dues devoted to collective bargaining. See Brief for Respondent 46–47. Indeed, it is uncontested that it would be constitutional for Washington to eliminate agency fees entirely. See *id.*, at 46 (citing *Lincoln Fed. Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525 (1949)). For the reasons that follow, we conclude that the far less restrictive limitation the voters of Washington placed on respondent's authorization to exact money from government employees is of no greater constitutional concern.

A

The principal reason the Supreme Court of Washington concluded that § 760 was unconstitutional was that it believed that our agency-fee cases, having balanced the consti-

tutional rights of unions and of nonmembers, dictated that a nonmember must shoulder the burden of objecting before a union can be barred from spending his fees for purposes impermissible under *Abood*. See 156 Wash. 2d, at 557–563, 130 P. 3d, at 358–360. The court reached this conclusion primarily because our cases have repeatedly invoked the following proposition: "'[D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee.'" *Hudson*, 475 U. S., at 306, n. 16 (quoting *Street*, 367 U. S., at 774); see also *Abood*, *supra*, at 238. The court concluded that § 760 triggered heightened First Amendment scrutiny because it deviated from this perceived constitutional balance by requiring unions to obtain affirmative consent.

This interpretation of our agency-fee cases extends them well beyond their proper ambit. Those cases were not balancing constitutional rights in the manner respondent suggests, for the simple reason that unions have no constitutional entitlement to the fees of nonmember-employees. See *Lincoln Fed. Union*, *supra*, at 529–531. We have never suggested that the First Amendment is implicated whenever governments place limitations on a union's entitlement to agency fees above and beyond what *Abood* and *Hudson* require. To the contrary, we have described *Hudson* as "outlin[ing] a *minimum* set of procedures by which a [public-sector] union in an agency-shop relationship could meet its requirement under *Abood*." *Keller* v. *State Bar of Cal.*, 496 U. S. 1, 17 (1990) (emphasis added). The mere fact that Washington required more than the *Hudson* minimum does not trigger First Amendment scrutiny. The constitutional floor for unions' collection and spending of agency fees is not also a constitutional ceiling for state-imposed restrictions.

The Supreme Court of Washington read far too much into our admonition that "dissent is not to be presumed." We meant only that it would be improper for a court to enjoin the expenditure of the agency fees of all employees, including

those who had not objected, when the statutory or constitutional limitations established in those cases could be satisfied by a narrower remedy. See, *e. g.*, *Street*, *supra*, at 768–770, 772–775 (discussing possible judicial remedies for violation of a federal statute that forbade unions from spending *objecting* employees' fees for political purposes); *Abood*, *supra*, at 235–236, 237–242 (discussing possible judicial remedies for a state statute that unconstitutionally authorized a public-sector union to spend *objecting* nonmembers' agency fees for ideological purposes not germane to collective bargaining); *Hudson*, *supra*, at 302, 304–310 (setting forth procedures necessary to prevent agency-shop arrangements from violating *Abood*). But, as the dissenting justices below correctly recognized, our repeated affirmation that *courts* have an obligation to interfere with a union's statutory entitlement no more than is necessary to vindicate the rights of nonmembers does not imply that legislatures (or voters) themselves cannot limit the scope of that entitlement.

B

Respondent defends the judgment below on a ground quite different from the mistaken rationale adopted by the Supreme Court of Washington. Its argument begins with the premise that § 760 is a limitation on how the union may spend "its" money, citing for that proposition the Washington Supreme Court's description of § 760 as encumbering funds that are lawfully within a union's possession. Brief for Respondent 21; 156 Wash. 2d, at 568–569, 130 P. 3d, at 363–364. Relying on that premise, respondent invokes *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 (1990), and related campaign-finance cases. It argues that, under the rigorous First Amendment scrutiny required by those cases, § 760 is unconstitutional because it applies to ballot propositions and because it does not limit equivalent election-related expenditures by corporations.

The Supreme Court of Washington's description of § 760 notwithstanding, our campaign-finance cases are not on point. For purposes of the First Amendment, it is entirely immaterial that § 760 restricts a union's use of funds only after those funds are already within the union's lawful possession under Washington law. What matters is that public-sector agency fees are in the union's possession only because Washington and its union-contracting government agencies have compelled their employees to pay those fees. The cases upon which respondent relies deal with governmental restrictions on how a regulated entity may spend money that has come into its possession without the assistance of governmental coercion of its employees. See, *e. g.*, *Bellotti*, *supra*, at 767–768; *Austin*, *supra*, at 654–656. As applied to public-sector unions, § 760 is not fairly described as a restriction on how the union can spend "its" money; it is a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's* money.[2]

The question that must be asked, therefore, is whether § 760 is a constitutional condition on the authorization that

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[2] Respondent might have had a point if, as it suggests at times, the statute burdened its ability to spend the dues of its own members. But § 760 restricts solely the "use [of] agency shop fees paid by an individual who is not a member." The only reason respondent's use of its members' dues was burdened is that respondent chose to commingle those dues with nonmembers' agency fees. See App. to Pet. for Cert. in No. 05–1657, pp. 99a, 105a–107a. Respondent's improvident accounting practices do not render § 760 unconstitutional. We note as well that, given current technology, it will not likely be burdensome for any nonmember who wishes to do so to provide affirmative authorization for use of his fees for electoral expenditures.

For similar reasons, the Supreme Court of Washington's invocation of the union's expressive associational rights under *Boy Scouts of America* v. *Dale*, 530 U. S. 640 (2000), was quite misplaced, as respondent basically concedes by not relying upon the case. Section 760 does not compel respondent's acceptance of unwanted members or otherwise make union membership less attractive. See *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 68–69 (2006).

public-sector unions enjoy to charge government employees agency fees. Respondent essentially answers that the statute unconstitutionally draws distinctions based on the content of the union's speech, requiring affirmative consent only for election-related expenditures while permitting expenditures for the rest of the purposes not chargeable under *Abood* unless the nonmember objects. The contention that this amounts to unconstitutional content-based discrimination is off the mark.

It is true enough that content-based regulations of speech are presumptively invalid. See, *e. g.*, *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382 (1992) (citing cases). We have recognized, however, that "[t]he rationale of the general prohibition . . . is that content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *Id.*, at 387 (quoting *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991)). And we have identified numerous situations in which that risk is inconsequential, so that strict scrutiny is unwarranted. For example, speech that is obscene or defamatory can be constitutionally proscribed because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas. See, *e. g.*, *R. A. V.*, 505 U. S., at 382–384. Similarly, content discrimination among various instances of a class of proscribable speech does not pose a threat to the marketplace of ideas when the selected subclass is chosen for the very reason that the entire class can be proscribed. See *id.*, at 388 (confirming that governments may choose to ban only the most prurient obscenity). Of particular relevance here, our cases recognize that the risk that content-based distinctions will impermissibly interfere with the marketplace of ideas is sometimes attenuated when the government is acting in a capacity other than as regulator. Accordingly, it is well established that the government can make content-based distinctions when it subsi-

dizes speech. See, *e. g.*, *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 548–550 (1983). And it is also black-letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum. See, *e. g.*, *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 799–800, 806 (1985).

The principle underlying our treatment of those situations is equally applicable to the narrow circumstances of these cases. We do not believe that the voters of Washington impermissibly distorted the marketplace of ideas when they placed a reasonable, viewpoint-neutral limitation on the State's general authorization allowing public-sector unions to acquire and spend the money of government employees. As the Supreme Court of Washington recognized, the voters of Washington sought to protect the integrity of the election process, see 156 Wash. 2d, at 563, 130 P. 3d, at 361, which the voters evidently thought was being impaired by the infusion of money extracted from nonmembers of unions without their consent. The restriction on the state-bestowed entitlement was thus limited to the state-created harm that the voters sought to remedy. The voters did not have to enact an across-the-board limitation on the use of nonmembers' agency fees by public-sector unions in order to vindicate their more narrow concern with the integrity of the election process. We said in *R. A. V.* that, when totally proscribable speech is at issue, content-based regulation is permissible so long as "there is no realistic possibility that official suppression of ideas is afoot." 505 U. S., at 390. We think the same is true when, as here, an extraordinary and totally repealable authorization to coerce payment from government employees is at issue. Even if it be thought necessary that the content limitation be reasonable and viewpoint neutral, cf. *Cornelius, supra,* at 806, the statute satisfies that require-

ment. Quite obviously, no suppression of ideas is afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission. Cf. *Regan*, *supra*, at 549–550 (First Amendment does not require the government to enhance a person's ability to speak). In sum, given the unique context of public-sector agency-shop arrangements, the content-based nature of § 760 does not violate the First Amendment.

We emphasize an important limitation upon our holding: We uphold § 760 only as applied to public-sector unions such as respondent. Section 760 applies on its face to both public- and private-sector unions in Washington.[3] Since private-sector unions collect agency fees through contractually required action taken by private employers rather than by government agencies, Washington's regulation of those private arrangements presents a somewhat different constitutional question.[4] We need not answer that question today, however, because at no stage of this litigation has respondent made an overbreadth challenge. See generally *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 633–634

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[3] Under the National Labor Relations Act, it is generally not an unfair labor practice for private-sector employers to enter into agency-shop arrangements, see 29 U. S. C. § 158(a)(3), but States retain the power under the Act to ban the execution or application of such agreements, see § 164(b).

[4] We do not suggest that the answer must be different. We have previously construed the authorization of private-sector agency-shop arrangements in the National Labor Relations Act in a manner that is arguably content based. See *Communications Workers* v. *Beck*, 487 U. S. 735, 738, 762–763 (1988) (§ 158(a)(3) authorizes expenditure of private-sector agency fees over a nonmember's objection only in furtherance of the union's obligations as exclusive bargaining representative); *Ellis* v. *Railway Clerks*, 466 U. S. 435, 450–451 (1984) (expenditures on publications that report about a union's activities as exclusive bargaining representative can be charged to nonmembers over their objection).

(1980) (applying overbreadth doctrine).[5] Instead, respondent has consistently argued simply that § 760 is unconstitutional as applied to itself. The only purpose for which it has noted the statute's applicability to private-sector unions is to establish that the statute was meant to be a general limitation on electoral speech, and not just a condition on state agencies' authorization of compulsory agency fees. See Brief for Respondent 24, 48. That limited contention, however, is both unconvincing and immaterial. The purpose of the voters of Washington was undoubtedly the general one of protecting the integrity of elections by limiting electoral spending in certain ways. But § 760, though applicable to all unions, served that purpose through very different means depending on the type of union involved: It *conditioned* public-sector unions' authorization to coerce fees from government employees at the same time that it *regulated* private-sector unions' collective-bargaining agreements. The constitutionality of the means chosen with respect to private-sector unions has no bearing on whether § 760 is constitutional as applied to public-sector unions.

* * *

We hold that it does not violate the First Amendment for a State to require that its public-sector unions receive affirmative authorization from a nonmember before spending that nonmember's agency fees for election-related purposes.

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[5] Nor is it clear that the "strong medicine" of the overbreadth doctrine is even available to challenge a statute such as § 760. See *Virginia* v. *Hicks*, 539 U. S. 113, 118–120 (2003) (recognizing that the doctrine's benefits—eliminating the chilling effect that overbroad laws have on nonparties—must be weighed against its costs—blocking perfectly constitutional applications of a law). It may be argued that the only other targets of the statute's narrow prohibition, private-sector unions, are sufficiently capable of defending their own interests in court that they will not be significantly "chilled."

We therefore vacate the judgment of the Supreme Court of Washington and remand the cases for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom THE CHIEF JUSTICE and JUSTICE ALITO join, concurring in part and concurring in the judgment.

I agree with the Court that the Supreme Court of Washington's decision rested entirely on flawed interpretations of this Court's agency-fee cases and our decision in *Boy Scouts of America* v. *Dale*, 530 U. S. 640 (2000). I therefore concur in the Court's judgment, and I join Parts I and II–A and the second paragraph of footnote 2 of the Court's opinion. However, I do not join Part II–B, which addresses numerous arguments that respondent Washington Education Association raised for the first time in its briefs before this Court. See, *e. g.*, *State ex rel. Washington State Public Disclosure Comm'n* v. *Washington Ed. Assn.*, 156 Wash. 2d 543, 565, n. 6, 130 P. 3d 352, 362, n. 6, (2006) (en banc) (noting that one of these arguments was neither raised nor addressed below). I would not address those arguments until the lower courts have been given the opportunity to address them. See, *e. g.*, *National Collegiate Athletic Assn.* v. *Smith*, 525 U. S. 459, 469–470 (1999).

Syllabus

PERMANENT MISSION OF INDIA TO THE UNITED NATIONS ET AL. *v.* CITY OF NEW YORK

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

No. 06–134. Argued April 24, 2007—Decided June 14, 2007

Under New York law, real property owned by a foreign government is exempt from taxation when used exclusively for diplomatic offices or quarters for ambassadors or ministers plenipotentiary to the United Nations. For years, respondent (City) has levied property taxes against petitioner foreign governments for that portion of their diplomatic office buildings used to house lower level employees and their families. Petitioners have refused to pay the taxes. By operation of state law, the unpaid taxes converted into tax liens held by the City against the properties. The City filed a state-court suit seeking declaratory judgments to establish the liens' validity, but petitioners removed the cases to federal court, where they argued that they were immune under the Foreign Sovereign Immunities Act of 1976 (FSIA), which is "the sole basis for obtaining jurisdiction over a foreign state in federal court," *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U. S. 428, 439. The District Court disagreed, relying on an FSIA exception withdrawing a foreign state's immunity from jurisdiction where "rights in immovable property situated in the United States are in issue." 28 U. S. C. § 1605(a)(4). The Second Circuit affirmed, holding that the "immovable property" exception applied, and thus the District Court had jurisdiction over the City's suits.

Held: The FSIA does not immunize a foreign government from a lawsuit to declare the validity of tax liens on property held by the sovereign for the purpose of housing its employees. Pp. 197–202.

(a) Under the FSIA, a foreign state is presumptively immune from suit unless a specific exception applies. In determining the immovable property exception's scope, the Court begins, as always, with the statute's text. Contrary to petitioners' position, § 1605(a)(4) does not expressly limit itself to cases in which the specific right at issue is title, ownership, or possession, or specifically exclude cases in which a lien's validity is at issue. Rather, it focuses more broadly on "rights in" property. At the time of the FSIA's adoption, "lien" was defined as a "charge or security or incumbrance upon property," Black's Law Dic-

tionary 1072, and "incumbrance" was defined as "[a]ny right to, or interest in, land which may subsist in another to the diminution of its value," *id.*, at 908. New York law defines "tax lien" in accordance with these general definitions. A lien's practical effects bear out the definitions of liens as interests in property. Because a lien on real property runs with the land and is enforceable against subsequent purchasers, a tax lien inhibits a quintessential property ownership right—the right to convey. It is thus plain that a suit to establish a tax lien's validity implicates "rights in immovable property." Pp. 197–199.

(b) This Court's reading is supported by two of the FSIA's related purposes. First, Congress intended the FSIA to adopt the restrictive theory of sovereign immunity, which recognizes immunity "with regard to sovereign or public acts *(jure imperii)* of a state, but not . . . private acts *(jure gestionis).*" *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U. S. 682, 711. Property ownership is not an inherently sovereign function. The FSIA was also meant to codify the real property exception recognized by international practice at the time of its enactment. That practice supports the City's view that petitioners are not immune, as does the contemporaneous restatement of foreign relations law. The Vienna Convention on Diplomatic Relations, on which both parties rely, does not unambiguously support either party, and, in any event, does nothing to deter this Court from its interpretation. Pp. 199–202.

446 F. 3d 365, affirmed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, GINSBURG, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 202.

John J. P. Howley argued the cause for petitioners. With him on the briefs were *Robert A. Kandel*, *Steven S. Rosenthal*, and *David O. Bickart.*

Sri Srinivasan argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Kneedler*, *Douglas Hallward-Driemeier*, *Douglas N. Letter*, and *Sharon Swingle.*

Michael A. Cardozo argued the cause for respondent. With him on the brief were *Norman Corenthal*, *John R. Low-Beer*, and *Brad M. Synder*.*

JUSTICE THOMAS delivered the opinion of the Court.

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U. S. C. § 1602 *et seq.*, governs federal courts' jurisdiction in lawsuits against foreign sovereigns. Today, we must decide whether the FSIA provides immunity to a foreign sovereign from a lawsuit to declare the validity of tax liens on property held by the sovereign for the purpose of housing its employees. We hold that the FSIA does not immunize a foreign sovereign from such a suit.

I

The Permanent Mission of India to the United Nations is located in a 26-floor building in New York City that is owned by the Government of India. Several floors are used for diplomatic offices, but approximately 20 floors contain residential units for diplomatic employees of the mission and their families. The employees—all of whom are below the rank of Head of Mission or Ambassador—are Indian citizens who receive housing from the mission rent free.

Similarly, the Ministry for Foreign Affairs of the People's Republic of Mongolia is housed in a six-story building in New York City that is owned by the Mongolian Government. Like the Permanent Mission of India, certain floors of the Ministry Building include residences for lower level employees of the Ministry and their families.

Under New York law, real property owned by a foreign government is exempt from taxation if it is "used exclusively" for diplomatic offices or for the quarters of a diplomat

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*A brief of *amici curiae* urging affirmance was filed for the International Municipal Lawyers Association et al. by *Charles A. Rothfeld*, *Andrew J. Pincus*, and *Dan Kahan*.

"with the rank of ambassador or minister plenipotentiary" to the United Nations. N. Y. Real Prop. Tax Law Ann. § 418 (West 2000). But "[i]f a portion only of any lot or building . . . is used exclusively for the purposes herein described, then such portion only shall be exempt and the remainder shall be subject to taxation . . . ." *Ibid.*

For several years, the city of New York (City) has levied property taxes against petitioners for the portions of their buildings used to house lower level employees. Petitioners, however, refused to pay the taxes. By operation of New York law, the unpaid taxes eventually converted into tax liens held by the City against the two properties. As of February 1, 2003, the Indian Mission owed about $16.4 million in unpaid property taxes and interest, and the Mongolian Ministry owed about $2.1 million.

On April 2, 2003, the City filed complaints in state court seeking declaratory judgments to establish the validity of the tax liens.[1] Petitioners removed their cases to federal court, pursuant to 28 U. S. C. § 1441(d), which provides for removal by a foreign state or its instrumentality. Once there, petitioners argued that they were immune from the suits under the FSIA's general rule of immunity for foreign governments. § 1604. The District Court disagreed, relying on the FSIA's "immovable property" exception, which

[1] The City concedes that even if a court of competent jurisdiction declares the liens valid, petitioners are immune from foreclosure proceedings. See Brief for Respondent 40 (noting that there is no FSIA immunity exception for enforcement actions). The City claims, however, that the declarations of validity are necessary for three reasons. First, once a court has declared property tax liens valid, foreign sovereigns traditionally concede and pay. Second, if the foreign sovereign fails to pay in the face of a valid court judgment, that country's foreign aid may be reduced by the United States by 110% of the outstanding debt. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006, § 543(a), 119 Stat. 2214; Consolidated Appropriations Act of 2005, § 543(a), 118 Stat. 3011. Third, the liens would be enforceable against subsequent purchasers. 5 Restatement of Property § 540 (1944).

provides that a foreign state shall not be immune from jurisdiction in any case in which "rights in immovable property situated in the United States are in issue." § 1605(a)(4).

Reviewing the District Court's decision under the collateral order doctrine, a unanimous panel of the Court of Appeals for the Second Circuit affirmed. 446 F. 3d 365 (2006). The Court of Appeals held that the text and purpose of the FSIA's immovable property exception confirmed that petitioners' personal property tax obligations involved "rights in immovable property." It therefore held that the District Court had jurisdiction to consider the City's suits. We granted certiorari, 549 U. S. 1177 (2007), and now affirm.

II

"[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U. S. 428, 439 (1989). Under the FSIA, a foreign state is presumptively immune from suit unless a specific exception applies. § 1604; *Saudi Arabia* v. *Nelson*, 507 U. S. 349, 355 (1993). At issue here is the scope of the exception where "rights in immovable property situated in the United States are in issue." § 1605(a)(4). Petitioners contend that the language "rights in immovable property" limits the reach of the exception to actions contesting ownership or possession. The City argues that the exception encompasses additional rights in immovable property, including tax liens. Each party claims international practice at the time of the FSIA's adoption supports its view. We agree with the City.

A

We begin, as always, with the text of the statute. *Limtiaco* v. *Camacho*, 549 U. S. 483, 488 (2007). The FSIA provides: "A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which . . . rights in immovable property situated in the

United States are in issue." 28 U. S. C. § 1605(a)(4). Contrary to petitioners' position, § 1605(a)(4) does not expressly limit itself to cases in which the specific right at issue is title, ownership, or possession. Neither does it specifically exclude cases in which the validity of a lien is at issue. Rather, the exception focuses more broadly on "rights in" property. Accordingly, we must determine whether an action seeking a declaration of the validity of a tax lien places "rights in immovable property . . . in issue."

At the time of the FSIA's adoption in 1976, a "lien" was defined as "[a] charge or security or incumbrance upon property." Black's Law Dictionary 1072 (4th ed. 1951). "Incumbrance," in turn, was defined as "[a]ny right to, or interest in, land which may subsist in another to the diminution of its value . . . ." *Id.*, at 908; see also *id.*, at 941 (8th ed. 2004) (defining "lien" as a "legal right or interest that a creditor has in another's property"). New York law defines "tax lien" in accordance with these general definitions. See N. Y. Real Prop. Tax Law Ann. § 102(21) (West Supp. 2007) (" 'Tax lien' means an unpaid tax . . . which is an encumbrance of real property . . . "). This Court, interpreting the Bankruptcy Code, has also recognized that a lienholder has a property interest, albeit a "nonpossessory" interest. *United States* v. *Security Industrial Bank*, 459 U. S. 70, 76 (1982).

The practical effects of a lien bear out these definitions of liens as interests in property. A lien on real property runs with the land and is enforceable against subsequent purchasers. See 5 Restatement of Property § 540 (1944). As such, "a lien has an immediate adverse effect upon the amount which [could be] receive[d] on a sale, . . . constitut[ing] a direct interference with the property . . . ." *Republic of Argentina* v. *New York*, 25 N. Y. 2d 252, 262, 250 N. E. 2d 698, 702 (1969). A tax lien thus inhibits one of the quintessential rights of property ownership—the right to convey. It is

therefore plain that a suit to establish the validity of a lien implicates "rights in immovable property."

B

Our reading of the text is supported by two well-recognized and related purposes of the FSIA: adoption of the restrictive view of sovereign immunity and codification of international law at the time of the FSIA's enactment. Until the middle of the last century, the United States followed "the classical or virtually absolute theory of sovereign immunity," under which "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." Letter from Jack B. Tate, Acting Legal Adviser, U. S. Dept. of State, to Acting U. S. Attorney General Phillip B. Perlman (May 19, 1952) (Tate Letter), reprinted in 26 Dept. of State Bull. 984 (1952), and in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U. S. 682, 711, 712 (1976) (Appendix 2 to opinion of the Court). The Tate Letter announced the United States' decision to join the majority of other countries by adopting the "restrictive theory" of sovereign immunity, under which "the immunity of the sovereign is recognized with regard to sovereign or public acts *(jure imperii)* of a state, but not with respect to private acts *(jure gestionis)*." *Id.*, at 711. In enacting the FSIA, Congress intended to codify the restrictive theory's limitation of immunity to sovereign acts. *Republic of Argentina* v. *Weltover, Inc.*, 504 U. S. 607, 612 (1992); *Asociacion de Reclamantes* v. *United Mexican States*, 735 F. 2d 1517, 1520 (CADC 1984) (Scalia, J.).

As a threshold matter, property ownership is not an inherently sovereign function. See *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 145 (1812) ("A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the

prince, and assuming the character of a private individual"). In addition, the FSIA was also meant "to codify . . . the pre-existing real property exception to sovereign immunity recognized by international practice." *Reclamantes, supra*, at 1521 (Scalia, J.). Therefore, it is useful to note that international practice at the time of the FSIA's enactment also supports the City's view that these sovereigns are not immune. The most recent restatement of foreign relations law at the time of the FSIA's enactment states that a foreign sovereign's immunity does not extend to "an action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction." Restatement (Second) of Foreign Relations Law of the United States § 68(b), p. 205 (1965). As stated above, because an action seeking the declaration of the validity of a tax lien on property is a suit to establish an interest in such property, such an action would be allowed under this rule.

Petitioners respond to this conclusion by citing the second sentence of Comment *d* to § 68, which states that the rule "does not preclude immunity with respect to a claim arising out of a foreign state's ownership or possession of immovable property but not contesting such ownership or the right to possession." *Id.*, at 207. According to petitioners, that sentence limits the exception to cases contesting ownership or possession. When read in context, however, the comment supports the City. Petitioners ignore the first sentence of the comment, which reemphasizes that immunity does not extend to cases involving the possession of or "interest in" the property. *Ibid.* And the illustrations following the comment make clear that it refers only to claims incidental to property ownership, such as actions involving an "injury suffered in a fall" on the property, for which immunity would apply. *Id.*, at 208. By contrast, for an eminent-domain proceeding, the foreign sovereign could not claim immunity.

Ibid. Like the eminent-domain proceeding, the City's lawsuits here directly implicate rights in property.

In addition, both parties rely on various international agreements, primarily the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U. S. T. 3227, T. I. A. S. No. 7502, to identify pre-FSIA international practice. Petitioners point to the Vienna Convention's analogous withholding of immunity for "a real action relating to private immovable property situated in the territory of the receiving State, unless [the diplomatic agent] holds it on behalf of the sending State for the purposes of the mission." *Id.*, at 3240, Art. 31(1)(a). Petitioners contend that this language indicates they are entitled to immunity for two reasons. First, petitioners argue that "'real action[s]'" do not include actions for performance of obligations "'deriving from ownership or possession of immovable property.'" Brief for Petitioners 28 (quoting E. Denza, Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations 238 (2d ed. 1998); emphasis deleted). Second, petitioners assert that the property here is held "'on behalf of the sending State for purposes of the Mission.'" Brief for Petitioners 28.

But as the City shows, it is far from apparent that the term "real action"—a term derived from the civil law—is as limited as petitioners suggest. See *Chateau Lafayette Apartments, Inc.* v. *Meadow Brook Nat. Bank*, 416 F. 2d 301, 304, n. 7 (CA5 1969). Moreover, the exception for property held "on behalf of the sending State" concerns only the case—not at issue here—where local law requires an agent to hold in his own name property used for the purposes of a mission. 1957 Y. B. Int'l L. Comm'n 94–95 (402d Meeting, May 22, 1957); see also *Deputy Registrar Case*, 94 I. L. R. 308, 313 (D. Ct. The Hague 1980). Other tribunals construing Article 31 have also held that it does not extend immunity to staff housing. See *id.*, at 312; cf. *Intpro Properties (U. K.) Ltd.* v. *Sauvel*, [1983] 1 Q. B. 1019, 1032–1033.

In sum, the Vienna Convention does not unambiguously support either party on the jurisdictional question.[2] In any event, nothing in the Vienna Convention deters us from our interpretation of the FSIA. Under the language of the FSIA's exception for immovable property, petitioners are not immune from the City's suits.

III

Because the statutory text and the acknowledged purposes of the FSIA make it clear that a suit to establish the validity of a tax lien places "rights in immovable property . . . in issue," we affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

Diplomatic channels provide the normal method of resolving disputes between local governmental entities and foreign sovereigns. See *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 146 (1812). Following well-established international practice, American courts throughout our history have consistently endorsed the general rule that foreign sovereigns enjoy immunity from suit in our courts. See *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983); *Nevada* v. *Hall*, 440 U. S. 410, 417 (1979). The fact that the immunity is the product of comity concerns rather than a want of juridical power, see *Verlinden B. V.*, 461 U. S.,

[2] The City offers several other arguments against immunity based on the Vienna Convention, but those arguments ultimately go to the merits of the case, *i. e.*, whether petitioners are actually responsible for paying the taxes. Because the only question before us is one of jurisdiction, and because the text and historical context of the FSIA demonstrate that petitioners are not immune from the City's suits, we leave these merits-related arguments to the lower courts.

at 486, does not detract from the important role that it performs in ordering our affairs.

The Foreign Sovereign Immunities Act of 1976 (FSIA) both codified and modified that basic rule. The statute confirms that sovereigns are generally immune from suit in our courts, 28 U. S. C. § 1604, but identifies seven specific exceptions through which courts may accept jurisdiction, § 1605(a). None of those exceptions pertains, or indeed makes any reference, to actions brought to establish a foreign sovereign's tax liabilities. Because this is such an action, I think it is barred by the general rule codified in the FSIA.

It is true that the FSIA contains an exception for suits to resolve disputes over "rights in immovable property," § 1605(a)(4), and New York City law provides that unpaid real estate taxes create a lien that constitutes an interest in such property, N. Y. C. Admin. Code § 11–301 (Cum. Supp. 2006). It follows that a literal application of the FSIA's text provides a basis for applying the exception to this case. See *ante*, at 197–199. Given the breadth and vintage of the background general rule, however, it seems to me highly unlikely that the drafters of the FSIA intended to abrogate sovereign immunity in suits over property interests whose primary function is to provide a remedy against delinquent taxpayers.

Under the Court's logic, since "a suit to establish the validity of a lien implicates 'rights in immovable property,'" *ante*, at 199, whenever state or municipal law recognizes a lien against a foreign sovereign's real property, the foreign government may be haled into federal court to litigate the validity of that lien. Such a broad exception to sovereign immunity threatens, as they say, to swallow the rule. Under the municipal law of New York City, for example, liens are available against real property, among other things, to compel landowners to pay for pest control, emergency repairs, and sidewalk upkeep. See N. Y. C. Admin. Code §§ 17–145, 17–147, 17–151(b) (2000); see also M. Mitzner, Liens

and Encumbrances, in Real Estate Titles 299, 311–314 (J. Pedowitz ed. 1984). A whole host of routine civil controversies, from sidewalk slip-and-falls to landlord-tenant disputes, could be converted into property liens under local law, and then used—as the tax lien was in this case—to pierce a foreign sovereign's traditional and statutory immunity. In order to reclaim immunity, foreign governments might argue in those cases—just as the Governments of India and the People's Republic of Mongolia tried to argue here—that slip-and-fall claims, even once they are transformed into property liens, do not implicate "rights in immovable property." But the burden of answering such complaints and making such arguments is itself an imposition that foreign sovereigns should not have to bear.

The force of the arguments of the Solicitor General as *amicus curiae* supporting petitioners buttresses my conviction that a narrow reading of the statutory exception is more faithful to congressional intent than a reading that enables a dispute over taxes to be classified as a dispute over "rights in immovable property." It is true that insofar as the FSIA transferred the responsibility for making immunity decisions from the State Department to the Judiciary, *Verlinden B. V.*, 461 U. S., at 487–488, the views of the Executive are not entitled to any special deference on this issue. But we have recognized that well-reasoned opinions of the Executive Branch about matters within its expertise may have the "power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).

And I am persuaded. At bottom, this case is not about the validity of the city's title to immovable property, or even the validity of its automatic prejudgment lien. Rather, it is a dispute over a foreign sovereign's tax liability. If Congress had intended the statute to waive sovereign immunity in tax litigation, I think it would have said so.

Accordingly, I respectfully dissent.

Syllabus

BOWLES *v.* RUSSELL, WARDEN

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

No. 06–5306. Argued March 26, 2007—Decided June 14, 2007

Having failed to file a timely notice of appeal from the Federal District Court's denial of habeas relief, petitioner Bowles moved to reopen the filing period pursuant to Federal Rule of Appellate Procedure 4(a)(6), which allows a district court to grant a 14-day extension under certain conditions, see 28 U. S. C. § 2107(c). The District Court granted Bowles' motion but inexplicably gave him 17 days to file his notice of appeal. He filed within the 17 days allowed by the District Court, but after the 14-day period allowed by Rule 4(a)(6) and § 2107(c). The Sixth Circuit held that the notice was untimely and that it therefore lacked jurisdiction to hear the case under this Court's precedent.

Held: Bowles' untimely notice of appeal—though filed in reliance upon the District Court's order—deprived the Sixth Circuit of jurisdiction. Pp. 208–215.

(a) The taking of an appeal in a civil case within the time prescribed by statute is "mandatory and jurisdictional." *Griggs* v. *Provident Consumer Discount Co.*, 459 U. S. 56, 61 *(per curiam)*. There is a significant distinction between time limitations set forth in a statute such as § 2107, which limit a court's jurisdiction, see, *e. g.*, *Kontrick* v. *Ryan*, 540 U. S. 443, 453, and those based on court rules, which do not, see, *e. g.*, *id.*, at 454. *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 505, and *Scarborough* v. *Principi*, 541 U. S. 401, 413, distinguished. Because Congress decides, within constitutional bounds, whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them. See *United States* v. *Curry*, 6 How. 106, 113. And when an "appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." *Ibid.* The resolution of this case follows naturally from this reasoning. Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), Bowles' failure to file in accordance with the statute deprived the Court of Appeals of jurisdiction. And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance. Pp. 209–213.

(b) Bowles' reliance on the "unique circumstances" doctrine, rooted in *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U. S. 215

(per curiam), and applied in *Thompson* v. *INS*, 375 U. S. 384 *(per curiam)*, is rejected. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the doctrine is illegitimate. *Harris Truck Lines* and *Thompson* are overruled to the extent they purport to authorize an exception to a jurisdictional rule. Pp. 213–214.

432 F. 3d 668, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 215.

Paul Mancino, Jr., argued the cause for petitioner. With him on the briefs were *Paul Mancino III* and *Brett Mancino*.

William P. Marshall argued the cause for respondent. With him on the brief were *Marc Dann*, Attorney General of Ohio, *Elise W. Porter*, Acting Solicitor General, and *Stephen P. Carney*, *Robert J. Krummen*, and *Elizabeth T. Scavo*, Deputy Solicitors.

Malcolm L. Stewart argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Dreeben*, *Eric D. Miller*, *Douglas N. Letter*, and *Lowell V. Sturgill, Jr.**

JUSTICE THOMAS delivered the opinion of the Court.

In this case, a District Court purported to extend a party's time for filing an appeal beyond the period allowed by statute. We must decide whether the Court of Appeals had jurisdiction to entertain an appeal filed after the statutory period but within the period allowed by the District Court's order. We have long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature. Accordingly, we hold that petitioner's untimely notice—even

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**Amy Howe*, *Kevin K. Russell*, and *Jeffrey L. Fisher* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

though filed in reliance upon a District Court's order—deprived the Court of Appeals of jurisdiction.

I

In 1999, an Ohio jury convicted petitioner Keith Bowles of murder for his involvement in the beating death of Ollie Gipson. The jury sentenced Bowles to 15-years-to-life imprisonment. Bowles unsuccessfully challenged his conviction and sentence on direct appeal.

Bowles then filed a federal habeas corpus application on September 5, 2002. On September 9, 2003, the District Court denied Bowles habeas relief. After the entry of final judgment, Bowles had 30 days to file a notice of appeal. Fed. Rule App. Proc. 4(a)(1)(A); 28 U. S. C. § 2107(a). He failed to do so. On December 12, 2003, Bowles moved to reopen the period during which he could file his notice of appeal pursuant to Rule 4(a)(6), which allows district courts to extend the filing period for 14 days from the day the district court grants the order to reopen, provided certain conditions are met. See § 2107(c).

On February 10, 2004, the District Court granted Bowles' motion. But rather than extending the time period by 14 days, as Rule 4(a)(6) and § 2107(c) allow, the District Court inexplicably gave Bowles 17 days—until February 27—to file his notice of appeal. Bowles filed his notice on February 26—within the 17 days allowed by the District Court's order, but after the 14-day period allowed by Rule 4(a)(6) and § 2107(c).

On appeal, respondent Russell argued that Bowles' notice was untimely and that the Court of Appeals therefore lacked jurisdiction to hear the case. The Court of Appeals agreed. It first recognized that this Court has consistently held the requirement of filing a timely notice of appeal is "mandatory and jurisdictional." 432 F. 3d 668, 673 (CA6 2005) (citing *Browder* v. *Director, Dept. of Corrections of Ill.*, 434 U. S. 257, 264 (1978)). The court also noted that Courts of Ap-

peals have uniformly held that Rule 4(a)(6)'s 180-day period for filing a motion to reopen is also mandatory and not susceptible to equitable modification. 432 F. 3d, at 673 (collecting cases). Concluding that "the fourteen-day period in Rule 4(a)(6) should be treated as strictly as the 180-day period in that same Rule," *id.*, at 676, the Court of Appeals held that it was without jurisdiction. We granted certiorari, 549 U. S. 1092 (2006), and now affirm.

II

According to 28 U. S. C. § 2107(a), parties must file notices of appeal within 30 days of the entry of the judgment being appealed. District courts have limited authority to grant an extension of the 30-day time period. Relevant to this case, if certain conditions are met, district courts have the statutory authority to grant motions to reopen the time for filing an appeal for 14 additional days. § 2107(c). Rule 4 of the Federal Rules of Appellate Procedure carries § 2107 into practice. In accord with § 2107(c), Rule 4(a)(6) describes the district court's authority to reopen and extend the time for filing a notice of appeal after the lapse of the usual 30 days:

> "(6) **Reopening the Time to File an Appeal.**
>
> "The district court may reopen the time to file an appeal *for a period of 14 days after the date when its order to reopen is entered*, but only if all the following conditions are satisfied:
>
> "(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;
>
> "(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

"(C) the court finds that no party would be prejudiced." (Emphasis added.)[1]

It is undisputed that the District Court's order in this case purported to reopen the filing period for more than 14 days. Thus, the question before us is whether the Court of Appeals lacked jurisdiction to entertain an appeal filed outside the 14-day window allowed by § 2107(c) but within the longer period granted by the District Court.

A

This Court has long held that the taking of an appeal within the prescribed time is "mandatory and jurisdictional." *Griggs* v. *Provident Consumer Discount Co.*, 459 U. S. 56, 61 (1982) *(per curiam)* (internal quotation marks omitted);[2] accord, *Hohn* v. *United States*, 524 U. S. 236, 247 (1998); *Tor-*

[1] The Rule was amended, effective December 1, 2005, to require that notice be pursuant to Fed. Rule Civ. Proc. 77(d). The substance is otherwise unchanged.

[2] *Griggs* and several other of this Court's decisions ultimately rely on *United States* v. *Robinson*, 361 U. S. 220, 229 (1960), for the proposition that the timely filing of a notice of appeal is jurisdictional. As the dissent notes, we have recently questioned *Robinson*'s use of the term "jurisdictional." *Post*, at 215–216 (opinion of SOUTER, J.). Even in our cases criticizing *Robinson*, however, we have noted the jurisdictional significance of the fact that a time limit is set forth in a statute, see *infra*, at 210–211, and have even pointed to § 2107 as a statute deserving of jurisdictional treatment, *infra*, at 211. Additionally, because we rely on those cases in reaching today's holding, the dissent's rhetoric claiming that we are ignoring their reasoning is unfounded.

Regardless of this Court's past careless use of terminology, it is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century. Consequently, the dissent's approach would require the repudiation of a century's worth of precedent and practice in American courts. Given the choice between calling into question some dicta in our recent opinions and effectively overruling a century's worth of practice, we think the former option is the only prudent course.

res v. *Oakland Scavenger Co.*, 487 U. S. 312, 314–315 (1988); *Browder*, 434 U. S., at 264. Indeed, even prior to the creation of the circuit courts of appeals, this Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction. See *Scarborough* v. *Pargoud*, 108 U. S. 567, 568 (1883) ("[T]he writ of error in this case was not brought within the time limited by law, and we have consequently no jurisdiction"); *United States* v. *Curry*, 6 How. 106, 113 (1848) ("[A]s this appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction"). Reflecting the consistency of this Court's holdings, the courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction. See, *e. g.*, *Atkins* v. *Medical Dept. of Augusta Cty. Jail*, No. 06–7792, 2007 WL 1048810 (CA4, Apr. 4, 2007) *(per curiam)* (unpublished); see also 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3901, p. 6 (2d ed. 1992) ("The rule is well settled that failure to file a timely notice of appeal defeats the jurisdiction of a court of appeals"). In fact, the author of today's dissent recently reiterated that "[t]he accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants, see, *e. g.*, . . . § 2107 (providing that notice of appeal in civil cases must be filed 'within thirty days after the entry of such judgment')." *Barnhart* v. *Peabody Coal Co.*, 537 U. S. 149, 160, n. 6 (2003) (majority opinion of Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., *inter alios*).

Although several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules, none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional. Indeed, those decisions have also recognized the jurisdictional significance of the fact that a time limitation is set forth in a statute. In *Kontrick* v. *Ryan*, 540 U. S. 443 (2004), we held that failure to comply with the time

requirement in Federal Rule of Bankruptcy Procedure 4004 did not affect a court's subject-matter jurisdiction. Critical to our analysis was the fact that "[n]o statute . . . specifies a time limit for filing a complaint objecting to the debtor's discharge." 540 U. S., at 448. Rather, the filing deadlines in the Bankruptcy Rules are "'procedural rules adopted by the Court for the orderly transaction of its business'" that are "'not jurisdictional.'" *Id.*, at 454 (quoting *Schacht* v. *United States*, 398 U. S. 58, 64 (1970)). Because "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction," 540 U. S., at 452 (citing U. S. Const., Art. III, § 1), it was improper for courts to use "the term 'jurisdictional' to describe emphatic time prescriptions in rules of court," 540 U. S., at 454. See also *Eberhart* v. *United States*, 546 U. S. 12 (2005) *(per curiam)*. As a point of contrast, we noted that § 2107 contains the type of statutory time constraints that would limit a court's jurisdiction. 540 U. S., at 453, and n. 8.[3] Nor do *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500 (2006), or *Scarborough* v. *Principi*, 541 U. S. 401 (2004), aid petitioner. In *Arbaugh*, the statutory limitation was an employee-numerosity requirement, not a time limit. 546 U. S., at 505. *Scarborough*, which addressed the availability of attorney's fees under the Equal Access to Justice Act, concerned "a mode of relief . . . ancillary to the judgment of a court" that already had plenary jurisdiction. 541 U. S., at 413.

This Court's treatment of its certiorari jurisdiction also demonstrates the jurisdictional distinction between court-

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[3] At least one Federal Court of Appeals has noted that *Kontrick* and *Eberhart* "called . . . into question" the "longstanding assumption" that the timely filing of a notice of appeal is a jurisdictional requirement. *United States* v. *Sadler*, 480 F. 3d 932, 935 (CA9 2007). That court nonetheless found that "[t]he distinction between jurisdictional rules and inflexible but not jurisdictional timeliness rules drawn by *Eberhart* and *Kontrick* turns largely on whether the timeliness requirement is or is not grounded in a statute." *Id.*, at 936.

promulgated rules and limits enacted by Congress. According to our Rules, a petition for a writ of certiorari must be filed within 90 days of the entry of the judgment sought to be reviewed. See this Court's Rule 13.1. That 90-day period applies to both civil and criminal cases. But the 90-day period for civil cases derives from both this Court's Rule 13.1 and 28 U. S. C. § 2101(c). We have repeatedly held that this statute-based filing period for civil cases is jurisdictional. See, *e. g.*, *Federal Election Comm'n* v. *NRA Political Victory Fund*, 513 U. S. 88, 90 (1994). Indeed, this Court's Rule 13.2 cites § 2101(c) in directing the Clerk not to file any petition "that is *jurisdictionally* out of time." (Emphasis added.) On the other hand, we have treated the rule-based time limit for criminal cases differently, stating that it may be waived because "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion . . . ." *Schacht*, *supra*, at 64.[4]

Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear

[4] The dissent minimizes this argument, stating that the Court understood § 2101(c) as jurisdictional "in the days when we used the term imprecisely." *Post*, at 218, n. 4. The dissent's apathy is surprising because if our treatment of our own jurisdiction is simply a relic of the old days, it is a relic with severe consequences. Just a few months ago, the Clerk, pursuant to this Court's Rule 13.2, refused to accept a petition for certiorari submitted by Ryan Heath Dickson because it had been filed one day late. In the letter sent to Dickson's counsel, the Clerk explained that "[w]hen the time to file a petition for a writ of certiorari in a civil case . . . has expired, the Court no longer has the power to review the petition." Letter from William K. Suter, Clerk of Court, to Ronald T. Spriggs (Dec. 28, 2006). Dickson was executed on April 26, 2007, without any Member of this Court having even seen his petition for certiorari. The rejected certiorari petition was Dickson's first in this Court, and one can only speculate as to whether denial of that petition would have been a foregone conclusion.

cases at all, it can also determine when, and under what conditions, federal courts can hear them. See *Curry*, 6 How., at 113. Put another way, the notion of "'subject-matter'" jurisdiction obviously extends to "'classes of cases . . . falling within a court's adjudicatory authority,'" *Eberhart*, *supra*, at 16 (quoting *Kontrick*, *supra*, at 455), but it is no less "jurisdictional" when Congress prohibits federal courts from adjudicating an otherwise legitimate "class of cases" after a certain period has elapsed from final judgment.

The resolution of this case follows naturally from this reasoning. Like the initial 30-day period for filing a notice of appeal, the limit on how long a district court may reopen that period is set forth in a statute, 28 U. S. C. § 2107(c). Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple "claim-processing rule." As we have long held, when an "appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." *Curry*, *supra*, at 113. Bowles' failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction. And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations. See *Arbaugh*, *supra*, at 513–514.

B

Bowles contends that we should excuse his untimely filing because he satisfies the "unique circumstances" doctrine, which has its roots in *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U. S. 215 (1962) *(per curiam)*. There, pursuant to then-Rule 73(a) of the Federal Rules of Civil Procedure, a District Court entertained a timely motion to extend the time for filing a notice of appeal. The District Court found the moving party had established a showing of "excusable neglect," as required by the Rule, and

granted the motion. The Court of Appeals reversed the finding of excusable neglect and, accordingly, held that the District Court lacked jurisdiction to grant the extension. *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 303 F. 2d 609, 611–612 (CA7 1962). This Court reversed, noting "the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect.'" 371 U. S., at 217.

Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the "unique circumstances" doctrine is illegitimate. Given that this Court has applied *Harris Truck Lines* only once in the last half century, *Thompson* v. *INS*, 375 U. S. 384 (1964) *(per curiam)*, several courts have rightly questioned its continuing validity. See, *e. g.*, *Panhorst* v. *United States*, 241 F. 3d 367, 371 (CA4 2001) (doubting "the continued viability of the unique circumstances doctrine"). See also *Houston* v. *Lack*, 487 U. S. 266, 282 (1988) (SCALIA, J., dissenting) ("Our later cases . . . effectively repudiate the *Harris Truck Lines* approach . . . "); *Osterneck* v. *Ernst & Whinney*, 489 U. S. 169, 170 (1989) (referring to "the so-called 'unique circumstances' exception" to the timely appeal requirement). We see no compelling reason to resurrect the doctrine from its 40-year slumber. Accordingly, we reject Bowles' reliance on the doctrine, and we overrule *Harris Truck Lines* and *Thompson* to the extent they purport to authorize an exception to a jurisdictional rule.

C

If rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits. Even narrow rules to this effect would give rise to litigation testing their reach and would no doubt detract from the clarity of the rule. However, congressionally authorized rule-

making would likely lead to less litigation than court-created exceptions without authorization. And in all events, for the reasons discussed above, we lack present authority to make the exception petitioner seeks.

III

The Court of Appeals correctly held that it lacked jurisdiction to consider Bowles' appeal. The judgment of the Court of Appeals is affirmed.

It is so ordered.

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

The District Court told petitioner Keith Bowles that his notice of appeal was due on February 27, 2004. He filed a notice of appeal on February 26, only to be told that he was too late because his deadline had actually been February 24. It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch. I respectfully dissent.

I

"'Jurisdiction,'" we have warned several times in the last decade, "'is a word of many, too many, meanings.'" *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 90 (1998) (quoting *United States* v. *Vanness*, 85 F. 3d 661, 663, n. 2 (CADC 1996)); *Kontrick* v. *Ryan*, 540 U. S. 443, 454 (2004) (quoting *Steel Co.*); *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 510 (2006) (same); *Rockwell Int'l Corp.* v. *United States*, 549 U. S. 457, 467 (2007) (same). This variety of meaning has insidiously tempted courts, this one included, to engage in "less than meticulous," *Kontrick*, *supra*, at 454, sometimes even "profligate . . . use of the term," *Arbaugh*, *supra*, at 510.

In recent years, however, we have tried to clean up our language, and until today we have been avoiding the errone-

ous jurisdictional conclusions that flow from indiscriminate use of the ambiguous word. Thus, although we used to call the sort of time limit at issue here "mandatory and jurisdictional," *United States* v. *Robinson*, 361 U. S. 220, 229 (1960), we have recently and repeatedly corrected that designation as a misuse of the "jurisdiction" label, *Arbaugh*, *supra*, at 510 (citing *Robinson* as an example of improper use of the term "jurisdiction"); *Eberhart* v. *United States*, 546 U. S. 12, 17–18 (2005) *(per curiam)* (same); *Kontrick*, *supra*, at 454 (same).

But one would never guess this from reading the Court's opinion in this case, which suddenly restores *Robinson*'s indiscriminate use of the "mandatory and jurisdictional" label to good law in the face of three unanimous repudiations of *Robinson*'s error. See *ante*, at 209. This is puzzling, the more so because our recent (and, I repeat, unanimous) efforts to confine jurisdictional rulings to jurisdiction proper were obviously sound, and the majority makes no attempt to show they were not.[1]

The stakes are high in treating time limits as jurisdictional. While a mandatory but nonjurisdictional limit is enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket, it may be waived or mitigated in exercising reasonable equitable discretion. But if a limit is taken to be jurisdictional, waiver becomes impossible, meritorious excuse irrelevant (unless the statute so provides), and *sua sponte* consideration in the

[1] The Court thinks my fellow dissenters and I are forgetful of an opinion I wrote and the others joined in 2003, which referred to the 30-day rule of 28 U. S. C. § 2107(a) as a jurisdictional time limit. See *ante*, at 210 (quoting *Barnhart* v. *Peabody Coal Co.*, 537 U. S. 149, 160, n. 6 (2003)). But that reference in *Barnhart* was a perfect example of the confusion of the mandatory and the jurisdictional that the entire Court has spent the past four years repudiating in *Arbaugh*, *Eberhart*, and *Kontrick*. My fellow dissenters and I believe that the Court was right to correct its course; the majority, however, will not even admit that we deliberately changed course, let alone explain why it is now changing course again.

courts of appeals mandatory, see *Arbaugh*, *supra*, at 514.[2] As the Court recognizes, *ante*, at 210–211, this is no way to regard time limits set out in a court rule rather than a statute, see *Kontrick*, *supra*, at 452 ("Only Congress may determine a lower federal court's subject-matter jurisdiction"). But neither is jurisdictional treatment automatic when a time limit is statutory, as it is in this case. Generally speaking, limits on the reach of federal statutes, even nontemporal ones, are only jurisdictional if Congress says so: "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh*, 546 U. S., at 516. Thus, we have held "that time prescriptions, however emphatic, 'are not properly typed "jurisdictional,"'" *id.*, at 510 (quoting *Scarborough* v. *Principi*, 541 U. S. 401, 414 (2004)), absent some jurisdictional designation by Congress. Congress put no jurisdictional tag on the time limit here.[3]

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[2] The requirement that courts of appeals raise jurisdictional issues *sua sponte* reveals further ill effects of today's decision. Under § 2107(c), "[t]he district court may . . . extend the time for appeal upon a showing of excusable neglect or good cause." By the Court's logic, if a district court grants such an extension, the extension's propriety is subject to mandatory *sua sponte* review in the court of appeals, even if the extension was unopposed throughout, and upon finding error the court of appeals must dismiss the appeal. I see no more justification for such a rule than reason to suspect Congress meant to create it.

[3] The majority answers that a footnote of our unanimous opinion in *Kontrick* v. *Ryan*, 540 U. S. 443 (2004), used § 2107(a) as an illustration of a jurisdictional time limit. *Ante*, at 211 ("[W]e noted that § 2107 contains the type of statutory time constraints that would limit a court's jurisdiction. 540 U. S., at 453, and n. 8"). What the majority overlooks, however, are the post-*Kontrick* cases showing that § 2107(a) can no longer be seen as an example of a jurisdictional time limit. The jurisdictional character of the 30- (or 60)-day time limit for filing notices of appeal under the present § 2107(a) was first pronounced by this Court in *Browder* v. *Director, Dept. of Corrections of Ill.*, 434 U. S. 257 (1978). But in that respect *Browder* was undercut by *Eberhart* v. *United States*, 546 U. S. 12 (2005) *(per curiam)*, decided after *Kontrick*. *Eberhart* cited *Browder* (along with several of the other cases on which the Court now relies) as an exam-

The doctrinal underpinning of this recently repeated view was set out in *Kontrick:* "the label 'jurisdictional' [is appropriate] not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." 540 U. S., at 455. A filing deadline is the paradigm of a claim-processing rule, not of a delineation of cases that federal courts may hear, and so it falls outside the class of limitations on subject-matter jurisdiction unless Congress says otherwise.[4]

The time limit at issue here, far from defining the set of cases that may be adjudicated, is much more like a statute of limitations, which provides an affirmative defense, see Fed. Rule Civ. Proc. 8(c), and is not jurisdictional, *Day* v.

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ple of the basic error of confusing mandatory time limits with jurisdictional limitations, a confusion for which *United States* v. *Robinson,* 361 U. S. 220 (1960), was responsible. Compare *ante,* at 209–210 (citing *Browder, Griggs* v. *Provident Consumer Discount Co.,* 459 U. S. 56 (1982) *(per curiam),* and *Hohn* v. *United States,* 524 U. S. 236 (1998)), with *Eberhart, supra,* at 17–18 (citing those cases as examples of the confusion caused by *Robinson*'s imprecise language). *Eberhart* was followed four months later by *Arbaugh* v. *Y & H Corp.,* 546 U. S. 500 (2006), which summarized the body of recent decisions in which the Court "clarified that time prescriptions, however emphatic, are not properly typed jurisdictional," *id.,* at 510 (internal quotation marks omitted). This unanimous statement of all Members of the Court participating in the case eliminated the option of continuing to accept § 2107(a) as jurisdictional and it precludes treating the 14-day period of § 2107(c) as a limit on jurisdiction.

[4] The Court points out that we have affixed a "jurisdiction" label to the time limit contained in § 2101(c) for petitions for writ of certiorari in civil cases. *Ante,* at 212 (citing *Federal Election Comm'n* v. *NRA Political Victory Fund,* 513 U. S. 88, 90 (1994); this Court's Rule 13.2). Of course, we initially did so in the days when we used the term imprecisely. The status of § 2101(c) is not before the Court in this case, so I express no opinion on whether there are sufficient reasons to treat it as jurisdictional. The Court's observation that jurisdictional treatment has had severe consequences in that context, *ante,* at 212, n. 4, does nothing to support an argument that jurisdictional treatment is sound, but instead merely shows that the certiorari rule, too, should be reconsidered in light of our recent clarifications of what sorts of rules should be treated as jurisdictional.

McDonough, 547 U. S. 198, 205 (2006). Statutes of limitations may thus be waived, *id.*, at 207–208, or excused by rules, such as equitable tolling, that alleviate hardship and unfairness, see *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95–96 (1990).

Consistent with the traditional view of statutes of limitations, and the carefully limited concept of jurisdiction explained in *Arbaugh*, *Eberhart*, and *Kontrick*, an exception to the time limit in 28 U. S. C. § 2107(c) should be available when there is a good justification for one, for reasons we recognized years ago. In *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U. S. 215, 217 (1962) *(per curiam)*, and *Thompson* v. *INS*, 375 U. S. 384, 387 (1964) *(per curiam)*, we found that "unique circumstances" excused failures to comply with the time limit. In fact, much like this case, *Harris* and *Thompson* involved District Court errors that misled litigants into believing they had more time to file notices of appeal than a statute actually provided. Thus, even back when we thoughtlessly called time limits jurisdictional, we did not actually treat them as beyond exemption to the point of shrugging at the inequity of penalizing a party for relying on what a federal judge had said to him. Since we did not dishonor reasonable reliance on a judge's official word back in the days when we uncritically had a jurisdictional reason to be unfair, it is unsupportable to dishonor it now, after repeatedly disavowing any such jurisdictional justification that would apply to the 14-day time limit of § 2107(c).

The majority avoids clashing with *Harris* and *Thompson* by overruling them on the ground of their "slumber," *ante*, at 214, and inconsistency with a time-limit-as-jurisdictional rule.[5] But eliminating those precedents underscores what

[5] With no apparent sense of irony, the Court finds that "'[o]ur later cases . . . effectively repudiate the *Harris Truck Lines* approach.'" *Ante*, at 214 (quoting *Houston* v. *Lack*, 487 U. S. 266, 282 (1988) (SCALIA, J., dissenting); omission in original). Of course, those "later cases" were *Browder* and *Griggs*, see *Houston*, *supra*, at 282, which have themselves been repudiated, not just "effectively" but explicitly, in *Eberhart*. See n. 3, *supra*.

has become the principal question of this case: why does today's majority refuse to come to terms with the steady stream of unanimous statements from this Court in the past four years, culminating in *Arbaugh*'s summary a year ago? The majority begs this question by refusing to confront what we have said: "in recent decisions, we have clarified that time prescriptions, however emphatic, 'are not properly typed "jurisdictional."' " *Arbaugh*, 546 U. S., at 510 (quoting *Scarborough*, 541 U. S., at 414). This statement of the Court, and those preceding it for which it stands as a summation, cannot be dismissed as "some dicta," *ante*, at 209, n. 2, and cannot be ignored on the ground that some of them were made in cases where the challenged restriction was not a time limit, see *ante*, at 211. By its refusal to come to grips with our considered statements of law the majority leaves the Court incoherent.

In ruling that Bowles cannot depend on the word of a District Court Judge, the Court demonstrates that no one may depend on the recent, repeated, and unanimous statements of all participating Justices of this Court. Yet more incongruously, all of these pronouncements by the Court, along with two of our cases,[6] are jettisoned in a ruling for which the leading justification is *stare decisis*, see *ante*, at 209 ("This Court has long held . . . ").

II

We have the authority to recognize an equitable exception to the 14-day limit, and we should do that here, as it certainly seems reasonable to rely on an order from a federal judge.[7]

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[6] Three, if we include *Wolfsohn* v. *Hankin*, 376 U. S. 203 (1964) *(per curiam)*.

[7] As a member of the Federal Judiciary, I cannot help but think that reliance on our orders is reasonable. See O. Holmes, Natural Law, in Collected Legal Papers 311 (1920). I would also rest better knowing that my innocent errors will not jeopardize anyone's rights unless absolutely necessary.

Bowles, though, does not have to convince us as a matter of first impression that his reliance was justified, for we only have to look as far as *Thompson* to know that he ought to prevail. There, the would-be appellant, Thompson, had filed post-trial motions 12 days after the District Court's final order. Although the rules said they should have been filed within 10, Fed. Rules Civ. Proc. 52(b) and 59(b) (1964 ed.), the trial court nonetheless had "specifically declared that the 'motion for a new trial' was made 'in ample time.' " *Thompson*, *supra*, at 385. Thompson relied on that statement in filing a notice of appeal within 60 days of the denial of the post-trial motions but not within 60 days of entry of the original judgment. Only timely post-trial motions affected the 60-day time limit for filing a notice of appeal, Rule 73(a) (1964 ed.), so the Court of Appeals held the appeal untimely. We vacated because Thompson "relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline." 375 U. S., at 387.

Thompson should control. In that case, and this one, the untimely filing of a notice of appeal resulted from reliance on an error by a District Court, an error that caused no evident prejudice to the other party. Actually, there is one difference between *Thompson* and this case: Thompson filed his post-trial motions late, and the District Court was mistaken when it said they were timely; here, the District Court made the error out of the blue, not on top of any mistake by Bowles, who then filed his notice of appeal by the specific date the District Court had declared timely. If anything, this distinction ought to work in Bowles's favor. Why should we have rewarded Thompson, who introduced the error, but now punish Bowles, who merely trusted the District Court's statement?[8]

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[8] Nothing in *Osterneck* v. *Ernst & Whinney*, 489 U. S. 169 (1989), requires such a strange rule. In *Osterneck*, we described the "unique circumstances" doctrine as applicable "only where a party has performed an act which, if properly done, would postpone the deadline for filing his

Under *Thompson*, it would be no answer to say that Bowles's trust was unreasonable because the 14-day limit was clear and counsel should have checked the judge's arithmetic. The 10-day limit on post-trial motions was no less pellucid in *Thompson*, which came out the other way. And what is more, counsel here could not have uncovered the court's error simply by counting off the days on a calendar. Federal Rule of Appellate Procedure 4(a)(6) allows a party to file a notice of appeal within 14 days of "the date when [the district court's] order to reopen is entered." See also 28 U. S. C. § 2107(c)(2) (allowing reopening for "14 days from the date of entry"). The District Court's order was dated February 10, 2004, which reveals the date the judge signed it but not necessarily the date on which the order was entered. Bowles's lawyer therefore could not tell from reading the order, which he received by mail, whether it was entered the day it was signed. Nor is the possibility of delayed entry merely theoretical: the District Court's original judgment in this case, dated July 10, 2003, was not entered until July 28. See App. 11 (District Court docket). According to Bowles's lawyer, electronic access to the docket was unavailable at the time, so to learn when the order was actually entered he would have had to call or go to the courthouse and check. See Tr. of Oral Arg. 56–57. Surely this is more than equity demands, and unless every statement by a federal court is to be tagged with the warning "Beware of the Judge," Bowles's

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appeal and has received specific assurance by a judicial officer that this act has been properly done." *Id.*, at 179. But the point we were making was that *Thompson* could not excuse a lawyer's original mistake in a case in which a judge had not assured him that his act had been timely; the Court of Appeals in *Osterneck* had found that no court provided a specific assurance, and we agreed. I see no reason to take *Osterneck*'s language out of context to buttress a fundamentally unfair resolution of an issue the *Osterneck* Court did not have in front of it. Cf. *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502, 515 (1993) ("[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code").

lawyer had no obligation to go behind the terms of the order he received.

I have to admit that Bowles's counsel probably did not think the order might have been entered on a different day from the day it was signed. He probably just trusted that the date given was correct, and there was nothing unreasonable in so trusting. The other side let the order pass without objection, either not caring enough to make a fuss or not even noticing the discrepancy; the mistake of a few days was probably not enough to ring the alarm bell to send either lawyer to his copy of the Federal Rules and then off to the courthouse to check the docket.[9] This would be a different case if the year were wrong on the District Court's order, or if opposing counsel had flagged the error. But on the actual facts, it was reasonable to rely on a facially plausible date provided by a federal judge.

I would vacate the decision of the Court of Appeals and remand for consideration of the merits.

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[9] At first glance it may seem unreasonable for counsel to wait until the penultimate day under the judge's order, filing a notice of appeal being so easy that counsel should not have needed the extra time. But as Bowles's lawyer pointed out at oral argument, filing the notice of appeal starts the clock for filing the record, see Fed. Rules App. Proc. 6(b)(2)(B), 10(b), and 11, which in turn starts the clock for filing a brief, see Rule 31(a)(1), for which counsel might reasonably want as much time as possible. See Tr. of Oral Arg. 6. A good lawyer plans ahead, and Bowles had a good lawyer.

Syllabus

POWEREX CORP. *v.* RELIANT ENERGY SERVICES, INC., ET AL.

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

No. 05–85. Argued April 16, 2007—Decided June 18, 2007

Plaintiffs-respondents filed state-court suits alleging that various companies in California's energy market had conspired to fix prices in violation of state law. Some of the defendants filed cross-claims seeking indemnity from, *inter alios*, two United States Government agencies (BPA and WAPA); a Canadian corporation (BC Hydro) wholly owned by British Columbia and thus a "foreign state" under the Foreign Sovereign Immunities Act of 1976 (FSIA); and petitioner Powerex, a wholly owned subsidiary of BC Hydro. The cross-defendants removed the entire case to federal court, with BC Hydro and petitioner relying on the FSIA. Plaintiffs-respondents moved to remand, arguing that petitioner was not a foreign state and that the cross-claims against BPA, WAPA, and BC Hydro were barred by sovereign immunity. The District Court agreed and remanded. As relevant here, petitioner appealed, arguing that it was a foreign sovereign under the FSIA, but plaintiffs-respondents rejoined that the appeal was jurisdictionally barred by 28 U. S. C. § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." The Ninth Circuit held that § 1447(d) did not preclude it from reviewing substantive issues of law that preceded the remand order, but affirmed the holding as to petitioner's foreign-state status.

Held: Section 1447(d) bars appellate consideration of petitioner's claim that it is a foreign state for FSIA purposes. Pp. 229–239.

(a) Appellate courts' authority to review district-court orders remanding removed cases to state court is substantially limited by statute. Section 1447(d) is read *in pari materia* with § 1447(c), so that only remands based on the grounds specified in the latter are shielded by the review bar mandated by the former. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 345–346. For purposes of this case, it is assumed that the grounds specified in § 1447(c) are lack of subject-matter jurisdiction and defects in removal procedure. Cf. *Quackenbush* v. *Allstate Ins. Co.*, 517 U. S. 706, 711–712. Given the proceedings below, review of the remand order is barred only if it was based on lack of subject-matter jurisdiction. Pp. 229–230.

Syllabus

(b) Nothing in § 1447(c)'s text supports the claim that a case cannot be remanded for lack of subject-matter jurisdiction within the meaning of that provision if the case was properly removed in the first instance. Indeed, statutory history conclusively refutes the argument that § 1447(c) is implicitly limited in such a manner. When a district court remands a properly removed case because it nonetheless lacks subject-matter jurisdiction, the remand is covered by § 1447(c) and shielded from review by § 1447(d). Pp. 230–232.

(c) The District Court relied upon a ground that is colorably characterized as subject-matter jurisdiction and so § 1447(d) bars appellate review. As an initial matter, it is clear from the record that the court was purporting to remand for lack of subject-matter jurisdiction. Even assuming that § 1447(d) permits appellate courts to look behind a district court's characterization of the basis for the remand, such review is hereby limited to ascertaining whether the characterization was colorable. In this case, the only plausible explanation of the District Court's remand was that it believed that it lacked the power to adjudicate the claims against petitioner once it had determined that petitioner was not a foreign state and that the other cross-defendants had sovereign immunity. It is unnecessary to determine whether that belief was correct; it was at least debatable. Petitioner contends instead that the District Court was actually remanding based on *Carnegie-Mellon Univ.* v. *Cohill*, 484 U. S. 343, 357, which authorizes remand when a district court declines to exercise supplemental jurisdiction. This is implausible. The District Court never mentioned the possibility of supplemental jurisdiction, and petitioner does not appear to have argued that the claims against it could be retained based on supplemental jurisdiction. Pp. 232–235.

(d) The Ninth Circuit held that § 1447(d) does not preclude reviewing a district court's substantive determinations that precede a remand order, a holding that appears to be premised on *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U. S. 140. *Waco*, however, does not permit an appeal when, as here, there is no order separate from the unreviewable remand order. Pp. 235–236.

(e) Petitioner's contention that Congress did not intend § 1447(d) to govern suits removed under the FSIA is flatly refuted by this Court's longstanding precedent that "[a]bsent a clear statutory command to the contrary, [the Court] assume[s] that Congress is 'aware of the universality of th[e] practice' of denying appellate review of remand orders when Congress creates a new ground for removal." *Things Remembered, Inc.* v. *Petrarca*, 516 U. S. 124, 128. Pp. 236–238.

391 F. 3d 1011, vacated in part and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, SOUTER, THOMAS, GINSBURG, and ALITO, JJ., joined. KENNEDY, J., filed a concurring opinion, in which ALITO, J., joined, *post,* p. 239. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined, *post,* p. 239.

David C. Frederick argued the cause for petitioner. With him on the briefs was *Scott H. Angstreich.*

Douglas H. Hallward-Driemeier argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement, Assistant Attorney General Keisler, Deputy Solicitor General Kneedler, Mark B. Stern,* and *H. Thomas Byron III.*

Leonard B. Simon argued the cause for respondents. With him on the brief were *Pamela M. Parker* and *William Bernstein.**

JUSTICE SCALIA delivered the opinion of the Court.

We granted certiorari to decide whether, under the Foreign Sovereign Immunities Act of 1976 (FSIA), petitioner is an "organ of a foreign state or political subdivision thereof." 28 U. S. C. § 1603(b)(2). When we granted certiorari, however, we asked the parties also to address whether the Ninth Circuit had appellate jurisdiction in light of 28 U. S. C. § 1447(d).

I

The procedural history of this case is long and complicated; we recount only what is necessary to resolve the writ before us. The State of California, along with some private and corporate citizens (hereinafter collectively referred to as plaintiffs-respondents), filed suits in California state courts against various companies in the California energy market,

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*Briefs of *amici curiae* urging reversal were filed for the Government of Canada by *Margaret K. Pfeiffer;* and for the Province of British Columbia by *Roy T. Englert, Jr.,* and *Matthew R. Segal.*

A brief of *amici curiae* was filed for Arthur R. Miller et al. by *Brian Wolfman* and *Mr. Miller, pro se.*

alleging that they had conspired to fix prices in violation of California law. Some of those defendants, in turn, filed cross-claims seeking indemnity from, *inter alios*, the Bonneville Power Administration (BPA), the Western Area Power Administration (WAPA), the British Columbia Hydro and Power Authority (BC Hydro), and petitioner Powerex. (We shall sometimes refer to these entities collectively as the cross-defendants.) BPA and WAPA are agencies of the United States Government. BC Hydro is a crown corporation of the Canadian Province of British Columbia that is wholly owned by the Province and that all parties agree constitutes a "foreign state" for purposes of the FSIA. See § 1603. Petitioner, also a Canadian corporation, is a wholly owned subsidiary of BC Hydro.

The cross-defendants removed the entire case to federal court. BC Hydro and petitioner both relied on § 1441(d), which permits a "foreign state," as defined by the FSIA, see § 1603(a), to remove civil actions brought against it in state court. BPA and WAPA invoked § 1442(a), authorizing removal by federal agencies. Plaintiffs-respondents moved to remand, arguing that petitioner was not a foreign state, and that the cross-claims against BPA, WAPA, and BC Hydro were barred by sovereign immunity. Petitioner opposed remand on the ground that it was a foreign state under the FSIA; the other cross-defendants opposed remand on the ground that their sovereign immunity entitled them to be dismissed from the action outright.

The District Court initially concluded (we assume correctly) that § 1442(a) entitled BPA and WAPA to remove the *entire* case and that BC Hydro was similarly entitled under § 1441(d). App. to Pet. for Cert. 20a. It thus believed that whether the case should be remanded "hinge[d on its] jurisdictional authority to hear the removed claims, not whether the actions were properly removed in the first instance." *Ibid.* The District Court held that petitioner did not qualify as a foreign sovereign under the FSIA. *Id.*, at 33a–38a. It

also decided that BC Hydro enjoyed sovereign immunity under the FSIA. *Id.*, at 21a–33a. And it concluded that BPA and WAPA were immune from suit in state court, which the court believed deprived it of jurisdiction over the claims against those agencies. *Id.*, at 38a–44a. Having reached these conclusions, the District Court remanded the entire case. *Id.*, at 44a.

Petitioner appealed to the Court of Appeals for the Ninth Circuit, arguing that it was a foreign sovereign under the FSIA. BPA and WAPA (but not BC Hydro) also appealed, asserting that the District Court, before remanding the case, should have dismissed them from the action in light of their sovereign immunity. Plaintiffs-respondents, for their part, rejoined that both appeals were jurisdictionally barred by § 1447(d) and that the District Court had not erred in any event. The Ninth Circuit rejected the invocation of § 1447(d), holding that that provision did not preclude it from reviewing substantive issues of law that preceded the remand order. *California* v. *NRG Energy Inc.*, 391 F. 3d 1011, 1022–1023 (2004). It also found that the District Court had jurisdiction over the case because BPA, WAPA, and BC Hydro properly removed the entire action. *Id.*, at 1023. Turning to the merits, the Ninth Circuit affirmed the holding that petitioner was not a "foreign state" for purposes of the FSIA. *Id.*, at 1025–1026. It also upheld the District Court's conclusion that BPA, WAPA, and BC Hydro retained sovereign immunity, *id.*, at 1023–1025, but reversed its decision not to dismiss BPA and WAPA before remanding, *id.*, at 1026–1027.

Petitioner sought certiorari review of the Ninth Circuit's determination that it was not an "organ of a foreign state or political subdivision thereof" under § 1603(b)(2). We granted certiorari on this question, but asked the parties to address in addition whether the Ninth Circuit had jurisdiction over petitioner's appeal notwithstanding § 1447(d). 549 U. S. 1178 (2007).

II

The authority of appellate courts to review district-court orders remanding removed cases to state court is substantially limited by statute. Title 28 U. S. C. § 1447(d) provides (with an exception for certain civil rights cases) that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." Determining whether the Ninth Circuit was permitted to review the District Court's remand is, alas, not as easy as one would expect from a mere reading of this text, for we have interpreted § 1447(d) to cover less than its words alone suggest. In *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 345–346 (1976), we held that § 1447(d) should be read *in pari materia* with § 1447(c), so that only remands based on the grounds specified in the latter are shielded by the bar on review mandated by the former. At the time of *Thermtron*, § 1447(c) stated in relevant part:

> "'If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case.'" *Id.*, at 342.

Consequently, *Thermtron* limited § 1447(d)'s application to such remands. *Id.*, at 346. In 1988, Congress amended § 1447(c) in relevant part as follows:

> "A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under [28 U. S. C. §] 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." § 1016(c)(1), 102 Stat. 4670.

When that version of § 1447(c) was in effect, we thus interpreted § 1447(d) to preclude review only of remands for lack of subject-matter jurisdiction and for defects in removal pro-

cedure. See *Quackenbush* v. *Allstate Ins. Co.*, 517 U. S. 706, 711–712 (1996); *Things Remembered, Inc.* v. *Petrarca*, 516 U. S. 124, 127–128 (1995).

Although § 1447(c) was amended yet again in 1996, 110 Stat. 3022, we will assume for purposes of this case that the amendment was immaterial to *Thermtron*'s gloss on § 1447(d), so that the prohibition on appellate review remains limited to remands based on the grounds specified in *Quackenbush*. We agree with petitioner that the remand order was not based on a defect in removal procedure, so on the foregoing interpretation of *Thermtron* the remand is immunized from review only if it was based on a lack of subject-matter jurisdiction.

A

The principal submission of the Solicitor General and petitioner is that the District Court's remand order was not based on a lack of "subject matter jurisdiction" within the meaning of § 1447(c) because that term is properly interpreted to cover *only* "a defect in subject matter jurisdiction *at the time of removal* that rendered *the removal itself* jurisdictionally improper." Brief for United States as *Amicus Curiae* 8; see also *id.*, at 8–11; Brief for Petitioner 42–45. Under this interpretation, the District Court's remand order was not based on a defect in subject-matter jurisdiction for purposes of § 1447(c), since the cross-defendants other than petitioner were statutorily authorized to remove the whole case in light of their sovereign status. The Ninth Circuit appears to have relied, at least in part, on this rationale. See 391 F. 3d, at 1023.

We reject this narrowing construction of § 1447(c)'s unqualified authorization of remands for lack of "subject matter jurisdiction." Nothing in the text of § 1447(c) supports the proposition that a remand for lack of subject-matter jurisdiction is not covered so long as the case was properly removed in the first instance. Petitioner and the Solicitor General do not seriously dispute the absence of an explicit textual

limitation. Instead, relying on the statutory history of § 1447(c), they make a three-step argument why the provision is implicitly limited in this manner. First, they note that the pre-1988 version of § 1447(c) mandated remand "[i]f at any time before final judgment it appear[ed] that the case was removed improvidently and without jurisdiction," 28 U. S. C. § 1447(c) (1982 ed.). That version, obviously, authorized remand only for cases that were *removed* improperly. Second, they contend that the purpose of the 1988 amendment was to impose a time limit for raising nonjurisdictional objections to removal, a contention that is certainly plausible in light of the structure of the amended provision:

> "A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." § 1447(c) (1988 ed.).

Finally, they conclude that since the purpose of the amendment was to alter the timing rules, there is no reason to think that Congress broadened the scope of § 1447(c) to authorize the remand of cases that had been properly removed. The language "lacks subject matter jurisdiction," which was newly added to § 1447(c), must be construed to cover only cases in which *removal* was jurisdictionally improper at the outset.

But the very statutory history upon which this creative argument relies conclusively refutes it. The same section of the public law that amended § 1447(c) to include the phrase "subject matter jurisdiction" also created a new § 1447(e). See § 1016(c), 102 Stat. 4670. Section 1447(e), which remains on the books, states:

> "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter

> jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court."

This unambiguously demonstrates that a case can be properly removed and yet suffer from a failing in *subject-matter jurisdiction* that requires remand. A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning. See, *e. g.*, *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 34 (2005). That maxim is doubly appropriate here, since the phrase "subject matter jurisdiction" was inserted into § 1447(c) and § 1447(e) at the same time. There is no reason to believe that the new language in the former provision, unlike the new language simultaneously inserted two subsections later, covers *only* cases in which removal itself was jurisdictionally improper. We hold that when a district court remands a properly removed case because it nonetheless lacks subject-matter jurisdiction, the remand is covered by § 1447(c) and thus shielded from review by § 1447(d).[1]

B

That holding requires us to determine whether the ground for the District Court's remand in the present case was lack of subject-matter jurisdiction. As an initial matter, it is quite clear that the District Court was *purporting* to remand on that ground. The heading of the discussion section of the remand order is entitled "Subject Matter Jurisdiction Over the Removed Actions." App. to Pet. for Cert. 20a. And

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[1] To be clear, we do not suggest that the question whether removal is proper is *always* different from the question whether the district court has subject-matter jurisdiction, for the two are often identical in light of the general rule that postremoval events do not deprive federal courts of subject-matter jurisdiction. See, *e. g.*, *Wisconsin Dept. of Corrections* v. *Schacht*, 524 U. S. 381, 391 (1998). We merely hold that when there is a divergence, such that a district court lacks subject-matter jurisdiction to hear a claim that was properly removed, the consequent remand is authorized by § 1447(c) and appellate review is barred by § 1447(d).

the District Court explicitly stated that the remand "issue hinges . . . on the Court's jurisdictional authority to hear the removed claims." *Ibid.* Were any doubt remaining, it is surely eliminated by the District Court's order denying a stay of the remand, which repeatedly stated that a lack of subject-matter jurisdiction required remand pursuant to § 1447(c). See App. 281–286.

For some Members of this Court, the foregoing conclusion that the District Court purported to remand for lack of subject-matter jurisdiction is alone enough to bar review under § 1447(d). See *Osborn* v. *Haley*, 549 U. S. 225, 264 (2007) (SCALIA, J., joined by THOMAS, J., dissenting). Even assuming, however, that § 1447(d) permits appellate courts to look behind the district court's characterization, see *Kircher* v. *Putnam Funds Trust*, 547 U. S. 633, 641, n. 9 (2006) (reserving the question), we conclude that appellate review is barred in this case.[2] There is only one *plausible* explanation of what legal ground the District Court actually relied upon for its remand in the present case. As contended by plaintiffs-respondents, it was the court's lack of *power* to adjudicate the claims against petitioner once it concluded both that petitioner was not a foreign state capable of independently removing and that the claims against the other removing cross-defendants were barred by sovereign immunity. Brief for Plaintiffs-Respondents 17–21, 25–26. Though we have not passed on the question whether, when sovereign immunity bars the claims against the only parties capable of removing the case, subject-matter jurisdiction exists to entertain the remaining claims, cf. n. 3, *infra*, the point is

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[2] The Court's opinion in *Osborn* v. *Haley*, 549 U. S. 225 (2007), had nothing to say about the scope of review that is permissible under § 1447(d), since it held that § 1447(d) was displaced in its entirety by 28 U. S. C. § 2679(d)(2). See 549 U. S., at 243–244 (reasoning that, of the two forum-determining provisions—§ 1447(d), the generally applicable section, and § 2679(d)(2), a special prescription governing Westfall Act cases—"only one can prevail").

certainly debatable. And we conclude that review of the District Court's characterization of its remand as resting upon lack of subject-matter jurisdiction, to the extent it is permissible at all, should be limited to confirming that that characterization was colorable. Lengthy appellate disputes about whether an arguable jurisdictional ground invoked by the district court was properly such would frustrate the purpose of § 1447(d) quite as much as determining whether the factfinding underlying that invocation was correct. See *Kircher*, *supra*, at 649–650 (SCALIA, J., concurring in part and concurring in judgment). Moreover, the line between misclassifying a ground as subject-matter jurisdiction and misapplying a proper ground of subject-matter jurisdiction is sometimes elusively thin. To decide the present case, we need not pass on whether § 1447(d) permits appellate review of a district-court remand order that dresses in jurisdictional clothing a patently nonjurisdictional ground (such as the docket congestion invoked by the District Court in *Thermtron*, 423 U. S., at 344). We hold that when, as here, the District Court relied upon a ground that is colorably characterized as subject-matter jurisdiction, appellate review is barred by § 1447(d).

Petitioner puts forward another explanation for the remand, which we find implausible. Petitioner claims that, because the entire case was properly removed, the District Court had the discretion to invoke a form of *supplemental jurisdiction* to hear the claims against it, and that its remand rested upon the decision not to exercise that discretion. In short, petitioner contends that the District Court was actually relying on *Carnegie-Mellon Univ.* v. *Cohill*, 484 U. S. 343, 357 (1988), which authorized district courts to remand removed state claims when they decide not to exercise supplemental jurisdiction. Brief for Petitioner 45–48; Reply Brief for Petitioner 16–20. It is far from clear, to begin with, (1) that supplemental jurisdiction was even available

in the circumstances of this case;[3] and (2) that when discretionary supplemental jurisdiction is declined the remand is not based on lack of subject-matter jurisdiction for purposes of § 1447(c) and § 1447(d).[4] Assuming those points, however, there is no reason to believe that the District Court's remand was actually based on this unexplained discretionary decision. The District Court itself *never mentioned* the possibility of supplemental jurisdiction, neither in its original decision, see App. to Pet. for Cert. 20a–44a, nor in its order denying petitioner's motion to stay the remand pending appeal, App. 281–286. To the contrary, as described above, it relied upon lack of subject-matter jurisdiction—which, in petitioner's view of things (but see n. 4, this page) would not include a *Cohill* remand. Moreover, it does not appear from the record that petitioner ever even argued to the District Court that supplemental jurisdiction was a basis for retaining the claims against it. There is, in short, no reason to believe that an unmentioned nonexercise of *Cohill* discretion was the basis for the remand.

C

Part of the reason why the Ninth Circuit concluded it had appellate jurisdiction is a legal theory quite different from those discussed and rejected above. Petitioner, along with the other appellants, convinced the court to apply Circuit precedent holding that § 1447(d) does not preclude review of a district court's merits determinations that precede the re-

[3] Petitioner provides no authority from this Court supporting the proposition that a district court presiding over a multiparty removed case can invoke supplemental jurisdiction to hear claims against a party that cannot independently remove when the claims against the only parties authorized to remove are barred by *sovereign immunity.*

[4] We have never passed on whether *Cohill* remands are subject-matter jurisdictional for purposes of post-1988 versions of § 1447(c) and § 1447(d). See *Things Remembered, Inc.* v. *Petrarca*, 516 U. S. 124, 129–130 (1995) (KENNEDY, J., concurring) (noting that the question is open); cf. *Cohill*, 484 U. S., at 355, n. 11 (discussing the pre-1988 version of § 1447(c)).

mand. See 391 F. 3d, at 1023 (citing, *inter alia*, *Pelleport Investors, Inc.* v. *Budco Quality Theatres, Inc.*, 741 F. 2d 273, 276–277 (CA9 1984)). Petitioner has not completely abandoned this argument before us, see Brief for Petitioner 50, and it is in any event desirable to address this aspect of the Ninth Circuit's judgment.

The line of Ninth Circuit jurisprudence upon which petitioner relied appears to be invoking our decision in *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U. S. 140 (1934). There the District Court, in a single decree, had entered one order dismissing a cross-complaint against one party, and another order remanding because there was no diversity of citizenship in light of the dismissal. *Id.*, at 142. We held that appellate jurisdiction existed to review the order of dismissal, although we repeatedly cautioned that the remand order itself could not be set aside. *Id.*, at 143–144. The Ninth Circuit's application of *Waco* to petitioner's appeal was mistaken. As we reiterated in *Kircher*, see 547 U. S., at 645–646, n. 13, *Waco* does not permit an appeal when there is no *order* separate from the unreviewable remand order. Here petitioner can point to no District Court order, separate from the remand, to which it objects and to which the issue of its foreign sovereign status is material. Thus, petitioner's invocation of *Waco* amounts to a request for one of two impermissible outcomes: an advisory opinion as to its FSIA status that will not affect any order of the District Court, or a reversal of the remand order. *Waco* did not, and could not, authorize either form of judicial relief.

D

Finally, petitioner contends, with no textual support, that § 1447(d) is simply inapplicable to a suit removed under the FSIA. It asserts that "§ 1447(d) must yield because Congress could not have intended to grant district judges irrevocable authority to decide questions with such sensitive foreign-relations implications." Brief for Petitioner 49.

We will not ignore a clear jurisdictional statute in reliance upon supposition of what Congress *really* wanted. See *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992). Petitioner's divination of congressional intent is flatly refuted by longstanding precedent:

> "Section 1447(d) applies 'not only to remand orders made in suits removed under [the general removal statute], but to orders of remand made in cases removed under any other statutes, as well.' . . . Absent a clear statutory command to the contrary, we assume that Congress is 'aware of the universality of th[e] practice' of denying appellate review of remand orders when Congress creates a new ground for removal." *Things Remembered*, 516 U. S., at 128 (quoting *United States* v. *Rice*, 327 U. S. 742, 752 (1946); emphasis deleted and alterations in original).

Congress has repeatedly demonstrated its readiness to exempt particular classes of remand orders from § 1447(d) when it wishes—both within the text of § 1447(d) itself (which exempts civil rights cases removed pursuant to 28 U. S. C. § 1443), and in separate statutes, see, *e. g.*, 12 U. S. C. § 1441a(*l*)(3)(C), § 1819(b)(2)(C); 25 U. S. C. § 487(d).

We are well aware that § 1447(d)'s immunization of erroneous remands has undesirable consequences in the FSIA context. A foreign sovereign defendant whose case is wrongly remanded is denied not only the federal forum to which it is entitled (as befalls all remanded parties with meritorious appeals barred by § 1447(d)), but also certain procedural rights that the FSIA specifically provides foreign sovereigns only in federal court (such as the right to a bench trial, see 28 U. S. C. § 1330(a); § 1441(d)). But whether that special concern outweighs § 1447(d)'s general interest in avoiding prolonged litigation on threshold nonmerits questions, see *Kircher*, *supra*, at 640, is a policy debate that belongs in the halls of Congress, not in the hearing room of this Court. As

far as the Third Branch is concerned, what the text of § 1447(d) indisputably does prevails over what it ought to have done.[5]

* * *

Section 1447(d) reflects Congress's longstanding "policy of not permitting interruption of the litigation of the merits of a removed case by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *Rice*, *supra*, at 751. Appellate courts must take that jurisdictional prescription seriously, however pressing the merits

[5] The dissent's belief that there is an implicit FSIA exception to § 1447(d), see *post*, at 239–244 (opinion of BREYER, J.), rests almost exclusively on our recent decision in *Osborn*. The dissent reads *Osborn* to stand for the proposition that any "conflict" between a specific, later-enacted statute and § 1447(d) should be resolved in favor of the former. *Post*, at 240–241. The reason why the dissent is forced to the parenthetical admission that "*Osborn* did not say as much," *post*, at 240, is because the dissent drastically overreads the case. *Osborn* held only that § 1447(d) was trumped by the Westfall Act's explicit provision that removal was conclusive upon the Attorney General's certification: As between "the two antishuttling commands," the Court said, "only one can prevail." 549 U. S., at 244. The opinion was quite clear that the *only* statutory rivalry with which it was concerned was dueling "antishuttling commands": "Only in the extraordinary case in which Congress has ordered the intercourt shuttle to travel just one way—from state to federal court—does today's decision hold sway." *Ibid.* That is why *Osborn* repeatedly emphasized that Westfall Act certification is "'conclusiv[e] . . . *for purposes of removal*,'" *id.*, at 242, 243, an emphasis that the dissent essentially ignores, *post*, at 240–241.

Osborn is no license for courts to assume the legislative role by characterizing the *consequences* of § 1447(d)'s bar on appellate review as creating a *conflict*, leaving it to judges to suppress that provision when they think Congress undervalued or overlooked those consequences. The dissent renders a quintessential policy judgment in concluding that appellate "delay is necessary, indeed, crucial," *post*, at 242, when the rights of a foreign sovereign are at stake. We have no idea whether this is a wise balancing of the various values at issue here. We are confident, however, that the dissent is wrong to think that it would improve the "law in this democracy," *post*, at 244, for judges to accept the lawmaking power that the dissent dangles before them.

of the appeal might seem. We hold that § 1447(d) bars appellate consideration of petitioner's claim that it is a foreign state for purposes of the FSIA. We therefore vacate in part the judgment of the Ninth Circuit and remand the case with instructions to dismiss petitioner's appeal for want of jurisdiction.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE ALITO joins, concurring.

When Congress acted through the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. § 1602 *et seq.* (2000 ed. and Supp. IV), to codify certain protections and immunities for foreign sovereigns and the entities of those sovereigns, it no doubt considered its action to be of importance for maintaining a proper relationship with other nations. And so it is troubling to be required to issue a decision that might well frustrate a policy of importance to our own Government.

As the Court explains, however, the structure and wording of § 1447(d) (2000 ed.) leave us no other choice. There is no latitude for us to reach a different result. If it is true that the statute as written and the judgment we issue today are inconsistent with the intent and purpose Congress wanted to express, then the immediate jeopardy that foreign sovereign entities will now face should justify urgent legislative action to enact the necessary statutory revisions.

JUSTICE BREYER, with whom JUSTICE STEVENS, joins, dissenting.

Unlike the Court, I believe the District Court's remand order is reviewable on appeal. And, reviewing the decision below, I would hold that Powerex is an organ of the Government of British Columbia.

I

The majority concludes that 28 U. S. C. § 1447(d) took from the Ninth Circuit the power to review the District Court's

remand decision. The statutory argument is a strong one. Section 1447(c) says that, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded" to state court; and § 1447(d), referring to subsection (c), adds that a district court "order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 345–346 (1976).

Nonetheless this Court has found exceptions to § 1447's seemingly blanket prohibition. See, *e. g.*, *id.*, at 350–352; *Osborn* v. *Haley*, 549 U. S. 225, 240–244 (2007). In doing so, the Court has recognized that even a statute silent on the subject can create an important conflict with § 1447(d)'s "no appellate review" instruction. And where that is so, we have, in fact, resolved the conflict by reading a later more specific statute as creating an implicit exception to § 1447(d) (though *Osborn* did not say as much). *Id.*, at 243–244.

The subject matter of the Foreign Sovereign Immunity Act of 1976's (FSIA) removal provision, foreign sovereigns, is special. And the FSIA creates serious conflicts with § 1447(d)'s "no appellate review" instruction. The FSIA is later enacted and subject-matter specific. Consequently, I would read into the FSIA a similar exception to § 1447(d), applicable here.

Osborn illustrates my starting point: a conflict with § 1447(d). The Westfall Act, the specific statute at issue in that case, provides for removal to federal court of a state-court lawsuit brought against a federal employee where the state-court lawsuit attacks employee actions within the scope of federal employment. 28 U. S. C. §§ 2679(d)(2)–(3). The Westfall Act authorizes the Attorney General to certify that the employee's actions at issue fall within the scope of federal employment. And the Westfall Act says that the certification "conclusively establish[es]" that fact for removal purposes. §§ 2679(d)(1)–(2). In *Osborn*, we pointed out

that § 1447(d) would permit a district court, without appellate review, to remand in the face of a contrary Attorney General certification. 549 U. S., at 242. Doing so, without appellate review, would thereby permit the district court to substitute its own judgment (as to whether the employee's actions were within the federal "scope of employment") for that of the Attorney General. And the district court would thereby have the unreviewable power to make the Attorney General's determination *non*-conclusive, contrary to what the statute says. Because § 1447(d), if applied, would render this statutory instruction "weightless," we found a conflict with § 1447(d). *Ibid.* And we resolved the conflict in favor of the later enacted, more specific Westfall Act. *Id.*, at 243.

A similarly strong conflict exists here, albeit not with a separate removal provision, but rather with a comprehensive statutory scheme. To understand how that is so, imagine a case not now before us. Imagine that a private plaintiff brings a lawsuit in state court against a noncommercial division of a foreign nation's government, say, a branch of that nation's defense ministry or, for that matter, against the foreign nation itself. The FSIA provides a specific guarantee that such a suit cannot continue (except in certain instances that, for purposes of my example, are not relevant). 28 U. S. C. §§ 1602–1605. It achieves this objective by authorizing the foreign government to remove the case to federal court where a federal judge will determine if the defendant is indeed a foreign government and, if so, dismiss the case. § 1441(d).

What happens if the foreign sovereign removes the case to federal court only to have the federal judge mistakenly remand the case to state court? As in an ordinary case, the lawsuit may well continue in the state tribunal. But, if so, *unlike the ordinary case* (say, a wrongly remanded diversity or "arising under" case) but like *Osborn*, the removing party will have lost considerably more than a choice of forum. The removing party will have lost that which *a different*

portion of the special statute sought to provide, namely, the immunity from suit that the FSIA sought to ensure.

That assurance forms a separate and central FSIA objective. The very purpose of sovereign immunity is to avoid subjecting a foreign sovereign to the rigors and "inconvenience of suit." *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 479 (2003). In such a case, a state court likely will feel bound by the federal court's prior judgment on the lack of immunity (under state law-of-the-case doctrine) and this Court's review (of an adverse state-court judgment) will come too late. In such a case, the FSIA's basic objective (unrelated to choice of forum) will have become "weightless." *Osborn*, *supra*, at 242.

It is difficult to see how this conflict between the FSIA's basic objective and § 1447(d) is any less serious than the conflict at issue in *Osborn*. The statutory objective here, harmonious relations with foreign sovereigns, is more, not less, important. See *Ex parte Peru*, 318 U. S. 578, 587 (1943) (exercising original writ to protect sovereign from erroneous District Court conclusion that it was not immune from suit). See also, *e. g.*, *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 35 (1945); *Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812); H. R. Rep. No. 94–1487, p. 13 (1976) (hereinafter H. R. Rep.) (FSIA intended to avoid "adverse foreign relations consequences").

Neither is a § 1447(d) exception here likely to undermine § 1447(d)'s basic purpose: avoiding the procedural delay that an added federal appeal would create. Avoiding that delay is important in a typical case where only choice of forum is at issue. But that same delay is necessary, indeed, crucial, in the special case where a foreign sovereign's immunity from suit is at issue. At the same time, foreign affairs is itself an exceptional topic, with special risks, special expertise, and special federal authority; hence, our finding a § 1447(d) exception in the FSIA is unlikely to lead courts to create a series of exceptions affecting more typical cases.

See, *e. g.*, *Kircher* v. *Putnam Funds Trust*, 547 U. S. 633, 640–641 (2006) (avoidance of delay is § 1447(d)'s basic purpose).

Finally, as in *Osborn*, the FSIA is a specific, later enacted statute. Cf. 549 U. S., at 243; see generally *Long Island Care at Home, Ltd.* v. *Coke*, *ante*, at 170 (where statutory provisions are inconsistent, "normally the specific governs the general"); *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 384–385 (1992); *Simpson* v. *United States*, 435 U. S. 6, 15 (1978).

Taken together, these considerations lead me to believe that, were a foreign *non*-commercial government entity's immunity from suit at issue, the FSIA would conflict with § 1447(d), leading a court properly to read the FSIA as implicitly creating an exception to § 1447(d), and thereby protecting the sovereign's right to appeal a wrongful remand order.

The removing defendant in this case, of course, is not a foreign sovereign immune from suit. It is a foreign governmental entity that acts in a commercial capacity and consequently is subject to suit. 28 U. S. C. § 1605(a)(2). But the FSIA nonetheless creates an important, though different, conflict. That conflict arises because a different FSIA provision says, "[u]pon removal the action shall be tried by the court *without jury*." § 1441(d) (emphasis added); see H. R. Rep., at 33 ("[O]ne effect of removing an action under the new section 1441(d) will be to extinguish a demand for a jury trial made in the state court"); S. Rep. No. 94–1310, p. 32 (1976) (hereinafter S. Rep.) (same). A wrongful remand would destroy this statutory right. The state-court trial would often proceed *with* a jury; and it is questionable whether even this Court could later set aside an adverse state-court judgment for that reason—at least Congress seems to have thought as much. See H. R. Rep., at 33 ("Because the *judicial power of the United States* specifically encompasses actions between a State, or the Citizens thereof,

and foreign States, this preemption of State court [jury trial] procedures in cases involving foreign sovereigns is clearly constitutional" (emphasis added; citations and internal quotation marks omitted)); S. Rep., at 32 (same).

The conflict is important, this case is special, and we should resolve it by reading the FSIA as implicitly preempting the general application of § 1447(d). Indeed, I do not see how we could read the FSIA differently in this respect depending upon whether commercial or noncommercial sovereign activity is at issue. For these reasons, I believe that the Ninth Circuit correctly determined that it possessed legal authority to review the case.

It is true, as the majority states, that Congress has in other contexts carved out certain removal orders as being specifically reviewable on appeal. *Ante,* at 237. The majority reads these specific statutes to suggest that had Congress intended § 1447(d) not to apply in FSIA cases, it could simply have said so. *Ibid.* However, in fact, for the reasons articulated above, I believe that Congress must have assumed the FSIA overrode § 1447. Congress enacted the FSIA soon after the Court's decision in *Thermtron Products,* 423 U. S., at 345, held that implicit § 1447(d) exceptions might exist. Cf. *Osborn,* 549 U. S., at 241–243 (despite statutory silence, reading Westfall Act as overriding § 1447(d)). And, as I have said, the FSIA would otherwise fail to achieve Congress' basic objectives. Context and purpose make clear that few if any Members of Congress could have wanted to block appellate review here. Were the Court to pay greater attention to statutory objectives and purposes and less attention to a technical parsing of language, it might agree. Were it to agree, we would exercise our *interpretive obligation,* not "lawmaking power," *ante,* at 238, n. 5, with increased fidelity to the intention of those to whom our Constitution delegates that lawmaking power, namely, the Congress of the United States. And, law in this democracy would be all the better for it.

II

I part company with the Ninth Circuit on the merits. The Circuit held that the District Court's remand was proper because, in its view, Powerex is not "*an organ of a . . . political subdivision*" of a "foreign state." 28 U. S. C. § 1603(b)(2) (emphasis added). Hence, it is not an "agency or instrumentality" of a foreign government and falls outside the scope of the FSIA's provision authorizing removal. § 1603(a); see generally *California* v. *NRG Energy Inc.*, 391 F. 3d 1011, 1025–1026 (2004).

In my view, however, Powerex is "an organ" of the Province of British Columbia, a "political subdivision" of Canada. The record makes clear that Powerex is a government-owned and government-operated electric power distribution company, not meaningfully different from ordinary municipal electricity distributors, the Tennessee Valley Authority, or any foreign "nationalized" power producers and distributors, such as Britain's former Central Electricity Generating Board or Electricité de France. See generally C. Harris, Electricity Markets: Pricing, Structures, and Economics 15–20 (2006) (summarizing features of electricity companies in United States and Europe, among others); J. Nelson, Marginal Cost Pricing in Practice 3–6, 32, 37 (1964) (summarizing features of France hydropower industry). See also http://tva.com/abouttva/index.htm (summarizing general features of Tennessee Valley Authority) (all Internet materials as visited June 8, 2007, and available in Clerk of Court's case file); Government Corporation Control Act, § 101, 59 Stat. 597–598 (describing Tennessee Valley Authority as "'wholly owned Government corporation'"); *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 388–389 (1995) (noting that corporate entities in Government Corporation Control Act were incorporated by other government-owned corporations); Dept. of Labor, Bureau of Labor Statistics, Career Guide to Industries, Utilities, online at http://www.bls.gov/oco/cg/cgs018.htm (describing features of public run utilities);

G. Rothwell & T. Gómez, Electricity Economics: Regulation and Deregulation 129–241 (2003) (comparing electricity markets and industries in California and various foreign nations).

Powerex is itself owned and operated by BC Hydro, an entity that all apparently concede is governmental in nature. Brief for Plaintiffs-Respondents 38–40, 42. British Columbia's statutes create BC Hydro as a kind of government agency to produce water-generated electric power. Power Measures Act, S. B. C., ch. 40 (1964); App. to Pet. for Cert. 52a, 118a, 163a–169a. BC Hydro has a board of directors, all of whom are appointed by British Columbia's government. *Id.*, at 58a–59a. It is an "agent of the [provincial] government and its powers may be exercised only as an agent of the government." Hydro Power Authority Act, R. S. B. C., ch. 212, § 3(1) (1996). The District Court concluded that BC Hydro is, in fact, a foreign sovereign entity entitled to immunity. 391 F. 3d, at 1024.

British Columbia's Minister of Energy issued a written directive ordering that BC Hydro create a subsidiary, Powerex, to carry out the specialized tasks of exporting hydro-generated electric power and of importing power, which it is then to distribute to British Columbia residents. App. 235–239, 250–251, 267. Powerex specifically carries out these obligations in accordance with various treaties between Canada and the United States. *Id.*, at 133–155; App. to Pet. for Cert. 55a; see Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, [1964] 15 U. S. T. 1555, T. I. A. S. No. 5638, App. to Pet. for Cert. 61a–82a; Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend d'Oreille River, Apr. 2, 1984, 1469 U. N. T. S. 309, T. I. A. S. No. 11088, App. to

Pet. for Cert. 138a–145a; British Columbia-Seattle Agreement (Mar. 30, 1984), App. 160–171.

Powerex's board members consist of some of BC Hydro's board members and other members whom those members appoint. App. 233–235. The government's comptroller general reviews Powerex's financial operations and regulates the terms under which it conducts business. Financial Administration Act, R. S. B. C., ch. 138, §§ 4.1, 8(2)(c)(i), 75, 79.3 (1996) (FAA), Addendum to Brief for Petitioner 34–36, 40–42 (hereinafter Addendum). British Columbia's fiscal control statute refers to Powerex as a "'government body.'" FAA § 1, Addendum 31, 33. And other British Columbia laws refer to its employees as "'public office holders.'" Lobbyists Registration Act, S. B. C., ch. 42, § 1 (2001), Addendum 50. Powerex pays no income taxes. See Income Tax Amendments Act, 1997, S. C. 1998, ch. 19, §178 (to be codified at R. S. C., ch. 1, §§ 149(1)(*d*), (*d*.2), Addendum 45; App. to Pet. for Cert. 58a; Brief for Petitioner 31. The British Columbian government, through BC Hydro, has sole beneficial ownership and control of Powerex. App. 267. If Powerex earns a profit, that profit must be rebated directly or indirectly to British Columbia's residents. *Id.*, at 215, 238. I can find no significant difference between Powerex and the classical government entities to which I previously referred. *Supra,* at 245.

The Ninth Circuit noted that Powerex may earn a profit and that the government of British Columbia does not provide financial support. And the Ninth Circuit thought these facts made a critical difference. But a well-run nationalized firm *should* make a reasonable profit; nor should it have to borrow from the government itself. See, *e. g.*, Nelson, *supra,* at 8–12; Harris, *supra*, at 125, 130–132; Rothwell & Gómez, *supra,* at 3–4. The relevant question is not *whether* Powerex earns a profit but where does that profit go? Here it does not go to private shareholders; it goes to the benefit

of the public in payments to the province and reduced electricity prices. App. 215, 238.

The Ninth Circuit also pointed out that certain provincial regulations that apply to other governmental departments do not apply to Powerex. That fact proves little. The Tennessee Valley Authority, which is "perhaps the best known of the American public corporations," *First Nat. City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U. S. 611, 625, n. 15 (1983), is not subject to certain federal regulations regarding hiring that apply to other governmental departments. See, *e. g.*, 16 U. S. C. § 831b.

In sum, Powerex is the kind of government entity that Congress had in mind when it wrote the FSIA's "commercial activit[y]" provisions. See generally 28 U. S. C. § 1602 *et seq.;* H. R. Rep., at 15; S. Rep., at 14; *Banco*, *supra*, at 624–625.

For these reasons, I believe we should consider, and reverse, the Ninth Circuit's determination. With respect, I dissent.

Syllabus

BRENDLIN *v.* CALIFORNIA

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 06–8120. Argued April 23, 2007—Decided June 18, 2007

After officers stopped a car to check its registration without reason to believe it was being operated unlawfully, one of them recognized petitioner Brendlin, a passenger in the car. Upon verifying that Brendlin was a parole violator, the officers formally arrested him and searched him, the driver, and the car, finding, among other things, methamphetamine paraphernalia. Charged with possession and manufacture of that substance, Brendlin moved to suppress the evidence obtained in searching his person and the car, arguing that the officers lacked probable cause or reasonable suspicion to make the traffic stop, which was an unconstitutional seizure of his person. The trial court denied the motion, but the California Court of Appeal reversed, holding that Brendlin was seized by the traffic stop, which was unlawful. Reversing, the State Supreme Court held that suppression was unwarranted because a passenger is not seized as a constitutional matter absent additional circumstances that would indicate to a reasonable person that he was the subject of the officer's investigation or show of authority.

Held: When police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and so may challenge the stop's constitutionality. Pp. 254–263.

(a) A person is seized and thus entitled to challenge the government's action when officers, by physical force or a show of authority, terminate or restrain the person's freedom of movement through means intentionally applied. *Florida* v. *Bostick*, 501 U. S. 429, 434; *Brower* v. *County of Inyo*, 489 U. S. 593, 597. There is no seizure without that person's actual submission. See, *e. g.*, *California* v. *Hodari D.*, 499 U. S. 621, 626, n. 2. When police actions do not show an unambiguous intent to restrain or when an individual's submission takes the form of passive acquiescence, the test for telling when a seizure occurs is whether, in light of all the surrounding circumstances, a reasonable person would have believed he was not free to leave. *E. g.*, *United States* v. *Mendenhall*, 446 U. S. 544, 554 (principal opinion). But when a person "has no desire to leave" for reasons unrelated to the police presence, the "coercive effect of the encounter" can be measured better by asking whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, *supra*, at 435–436. Pp. 254–256.

Syllabus

(b) Brendlin was seized because no reasonable person in his position when the car was stopped would have believed himself free to "terminate the encounter" between the police and himself. *Bostick*, *supra*, at 436. Any reasonable passenger would have understood the officers to be exercising control to the point that no one in the car was free to depart without police permission. A traffic stop necessarily curtails a passenger's travel just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on "privacy and personal security" does not normally (and did not here) distinguish between passenger and driver. *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 554. An officer who orders a particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect the officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place. It is also reasonable for passengers to expect that an officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety. See, *e. g.*, *Maryland* v. *Wilson*, 519 U. S. 408, 414–415. The Court's conclusion comports with the views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on the question. Pp. 256–259.

(c) The State Supreme Court's contrary conclusion reflects three premises with which this Court respectfully disagrees. First, the view that the police only intended to investigate the car's driver and did not direct a show of authority toward Brendlin impermissibly shifts the issue from the intent of the police as objectively manifested to the motive of the police for taking the intentional action to stop the car. Applying the objective *Mendenhall* test resolves any ambiguity by showing that a reasonable passenger would understand that he was subject to the police display of authority. Second, the state court's assumption that Brendlin, as the passenger, had no ability to submit to the police show of authority because only the driver was in control of the moving car is unavailing. Brendlin had no effective way to signal submission while the car was moving, but once it came to a stop he could, and apparently did, submit by staying inside. Third, there is no basis for the state court's fear that adopting the rule this Court applies would encompass even those motorists whose movement has been impeded due

to the traffic stop of another car. An occupant of a car who knows he is stuck in traffic because another car has been pulled over by police would not perceive the show of authority as directed at him or his car. Pp. 259–263.

(d) The state courts are left to consider in the first instance whether suppression turns on any other issue. P. 263.

38 Cal. 4th 1107, 136 P. 3d 845, vacated and remanded.

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

Elizabeth M. Campbell, by appointment of the Court, 549 U. S. 1263, argued the cause for petitioner. With her on the briefs were *Jeffrey T. Green*, *Richard A. Kaplan*, and *Sarah O'Rourke Schrup*.

Clifford E. Zall, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Edmund G. Brown, Jr.*, Attorney General, *Manuel M. Medeiros*, State Solicitor General, *Dane R. Gillette*, Chief Assistant Attorney General, *Michael P. Farrell*, Senior Assistant Attorney General, *Donald E. de Nicola*, Deputy State Solicitor, *Michael A. Canzoneri*, Supervising Deputy Attorney General, and *Doris A. Calandra*, Deputy Attorney General.*

JUSTICE SOUTER delivered the opinion of the Court.

When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. The question in this case is whether the same is true of a passenger. We hold that a passenger is seized as well and so may challenge the constitutionality of the stop.

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *Reginald T. Shuford*, *Dennis D. Parker*, *Susan N. Herman*, *Dennis Courtland Hayes*, and *Kenneth Kimerling;* and for the National Association of Criminal Defense Lawyers et al. by *Jonathan E. Nuechterlein*, *Sambhav Sankar*, *Pamela Harris*, and *Frances H. Pratt*.

Kym L. Worthy and *Timothy A. Baughman* filed a brief of *amicus curiae* for Wayne County, Michigan, urging affirmance.

I

Early in the morning of November 27, 2001, Deputy Sheriff Robert Brokenbrough and his partner saw a parked Buick with expired registration tags. In his ensuing conversation with the police dispatcher, Brokenbrough learned that an application for renewal of registration was being processed. The officers saw the car again on the road, and this time Brokenbrough noticed its display of a temporary operating permit with the number "11," indicating it was legal to drive the car through November. App. 115. The officers decided to pull the Buick over to verify that the permit matched the vehicle, even though, as Brokenbrough admitted later, there was nothing unusual about the permit or the way it was affixed. Brokenbrough asked the driver, Karen Simeroth, for her license and saw a passenger in the front seat, petitioner Bruce Brendlin, whom he recognized as "one of the Brendlin brothers." *Id.*, at 65. He recalled that either Scott or Bruce Brendlin had dropped out of parole supervision and asked Brendlin to identify himself.[1] Brokenbrough returned to his cruiser, called for backup, and verified that Brendlin was a parole violator with an outstanding no-bail warrant for his arrest. While he was in the patrol car, Brokenbrough saw Brendlin briefly open and then close the passenger door of the Buick. Once reinforcements arrived, Brokenbrough went to the passenger side of the Buick, ordered him out of the car at gunpoint, and declared him under arrest. When the police searched Brendlin incident to arrest, they found an orange syringe cap on his person. A patdown search of Simeroth revealed syringes and a plastic bag of a green leafy substance, and she was also formally arrested. Officers then searched the car and found tubing, a scale, and other things used to produce methamphetamine.

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[1] The parties dispute the accuracy of the transcript of the suppression hearing and disagree as to whether Brendlin gave his name or the false name "Bruce Brown." App. 115.

Brendlin was charged with possession and manufacture of methamphetamine, and he moved to suppress the evidence obtained in the searches of his person and the car as fruits of an unconstitutional seizure, arguing that the officers lacked probable cause or reasonable suspicion to make the traffic stop. He did not assert that his Fourth Amendment rights were violated by the search of Simeroth's vehicle, cf. *Rakas* v. *Illinois*, 439 U. S. 128 (1978), but claimed only that the traffic stop was an unlawful seizure of his person. The trial court denied the suppression motion after finding that the stop was lawful and Brendlin was not seized until Brokenbrough ordered him out of the car and formally arrested him. Brendlin pleaded guilty, subject to appeal on the suppression issue, and was sentenced to four years in prison.

The California Court of Appeal reversed the denial of the suppression motion, holding that Brendlin was seized by the traffic stop, which the court held unlawful. 8 Cal. Rptr. 3d 882 (2004) (officially depublished). By a narrow majority, the Supreme Court of California reversed. The State Supreme Court noted California's concession that the officers had no reasonable basis to suspect unlawful operation of the car, 38 Cal. 4th 1107, 1114, 136 P. 3d 845, 848 (2006),[2] but still held suppression unwarranted because a passenger "is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer's investigation or show of authority," *id.*, at 1111, 136 P. 3d, at 846. The court reasoned that Brendlin was not seized by the traffic stop because Simeroth was its exclusive target, *id.*, at 1118, 136 P. 3d, at 851, that a passenger cannot submit to an officer's show of authority while the driver controls the car,

[2] California conceded that the police officers lacked reasonable suspicion to justify the traffic stop because a "'vehicle with an application for renewal of expired registration would be expected to have a temporary operating permit.'" 38 Cal. 4th, at 1114, 136 P. 3d, at 848 (quoting Brief for Respondent California in No. S123133 (Sup. Ct. Cal.), p. 24).

id., at 1118–1119, 136 P. 3d, at 851–852, and that once a car has been pulled off the road, a passenger "would feel free to depart or otherwise to conduct his or her affairs as though the police were not present," *id.*, at 1119, 136 P. 3d, at 852. In dissent, Justice Corrigan said that a traffic stop entails the seizure of a passenger even when the driver is the sole target of police investigation because a passenger is detained for the purpose of ensuring an officer's safety and would not feel free to leave the car without the officer's permission. *Id.*, at 1125, 136 P. 3d, at 856.

We granted certiorari to decide whether a traffic stop subjects a passenger, as well as the driver, to Fourth Amendment seizure, 549 U. S. 1177 (2007). We now vacate.

II

A

A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, "'by means of physical force or show of authority,'" terminates or restrains his freedom of movement, *Florida* v. *Bostick*, 501 U. S. 429, 434 (1991) (quoting *Terry* v. *Ohio*, 392 U. S. 1, 19, n. 16 (1968)), "*through means intentionally applied*," *Brower* v. *County of Inyo*, 489 U. S. 593, 597 (1989) (emphasis in original). Thus, an "unintended person . . . [may be] the object of the detention," so long as the detention is "willful" and not merely the consequence of "an unknowing act." *Id.*, at 596; cf. *County of Sacramento* v. *Lewis*, 523 U. S. 833, 844 (1998) (no seizure where a police officer accidentally struck and killed a motorcycle passenger during a high-speed pursuit). A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned. See *California* v. *Hodari D.*, 499 U. S. 621, 626, n. 2 (1991); *Lewis*, *supra*, at 844, 845, n. 7.

When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in *United States* v. *Mendenhall*, 446 U. S. 544 (1980), who wrote that a seizure occurs if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," *id.*, at 554 (principal opinion). Later on, the Court adopted Justice Stewart's touchstone, see, *e. g.*, *Hodari D.*, *supra*, at 627; *Michigan* v. *Chesternut*, 486 U. S. 567, 573 (1988); *INS* v. *Delgado*, 466 U. S. 210, 215 (1984), but added that when a person "has no desire to leave" for reasons unrelated to the police presence, the "coercive effect of the encounter" can be measured better by asking whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter," *Bostick*, *supra*, at 435–436; see also *United States* v. *Drayton*, 536 U. S. 194, 202 (2002).

The law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver "even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware* v. *Prouse*, 440 U. S. 648, 653 (1979); see also *Whren* v. *United States*, 517 U. S. 806, 809–810 (1996). And although we have not, until today, squarely answered the question whether a passenger is also seized, we have said over and over in dicta that during a traffic stop an officer seizes everyone in the vehicle, not just the driver. See, *e. g.*, *Prouse*, *supra*, at 653 ("[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth and Fourteenth] Amendments"); *Colorado* v. *Bannister*, 449 U. S. 1, 4, n. 3 (1980) *(per curiam)* ("There can be no question that the stopping of a vehicle and the detention of its occupants constitute a 'seizure' within the meaning of the Fourth Amendment"); *Berkemer* v. *McCarty*,

468 U. S. 420, 436–437 (1984) ("[W]e have long acknowledged that stopping an automobile and detaining its occupants constitute a seizure" (internal quotation marks omitted)); *United States* v. *Hensley*, 469 U. S. 221, 226 (1985) ("[S]topping a car and detaining its occupants constitute a seizure"); *Whren*, *supra*, at 809–810 ("Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]").

We have come closest to the question here in two cases dealing with unlawful seizure of a passenger, and neither time did we indicate any distinction between driver and passenger that would affect the Fourth Amendment analysis. *Delaware* v. *Prouse* considered grounds for stopping a car on the road and held that Prouse's suppression motion was properly granted. We spoke of the arresting officer's testimony that Prouse was in the back seat when the car was pulled over, see 440 U. S., at 650, n. 1, described Prouse as an occupant, not as the driver, and referred to the car's "occupants" as being seized, *id.*, at 653. Justification for stopping a car was the issue again in *Whren* v. *United States*, where we passed upon a Fourth Amendment challenge by two petitioners who moved to suppress drug evidence found during the course of a traffic stop. See 517 U. S., at 809. Both driver and passenger claimed to have been seized illegally when the police stopped the car; we agreed and held suppression unwarranted only because the stop rested on probable cause. *Id.*, at 809–810, 819.

B

The State concedes that the police had no adequate justification to pull the car over, see n. 2, *supra*, but argues that the passenger was not seized and thus cannot claim that the evidence was tainted by an unconstitutional stop. We resolve this question by asking whether a reasonable person

in Brendlin's position when the car stopped would have believed himself free to "terminate the encounter" between the police and himself. *Bostick*, 501 U. S., at 436. We think that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.

A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on "privacy and personal security" does not normally (and did not here) distinguish between passenger and driver. *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 554 (1976). An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place. Cf. *Drayton*, *supra*, at 197–199, 203–204 (finding no seizure when police officers boarded a stationary bus and asked passengers for permission to search for drugs).[3]

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[3] Of course, police may also stop a car solely to investigate a passenger's conduct. See, *e. g.*, *United States* v. *Rodriguez-Diaz*, 161 F. Supp. 2d 627, 629, n. 1 (Md. 2001) (passenger's violation of local seatbelt law); *People* v. *Roth*, 85 P. 3d 571, 573 (Colo. App. 2003) (passenger's violation of littering ordinance). Accordingly, a passenger cannot assume, merely from the fact of a traffic stop, that the driver's conduct is the cause of the stop.

It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety. In *Maryland* v. *Wilson*, 519 U. S. 408 (1997), we held that during a lawful traffic stop an officer may order a passenger out of the car as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk. *Id.*, at 414–415; cf. *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977) *(per curiam)* (driver may be ordered out of the car as a matter of course). In fashioning this rule, we invoked our earlier statement that " '[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.' " *Wilson*, *supra*, at 414 (quoting *Michigan* v. *Summers*, 452 U. S. 692, 702–703 (1981)). What we have said in these opinions probably reflects a societal expectation of " 'unquestioned [police] command' " at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission. *Wilson*, *supra*, at 414.[4]

Our conclusion comports with the views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on the question. See *United States* v. *Kimball*, 25 F. 3d 1, 5 (CA1 1994); *United States* v. *Mosley*, 454 F. 3d 249, 253 (CA3 2006); *United States* v. *Rusher*, 966 F. 2d 868, 874, n. 4 (CA4 1992); *United States* v. *Grant*, 349 F. 3d 192, 196 (CA5 2003); *United States* v. *Perez*, 440 F. 3d 363, 369 (CA6 2006); *United States* v. *Powell*, 929 F. 2d 1190, 1195 (CA7 1991); *United States* v. *Ameling*, 328 F. 3d 443, 446–447, n. 3 (CA8 2003); *United States* v. *Twilley*, 222 F. 3d 1092, 1095

[4] Although the State Supreme Court inferred from Brendlin's decision to open and close the passenger door during the traffic stop that he was "awar[e] of the available options," 38 Cal. 4th 1107, 1120, 136 P. 3d 845, 852 (2006), this conduct could equally be taken to indicate that Brendlin felt compelled to remain inside the car. In any event, the test is not what Brendlin felt but what a reasonable passenger would have understood.

(CA9 2000); *United States* v. *Eylicio-Montoya*, 70 F. 3d 1158, 1163–1164 (CA10 1995); *State* v. *Bowers*, 334 Ark. 447, 451–452, 976 S. W. 2d 379, 381–382 (1998); *State* v. *Haworth*, 106 Idaho 405, 405–406, 679 P. 2d 1123, 1123–1124 (1984); *People* v. *Bunch*, 207 Ill. 2d 7, 13, 796 N. E. 2d 1024, 1029 (2003); *State* v. *Eis*, 348 N. W. 2d 224, 226 (Iowa 1984); *State* v. *Hodges*, 252 Kan. 989, 1002–1005, 851 P. 2d 352, 361–362 (1993); *State* v. *Carter*, 69 Ohio St. 3d 57, 63, 630 N. E. 2d 355, 360 (1994) *(per curiam); State* v. *Harris*, 206 Wis. 2d 243, 253–258, 557 N. W. 2d 245, 249–251 (1996). And the treatise writers share this prevailing judicial view that a passenger may bring a Fourth Amendment challenge to the legality of a traffic stop. See, *e. g.*, 6 W. LaFave, Search and Seizure § 11.3(e), pp. 194, 195, and n. 277 (4th ed. 2004 and Supp. 2007) ("If either the stopping of the car, the length of the passenger's detention thereafter, or the passenger's removal from it are unreasonable in a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit" (footnote omitted)); 1 W. Ringel, Searches & Seizures, Arrests and Confessions § 11:20, p. 11–98 (2d ed. 2007) ("[A] law enforcement officer's stop of an automobile results in a seizure of both the driver and the passenger").[5]

C

The contrary conclusion drawn by the Supreme Court of California, that seizure came only with formal arrest, reflects three premises as to which we respectfully disagree. First, the State Supreme Court reasoned that Brendlin was not seized by the stop because Deputy Sheriff Brokenbrough only intended to investigate Simeroth and did not direct a

[5] Only two State Supreme Courts, other than California's, have stood against this tide of authority. See *People* v. *Jackson*, 39 P. 3d 1174, 1184–1186 (Colo. 2002) (en banc); *State* v. *Mendez*, 137 Wash. 2d 208, 222–223, 970 P. 2d 722, 729 (1999).

show of authority toward Brendlin. The court saw Brokenbrough's "flashing lights [as] directed at the driver," and pointed to the lack of record evidence that Brokenbrough "was even aware [Brendlin] was in the car prior to the vehicle stop." 38 Cal. 4th, at 1118, 136 P. 3d, at 851. But that view of the facts ignores the objective *Mendenhall* test of what a reasonable passenger would understand. To the extent that there is anything ambiguous in the show of force (was it fairly seen as directed only at the driver or at the car and its occupants?), the test resolves the ambiguity, and here it leads to the intuitive conclusion that all the occupants were subject to like control by the successful display of authority. The State Supreme Court's approach, on the contrary, shifts the issue from the intent of the police as objectively manifested to the motive of the police for taking the intentional action to stop the car, and we have repeatedly rejected attempts to introduce this kind of subjectivity into Fourth Amendment analysis. See, *e. g.*, *Whren*, 517 U. S., at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"); *Chesternut*, 486 U. S., at 575, n. 7 ("[T]he subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted"); *Mendenhall*, 446 U. S., at 554, n. 6 (principal opinion) (disregarding a Government agent's subjective intent to detain Mendenhall); cf. *Rakas*, 439 U. S., at 132–135 (rejecting the "target theory" of Fourth Amendment standing, which would have allowed "any criminal defendant at whom a search was directed" to challenge the legality of the search (internal quotation marks omitted)).

California defends the State Supreme Court's ruling on this point by citing our cases holding that seizure requires a purposeful, deliberate act of detention. See Brief for Respondent 9–14. But *Chesternut*, *supra*, answers that argument. The intent that counts under the Fourth Amendment

is the "intent [that] has been conveyed to the person confronted," *id.*, at 575, n. 7, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized. Our most recent cases are in accord on this point. In *Lewis*, 523 U. S. 833, we considered whether a seizure occurred when an officer accidentally ran over a passenger who had fallen off a motorcycle during a high-speed chase, and in holding that no seizure took place, we stressed that the officer stopped Lewis's movement by accidentally crashing into him, not "through means intentionally applied." *Id.*, at 844 (emphasis deleted; internal quotation marks omitted). We did not even consider, let alone emphasize, the possibility that the officer had meant to detain the driver only and not the passenger. Nor is *Brower*, 489 U. S. 593, to the contrary, where it was dispositive that "Brower was meant to be stopped by the physical obstacle of the roadblock—and that he was so stopped." *Id.*, at 599. California reads this language to suggest that for a specific occupant of the car to be seized he must be the motivating target of an officer's show of authority, see Brief for Respondent 12, as if the thrust of our observation were that Brower, and not someone else, was "meant to be stopped." But our point was not that Brower alone was the target but that officers detained him "through means intentionally applied"; if the car had had another occupant, it would have made sense to hold that he too had been seized when the car collided with the roadblock. Neither case, then, is at odds with our holding that the issue is whether a reasonable passenger would have perceived that the show of authority was at least partly directed at him, and that he was thus not free to ignore the police presence and go about his business.

Second, the Supreme Court of California assumed that Brendlin, "as the passenger, had no ability to submit to the deputy's show of authority" because only the driver was in control of the moving vehicle. 38 Cal. 4th, at 1118, 1119, 136

P. 3d, at 852. But what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away. Here, Brendlin had no effective way to signal submission while the car was still moving on the roadway, but once it came to a stop he could, and apparently did, submit by staying inside.

Third, the State Supreme Court shied away from the rule we apply today for fear that it "would encompass even those motorists following the vehicle subject to the traffic stop who, by virtue of the original detention, are forced to slow down and perhaps even come to a halt in order to accommodate that vehicle's submission to police authority." *Id.*, at 1120, 136 P. 3d, at 853. But an occupant of a car who knows that he is stuck in traffic because another car has been pulled over (like the motorist who cannot even make out why the road is suddenly clogged) would not perceive a show of authority as directed at him or his car. Such incidental restrictions on freedom of movement would not tend to affect an individual's "sense of security and privacy in traveling in an automobile." *Prouse*, 440 U. S., at 662. Nor would the consequential blockage call for a precautionary rule to avoid the kind of "arbitrary and oppressive interference by [law] enforcement officials with the privacy and personal security of individuals" that the Fourth Amendment was intended to limit. *Martinez-Fuerte*, 428 U. S., at 554.[6]

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[6] California claims that, under today's rule, "all taxi cab and bus passengers would be 'seized' under the Fourth Amendment when the cab or bus driver is pulled over by the police for running a red light." Brief for Respondent 23. But the relationship between driver and passenger is not the same in a common carrier as it is in a private vehicle, and the expectations of police officers and passengers differ accordingly. In those cases, as here, the crucial question would be whether a reasonable person in the passenger's position would feel free to take steps to terminate the encounter.

Indeed, the consequence to worry about would not flow from our conclusion, but from the rule that almost all courts have rejected. Holding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal.[7] The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to run the kind of "roving patrols" that would still violate the driver's Fourth Amendment right. See, *e. g.*, *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 273 (1973) (stop and search by Border Patrol agents without a warrant or probable cause violated the Fourth Amendment); *Prouse*, *supra*, at 663 (police spot check of driver's license and registration without reasonable suspicion violated the Fourth Amendment).

* * *

Brendlin was seized from the moment Simeroth's car came to a halt on the side of the road, and it was error to deny his suppression motion on the ground that seizure occurred only at the formal arrest. It will be for the state courts to consider in the first instance whether suppression turns on any other issue. The judgment of the Supreme Court of California is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[7] Compare *Delaware* v. *Prouse*, 440 U. S. 648, 663 (1979) (requiring "at least articulable and reasonable suspicion" to support random, investigative traffic stops), and *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 880–884 (1975) (same), with *Whren* v. *United States*, 517 U. S. 806, 810 (1996) ("[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred"), and *Atwater* v. *Lago Vista*, 532 U. S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender").

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CREDIT SUISSE SECURITIES (USA) LLC, FKA CREDIT SUISSE FIRST BOSTON LLC, ET AL. *v.* BILLING ET AL.

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

No. 05–1157. Argued March 27, 2007—Decided June 18, 2007

Respondent investors filed suit, alleging that petitioner investment banks, acting as underwriters, violated antitrust laws when they formed syndicates to help execute initial public offerings for several hundred technology-related companies. Respondents claim that the underwriters unlawfully agreed that they would not sell newly issued securities to a buyer unless the buyer committed (1) to buy additional shares of that security later at escalating prices (known as "laddering"), (2) to pay unusually high commissions on subsequent security purchases from the underwriters, or (3) to purchase from the underwriters other less desirable securities (known as "tying"). The underwriters moved to dismiss, claiming that federal securities law impliedly precludes application of antitrust laws to the conduct in question. The District Court dismissed the complaints, but the Second Circuit reversed.

Held: The securities law implicitly precludes the application of the antitrust laws to the conduct alleged in this case. Pp. 270–285.

(a) Where regulatory statutes are silent in respect to antitrust, courts must determine whether, and in what respects, they implicitly preclude the antitrust laws' application. Taken together, *Silver* v. *New York Stock Exchange*, 373 U. S. 341; *Gordon* v. *New York Stock Exchange, Inc.*, 422 U. S. 659; and *United States* v. *National Assn. of Securities Dealers, Inc.*, 422 U. S. 694 *(NASD)*, make clear that a court deciding this preclusion issue is deciding whether, given context and likely consequences, there is a "clear repugnancy" between the securities law and the antitrust complaint, *i. e.*, whether the two are "clearly incompatible." Moreover, *Gordon* and *NASD,* in finding sufficient incompatibility to warrant an implication of preclusion, treated as critical: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. In addition, (4) in *Gordon* and *NASD* the possible conflict affected practices that lie squarely within an area of financial market activity that securities law seeks to regulate. Pp. 270–276.

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(b) Several considerations—the underwriters' efforts jointly to promote and sell newly issued securities is central to the proper functioning of well-regulated capital markets; the law grants the Securities and Exchange Commission (SEC) authority to supervise such activities; and the SEC has continuously exercised its legal authority to regulate this type of conduct—show that the first, second, and fourth conditions are satisfied in this case. This leaves the third condition: whether there is a conflict rising to the level of incompatibility. Pp. 276–277.

(c) The complaints here can be read as attacking the *manner* in which the underwriters jointly seek to collect "excessive" commissions through the practices of laddering, tying, and collecting excessive commissions, which according to respondents the SEC itself has already disapproved and, in all likelihood, will not approve in the foreseeable future. Nonetheless, certain considerations, taken together, lead to the conclusion that securities law and antitrust law are clearly incompatible in this context. Pp. 278–285.

(1) First, to permit antitrust actions such as this threatens serious securities-related harm. For one thing, a fine, complex, detailed line separates activity that the SEC permits or encourages from activity that it forbids. And the SEC has the expertise to distinguish what is forbidden from what is allowed. For another thing, reasonable but contradictory inferences may be drawn from overlapping evidence that shows both unlawful antitrust activity and lawful securities marketing activity. Further, there is a serious risk that antitrust courts, with different nonexpert judges and different nonexpert juries, will produce inconsistent results. Together these factors mean there is no practical way to confine antitrust suits so that they challenge only the kind of activity the investors seek to target, which is presently unlawful and will likely remain unlawful under the securities law. Rather, these considerations suggest that antitrust courts are likely to make unusually serious mistakes in this respect. And that threat means that underwriters must act to avoid not simply conduct that the securities law forbids, but also joint conduct that the securities law permits or encourages. Thus, allowing an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities market. Pp. 279–283.

(2) Second, any enforcement-related need for an antitrust lawsuit is unusually small. For one thing, the SEC actively enforces the rules and regulations that forbid the conduct in question. For another, investors harmed by underwriters' unlawful practices may sue and obtain damages under the securities law. Finally, the fact that the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations

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makes it somewhat less necessary to rely on antitrust actions to address anticompetitive behavior. Pp. 283–284.

(3) In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct. Together these considerations indicate a serious conflict between application of the antitrust laws and proper enforcement of the securities law. The Solicitor General's proposal to avoid this conflict does not convincingly address these concerns. Pp. 284–285.

426 F. 3d 130, reversed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, SOUTER, GINSBURG, and ALITO, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 285. THOMAS, J., filed a dissenting opinion, *post*, p. 287. KENNEDY, 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 *Kenneth S. Geller*, *Timothy S. Bishop*, *John P. Schmitz*, *Robert B. McCaw*, *Louis R. Cohen*, *Ali M. Stoeppelwerth*, *Noah A. Levine*, *Andrew J. Frackman*, *Timothy J. Muris*, *Richard G. Parker*, *Carter G. Phillips*, *A. Robert Pietrzak*, *Andrew B. Clubok*, *Brant W. Bishop*, *Bradley J. Bondi*, *Shepard Goldfein*, *Preeta D. Bansal*, *Richard A. Cirillo*, *Moses Silverman*, *Jon R. Roellke*, *Jeffrey H. Drichta*, *Paul Gonson*, *Glenn R. Reichardt*, *Gandolfo V. DiBlasi*, *Penny Shane*, *David M. J. Rein*, *Randy M. Mastro*, *John A. Herfort*, *Steven Wolowitz*, *Gerald J. Fields*, *David W. Ichel*, *Jayma M. Meyer*, *John D. Donovan, Jr.*, and *Robert G. Jones*.

Solicitor General Clement argued the cause for the United States as *amicus curiae*. With him on the brief were *Assistant Attorney General Barnett*, *Deputy Solicitor General Hungar*, *Deputy Assistant Attorney General Meyer*, *Douglas Hallward-Driemeier*, *Catherine G. O'Sullivan*, *Nancy C. Garrison*, and *Richard M. Humes*.

Christopher Lovell argued the cause for respondents. With him on the brief for respondent Billing et al. were *Gary S. Jacobson*, *Melvyn I. Weiss*, *Howard B. Sirota*, *Fred Tay-*

lor Isquith, *J. Douglas Richards*, *Einer Elhauge*, and *Jonathan R. Macey*. *Russel H. Beatie* filed a brief for respondent Pfeiffer.*

JUSTICE BREYER delivered the opinion of the Court.

A group of buyers of newly issued securities have filed an antitrust lawsuit against underwriting firms that market and distribute those issues. The buyers claim that the underwriters unlawfully agreed with one another that they would not sell shares of a popular new issue to a buyer unless that buyer committed (1) to buy additional shares of that security later at escalating prices (a practice called "laddering"), (2) to pay unusually high commissions on subsequent security purchases from the underwriters, or (3) to purchase from the underwriters other less desirable securities (a practice called "tying"). The question before us is whether there is a "'plain repugnancy'" between these antitrust claims and the federal securities law. See *Gordon* v. *New York Stock Exchange, Inc.*, 422 U. S. 659, 682 (1975) (quoting *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 350–351 (1963)). We conclude that there is. Consequently we must interpret the securities laws as implicitly precluding the application of the antitrust laws to the conduct alleged

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*Briefs of *amici curiae* urging reversal were filed for the National Association of Securities Dealers, Inc., by *Theodore B. Olson*, *F. Joseph Warin*, *Douglas R. Cox*, and *Amir C. Tayrani;* for NYSE Group, Inc., by *Jay N. Fastow;* for the Securities Industry and Financial Markets Association et al. by *Roy T. Englert, Jr.*, *Gary A. Orseck*, *Robin S. Conrad*, *Amar D. Sarwal*, and *Robert H. Bork;* for the Washington Legal Foundation by *James A. Meyers*, *Garret G. Rasmussen*, *Daniel J. Popeo*, and *Richard A. Samp;* and for W. R. Hambrecht + Co., LLC, by *Paul Michael Kaplan*.

Briefs of *amici curiae* urging affirmance were filed for the State of New York by *Andrew M. Cuomo*, Attorney General, *Barbara D. Underwood*, Solicitor General, *Daniel Smirlock*, Deputy Solicitor General, *Andrew D. Bing*, Assistant Solicitor General, *Richard E. Grimm*, and *Sarah M. Hubbard*, Assistant Attorney General; and for the American Antitrust Institute by *Joseph Goldberg* and *Daniel E. Gustafson*.

in this case. See 422 U. S., at 682, 689, 691; see also *United States* v. *National Assn. of Securities Dealers, Inc.*, 422 U. S. 694 (1975) *(NASD); Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963).

I

A

The underwriting practices at issue take place during the course of an initial public offering (IPO) of shares in a company. An IPO presents an opportunity to raise capital for a new enterprise by selling shares to the investing public. A group of underwriters will typically form a syndicate to help market the shares. The syndicate will investigate and estimate likely market demand for the shares at various prices. It will then recommend to the firm a price and the number of shares it believes the firm should offer. Ultimately, the syndicate will promise to buy from the firm all the newly issued shares on a specified date at a fixed, agreed-upon price, which price the syndicate will then charge investors when it resells the shares. When the syndicate buys the shares from the issuing firm, however, the firm gives the syndicate a price discount, which amounts to the syndicate's commission. See generally L. Loss & J. Seligman, Fundamentals of Securities Regulation 66–72 (4th ed. 2001).

At the heart of the syndicate's IPO marketing activity lie its efforts to determine suitable initial share prices and quantities. At first, the syndicate makes a preliminary estimate that it submits in a registration statement to the Securities and Exchange Commission (SEC). It then conducts a "road show" during which syndicate underwriters and representatives of the offering firm meet potential investors and engage in a process that the industry calls "bookbuilding." During this time, the underwriters and firm representatives present information to investors about the company and the stock. And they attempt to gauge the strength of the investors' interest in purchasing the stock. For this purpose, under-

writers might well ask the investors how their interest would vary depending upon price and the number of shares that are offered. They will learn, among other things, which investors might buy shares, in what quantities, at what prices, and for how long each is likely to hold purchased shares before selling them to others.

On the basis of this kind of information, the members of the underwriting syndicate work out final arrangements with the issuing firm, fixing the price per share and specifying the number of shares for which the underwriters will be jointly responsible. As we have said, after buying the shares at a discounted price, the syndicate resells the shares to investors at the fixed price, in effect earning its commission in the process.

B

In January 2002, respondents, a group of 60 investors, filed two antitrust class-action lawsuits against petitioners, 10 leading investment banks. They sought relief under § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U. S. C. § 1; § 2(c) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1527, 15 U. S. C. § 13(c); and state antitrust laws. App. 1, 14. The investors stated that between March 1997 and December 2000 the banks had acted as underwriters, forming syndicates that helped execute the IPOs of several hundred technology-related companies. *Id.*, at 22. Respondents' antitrust complaints allege that the underwriters "abused the . . . practice of combining into underwriting syndicates" by agreeing among themselves to impose harmful conditions upon potential investors—conditions that the investors apparently were willing to accept in order to obtain an allocation of new shares that were in high demand. *Id.*, at 12.

These conditions, according to respondents, consist of a requirement that the investors pay "additional anticompetitive charges" over and above the agreed-upon IPO share price plus underwriting commission. In particular, these addi-

tional charges took the form of (1) investor promises "to place bids . . . in the aftermarket at prices above the IPO price" (*i. e.*, "laddering" agreements); (2) investor "commitments to purchase other, less attractive securities" (*i. e.*, "tying" arrangements); and (3) investor payment of "noncompetitively determined" (*i. e.*, excessive) "commissions," including the "purchas[e] of an issuer's shares in follow-up or 'secondary' public offerings (for which the underwriters would earn underwriting discounts)." *Id.*, at 12–13. The complaint added that the underwriters' agreement to engage in some or all of these practices artificially inflated the share prices of the securities in question. *Id.*, at 32.

The underwriters moved to dismiss the investors' complaints on the ground that federal securities law impliedly precludes application of antitrust laws to the conduct in question. (The antitrust laws at issue include the commercial bribery provisions of the Robinson-Patman Act.) The District Court agreed with petitioners and dismissed the complaints against them. See *In re Initial Public Offering Antitrust Litigation*, 287 F. Supp. 2d 497, 524–525 (SDNY 2003) *(IPO Antitrust)*. The Court of Appeals for the Second Circuit reversed, however, and reinstated the complaints. 426 F. 3d 130, 170, 172 (2005). We granted the underwriters' petition for certiorari. And we now reverse the judgment of the Court of Appeals.

II

A

Sometimes regulatory statutes explicitly state whether they preclude application of the antitrust laws. Compare, *e. g.*, Webb-Pomerene Act, 15 U. S. C. § 62 (expressly providing antitrust immunity), with § 601(b)(1) of the Telecommunications Act of 1996, 47 U. S. C. § 152 (stating that antitrust laws remain applicable). See also *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398, 406–407 (2004) (analyzing the antitrust saving clause of the

Telecommunications Act). Where regulatory statutes are silent in respect to antitrust, however, courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws. Those determinations may vary from statute to statute, depending upon the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws. Compare *Gordon*, 422 U. S., at 689 (finding implied preclusion of antitrust laws); and *NASD*, 422 U. S., at 729–730 (same), with *Otter Tail Power Co.* v. *United States*, 410 U. S. 366, 374–375 (1973) (finding no implied immunity); *Philadelphia Nat. Bank*, 374 U. S., at 352 (same); and *Silver*, 373 U. S., at 360 (same). See also *Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 664 F. 2d 716, 727 (CA9 1981).

Three decisions from this Court specifically address the relation of securities law to antitrust law. In *Silver* the Court considered a dealer's claim that, by expelling him from the New York Stock Exchange, the exchange had violated the antitrust prohibition against group "boycott[s]." 373 U. S., at 347. The Court wrote that, where possible, courts should "reconcil[e] the operation of both [*i. e.*, antitrust and securities] statutory schemes . . . rather than holding one completely ousted." *Id.*, at 357. It also set forth a standard, namely, that "[r]epeal [of the antitrust laws] is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." *Ibid.* And it held that the securities law did *not* preclude application of the antitrust laws to the claimed boycott *insofar as the exchange denied the expelled dealer a right to fair procedures.* *Id.*, at 359–360.

In reaching this conclusion, the Court noted that the SEC lacked jurisdiction under the securities law "to review particular instances of enforcement of exchange rules"; that "nothing [was] built into the regulatory scheme which performs the antitrust function of insuring" that rules that in-

jure competition are nonetheless "justified as furthering" legitimate regulatory "ends"; that the expulsion "would clearly" violate "the Sherman Act unless justified by reference to the purposes of the Securities Exchange Act"; and that it could find *no such justifying purpose* where the exchange took "anticompetitive collective action . . . *without according fair procedures.*" *Id.*, at 357–358, 364 (emphasis added).

In *Gordon* the Court considered an antitrust complaint that essentially alleged "price fixing" among stockbrokers. It charged that members of the New York Stock Exchange had agreed to fix their commissions on sales under $500,000. And it sought damages and an injunction forbidding future agreements. 422 U. S., at 661, and n. 3. The lawsuit was filed at a time when regulatory attitudes toward fixed stockbroker commissions were changing. The fixed commissions challenged in the complaint were applied during a period when the SEC approved of the practice of fixing broker-commission rates. But Congress and the SEC had both subsequently disapproved for the future the fixing of some of those rates. See *id.*, at 690–691.

In deciding whether antitrust liability could lie, the Court repeated *Silver*'s general standard in somewhat different terms: It said that an "implied repeal" of the antitrust laws would be found only "where there is a 'plain repugnancy between the antitrust and regulatory provisions.'" 422 U. S., at 682 (quoting *Philadelphia Nat. Bank*, *supra*, at 350–351). It then held that the securities laws impliedly precluded application of the antitrust laws in the case at hand. The Court rested this conclusion on three sets of considerations. For one thing, the securities law "gave the SEC direct regulatory power over exchange rules and practices with respect to the fixing of reasonable rates of commission." 422 U. S., at 685 (internal quotation marks omitted). For another, the SEC had "taken an active role in review of proposed rate changes during the last 15 years," and had engaged in "con-

tinuing activity" in respect to the regulation of commission rates. *Ibid.* Finally, without antitrust immunity, "the exchanges and their members" would be subject to "conflicting standards." *Id.*, at 689.

This last consideration—the conflict—was complicated due to Congress', and the agency's, changing views about the validity of fixed commissions. As far as the *past* fixing of rates was concerned, the conflict was clear: The antitrust law had forbidden the very thing that the securities law had then permitted, namely, an anticompetitive ratesetting process. In respect to the future, however, the conflict was less apparent. That was because the SEC's new (congressionally authorized) prohibition of (certain) fixed rates would take effect in the near-term future. And after that time the SEC and the antitrust law would *both* likely prohibit some of the ratefixing to which the plaintiff's injunction would likely apply. See *id.*, at 690–691.

Despite the likely compatibility of the laws in the future, the Court nonetheless expressly found *conflict.* The conflict arose from the fact that the law permitted the SEC to supervise the competitive setting of rates and to "*reintroduc[e] . . . fixed rates*," *id.*, at 691 (emphasis added), under certain conditions. The Court consequently wrote that "failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates." *Ibid.* The upshot is that, in light of potential future conflict, the Court found that the securities law precluded antitrust liability even in respect to a practice that both antitrust law and securities law might forbid.

In *NASD* the Court considered a Department of Justice antitrust complaint claiming that mutual fund companies had agreed with securities broker-dealers (1) to fix "resale" prices, *i. e.*, the prices at which a broker-dealer would sell a mutual fund's shares to an investor or buy mutual fund shares from a fund investor (who wished to redeem the shares); (2) to fix other terms of sale including those related

to when, how, to whom, and from whom the broker-dealers might sell and buy mutual fund shares; and (3) to prohibit broker-dealers from freely selling to, and buying shares from, one another. See 422 U. S., at 700–703.

The Court again found "clear repugnancy," and it held that the securities law, by implication, precluded all parts of the antitrust claim. *Id.*, at 719. In reaching this conclusion, the Court found that antitrust law (*e. g.*, forbidding resale price maintenance) and securities law (*e. g.*, permitting resale price maintenance) were in conflict. In deciding that the latter trumped the former, the Court relied upon the same kinds of considerations it found determinative in *Gordon*. In respect to the last set of allegations (restricting a free market in mutual fund shares among brokers), the Court said that (1) the relevant securities law "enables [the SEC] to monitor the activities questioned"; (2) "the history of Commission regulations suggests no laxity in the exercise of this authority"; and hence (3) allowing an antitrust suit to proceed that is "so directly related to the SEC's responsibilities" would present "a substantial danger that [broker-dealers and other defendants] would be subjected to duplicative and inconsistent standards." *NASD,* 422 U. S., at 734–735.

As to the other practices alleged in the complaint (concerning, *e. g.*, resale price maintenance), the Court emphasized that (1) the securities law "vested in the SEC final authority to determine whether and to what extent" the relevant practices "should be tolerated," *id.*, at 729; (2) although the SEC has not actively supervised the relevant practices, that is only because the statute "reflects a clear congressional determination that, subject to Commission oversight, mutual funds should be allowed to retain the initiative in dealing with the potentially adverse effects of disruptive trading practices," *id.*, at 727; and (3) the SEC has supervised the funds insofar as its "acceptance of fund-initiated restrictions for more than three decades . . . manifests an informed ad-

ministrative judgment that the contractual restrictions . . . were appropriate means for combating the problems of the industry," *id.*, at 728. The Court added that, in these respects, the SEC had engaged in "precisely the kind of administrative oversight of private practices that Congress contemplated." *Ibid.*

As an initial matter these cases make clear that JUSTICE THOMAS is wrong to regard §§ 77p(a) and 78bb(a) as saving clauses so broad as to preserve all antitrust actions. See *post*, p. 287 (dissenting opinion). The United States advanced the same argument in *Gordon*. See Brief for United States as *Amicus Curiae* in *Gordon* v. *New York Stock Exchange, Inc.*, O. T. 1974, No. 74–304, pp. 8, 42. And the Court, in finding immunity, necessarily rejected it. See also *NASD*, *supra*, at 694 (same holding); *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 383 (1983) (finding saving clause applicable to overlap between *securities* laws where that "overlap [was] neither unusual nor unfortunate" (internal quotation marks omitted)). Although one party has made the argument in this Court, it was not presented in the courts below. And we shall not reexamine it.

This Court's prior decisions also make clear that, when a court decides whether securities law precludes antitrust law, it is deciding whether, given context and likely consequences, there is a "clear repugnancy" between the securities law and the antitrust complaint—or as we shall subsequently describe the matter, whether the two are "clearly incompatible." Moreover, *Gordon* and *NASD*, in finding sufficient incompatibility to warrant an implication of preclusion, have treated the following factors as critical: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements,

duties, privileges, or standards of conduct. We also note (4) that in *Gordon* and *NASD* the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.

B

These principles, applied to the complaints before us, considerably narrow our legal task. For the parties cannot reasonably dispute the existence here of several of the conditions that this Court previously regarded as crucial to finding that the securities law impliedly precludes the application of the antitrust laws.

First, the activities in question here—the underwriters' efforts jointly to promote and to sell newly issued securities—is central to the proper functioning of well-regulated capital markets. The IPO process supports new firms that seek to raise capital; it helps to spread ownership of those firms broadly among investors; it directs capital flows in ways that better correspond to the public's demand for goods and services. Moreover, financial experts, including the securities regulators, consider the general kind of joint underwriting activity at issue in this case, including road shows and bookbuilding efforts essential to the successful marketing of an IPO. See Memorandum *Amicus Curiae* of SEC in *IPO Antitrust*, Case No. 01 CIV 2014 (WHP) (SDNY), pp. 15, 39–40, App. D to Pet. for Cert. 124a, 138a, 155a–157a (hereinafter Brief for SEC). Thus, the antitrust complaints before us concern practices that lie at the very heart of the securities marketing enterprise.

Second, the law grants the SEC authority to supervise all of the activities here in question. Indeed, the SEC possesses considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage. See, *e. g.*, 15 U. S. C. §§ 77b(a)(3), 77j, 77z–2 (granting SEC power to regulate the process of bookbuilding, solicitations

of "indications of interest," and communications between underwriting participants and their customers, including those that occur during road shows); § 78*o*(c)(2)(D) (granting SEC power to define and prevent through rules and regulations acts and practices that are fraudulent, deceptive, or manipulative); § 78i(a)(6) (similar); § 78j(b) (similar). Private individuals who suffer harm as a result of a violation of pertinent statutes and regulations may also recover damages. See §§ 78bb, 78u–4, 77k.

Third, the SEC has continuously exercised its legal authority to regulate conduct of the general kind now at issue. It has defined in detail, for example, what underwriters may and may not do and say during their road shows. Compare, *e. g.*, Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, 70 Fed. Reg. 19672 (2005), with Regulation M, 17 CFR §§ 242.100–242.105 (2006). It has brought actions against underwriters who have violated these SEC regulations. See Brief for SEC 13–14, App. D to Pet. for Cert. 136a–138a. And private litigants, too, have brought securities actions complaining of conduct virtually identical to the conduct at issue here; and they have obtained damages. See, *e. g.*, *In re Initial Pub. Offering Securities Litigation*, 241 F. Supp. 2d 281 (SDNY 2003).

The preceding considerations show that the first condition (legal regulatory authority), the second condition (exercise of that authority), and the fourth condition (heartland securities activity) that were present in *Gordon* and *NASD* are satisfied in this case as well. Unlike *Silver*, there is here no question of the existence of appropriate regulatory authority, nor is there doubt as to whether the regulators have exercised that authority. Rather, the question before us concerns the third condition: Is there a conflict that rises to the level of incompatibility? Is an antitrust suit such as this likely to prove practically incompatible with the SEC's administration of the Nation's securities laws?

III

A

Given the SEC's comprehensive authority to regulate IPO underwriting syndicates, its active and ongoing exercise of that authority, and the undisputed need for joint IPO underwriter activity, we do not read the complaints as attacking the bare existence of IPO underwriting syndicates or any of the joint activity that the SEC considers a necessary component of IPO-related syndicate activity. See Brief for SEC 15, 39–40, App. D to Pet. for Cert. 138a, 155a–157a. See also *IPO Antitrust*, 287 F. Supp. 2d, at 507 (discussing the history of syndicate marketing of IPOs); App. 12 (complaint attacks underwriters "*abus[e]*" of "the preexisting practice of combining into underwriting syndicates" (emphasis added)); H. R. Rep. No. 1383, 73d Cong., 2d Sess., 6–7 (1934); S. Rep. No. 792, 73d Cong., 2d Sess., 5 (1934) (law must give to securities agencies freedom to regulate agreements among syndicate members). Nor do we understand the complaints as questioning underwriter agreements to fix the levels of their commissions, whether or not the resulting price is "excessive." See *Gordon*, 422 U. S., at 688–689 (securities law conflicts with, and therefore precludes, antitrust attack on the fixing of commissions where the SEC has not approved, but later *might* approve, the practice).

We nonetheless can read the complaints as attacking the *manner* in which the underwriters jointly seek to collect "excessive" commissions. The complaints attack underwriter efforts to collect commissions through certain practices (*i. e.*, laddering, tying, collecting excessive commissions in the form of later sales of the issued shares), which according to respondents the SEC itself has already disapproved and, in all likelihood, will not approve in the foreseeable future. In respect to this set of claims, they contend that there is no possible "conflict" since both securities law and antitrust law aim to prohibit the same undesirable activity. Without a

conflict, they add, there is no "repugnance" or "incompatibility," and this Court may not imply that securities law precludes an antitrust suit.

B

We accept the premises of respondents' argument—that the SEC has full regulatory authority over these practices, that it has actively exercised that authority, but that the SEC has *disapproved* (and, for argument's sake, we assume that it will continue to disapprove) the conduct that the antitrust complaints attack. Nonetheless, we cannot accept respondents' conclusion. Rather, several considerations taken together lead us to find that, even on these prorespondent assumptions, securities law and antitrust law are clearly incompatible.

First, to permit antitrust actions such as the present one *still* threatens serious securities-related harm. For one thing, an unusually serious legal line-drawing problem remains unabated. In the present context only a fine, complex, detailed line separates activity that the SEC permits or encourages (for which respondents must concede antitrust immunity) from activity that the SEC must (and inevitably will) forbid (and which, on respondents' theory, should be open to antitrust attack).

For example, in respect to "laddering" the SEC forbids an underwriter to "[s]olici[t] customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for IPO stock," 70 Fed. Reg. 19675–19676 (emphasis deleted); 17 CFR §§242.100–242.105. But at the same time the SEC permits, indeed encourages, underwriters (as part of the "bookbuilding" process) to "inquir[e] as to a customer's desired future position in the longer term (for example, three to six months), and the price or prices at which the customer might accumulate that position without reference to immediate aftermarket activity." 70 Fed. Reg. 19676.

It will often be difficult for someone who is not familiar with accepted syndicate practices to determine with confidence whether an underwriter has insisted that an investor buy more shares in the immediate aftermarket (forbidden), or has simply allocated more shares to an investor willing to purchase additional shares of that issue in the long run (permitted). And who but a securities expert could say whether the present SEC rules set forth a virtually permanent line, unlikely to change in ways that would permit the sorts of "laddering-like" conduct that it now seems to forbid? Cf. *Gordon*, *supra*, at 690–691.

Similarly, in respect to "tying" and other efforts to obtain an increased commission from future sales, the SEC has sought to prohibit an underwriter "from demanding . . . an offer from [its] customers of any payment or other consideration [such as the purchase of a different security] in addition to the security's stated consideration." 69 Fed. Reg. 75785 (2004). But the SEC would permit a firm to "allocat[e] IPO shares to a customer because the customer has separately retained the firm for other services, when the customer has not paid excessive compensation in relation to those services." *Ibid.*, and n. 108. The National Association of Securities Dealers (NASD), over which the SEC exercises supervisory authority, has also proposed a rule that would prohibit a member underwriter from "offering or threatening to withhold" IPO shares "as consideration or inducement for the receipt of compensation that is excessive in relation to the services provided." *Id.*, at 77810. The NASD would allow, however, a customer legitimately to compete for IPO shares by increasing the level and quantity of compensation it pays to the underwriter. See *ibid.* (describing NASD Proposed Rule 2712(a)).

Under these standards, to distinguish what is forbidden from what is allowed requires an understanding of just when, in relation to services provided, a commission is "excessive," indeed, so "excessive" that it will remain *permanently* for-

bidden, see *Gordon*, 422 U. S., at 690–691. And who but the SEC itself could do so with confidence?

For another thing, evidence tending to show unlawful antitrust activity and evidence tending to show lawful securities marketing activity may overlap, or prove identical. Consider, for instance, a conversation between an underwriter and an investor about how long an investor intends to hold the new shares (and at what price), say, a conversation that elicits comments concerning both the investor's short and longer term plans. That exchange might, as a plaintiff sees it, provide evidence of an underwriter's insistence upon "laddering" or, as a defendant sees it, provide evidence of a lawful effort to allocate shares to those who will hold them for a longer time. See Brief for United States as *Amicus Curiae* 27.

Similarly, the same somewhat ambiguous conversation might help to establish an effort to collect an unlawfully high commission through atypically high commissions on later sales or through the sales of less popular stocks. Or it might prove only that the underwriter allocates more popular shares to investors who will help stabilize the aftermarket share price. See, *e. g.*, *Department of Enforcement* v. *Respondent,* Disciplinary Proc. No. CAF030014 (NASD Hearing Panel, Mar. 3, 2006), pp. 12–13 (redacted decision), called for review, Complaint No. CAF030014 (NASD Nat. Adjudicatory Council, Apr. 11, 2006).

Further, antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries. In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will prove difficult for those many different courts to reach consistent results. And, given the fact-related nature of many such evaluations, it will also prove difficult to ensure that the different courts evaluate similar fact patterns consistently. The result is an unusually high risk that different

courts will evaluate similar factual circumstances differently. See Hovenkamp, Antitrust Violations in Securities Markets, 28 J. Corp. L. 607, 629 (2003) ("Once regulation of an industry is entrusted to jury trials, the outcomes of antitrust proceedings will be inconsistent with one another . . . ").

Now consider these factors together—the fine securities-related lines separating the permissible from the impermissible; the need for securities-related expertise (particularly to determine whether an SEC rule is likely permanent); the overlapping evidence from which reasonable but contradictory inferences may be drawn; and the risk of inconsistent court results. Together these factors mean there is no practical way to confine antitrust suits so that they challenge only activity of the kind the investors seek to target, activity that is presently unlawful and will likely remain unlawful under the securities law. Rather, these factors suggest that antitrust courts are likely to make unusually serious mistakes in this respect. And the threat of antitrust mistakes, *i. e.*, results that stray outside the narrow bounds that plaintiffs seek to set, means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages). And therein lies the problem.

This kind of problem exists to some degree in respect to other antitrust lawsuits. But here the factors we have mentioned make mistakes unusually likely (a matter relevant to Congress' determination of which institution should regulate a particular set of market activities). And the role that joint conduct plays in respect to the marketing of IPOs, along with the important role IPOs themselves play in relation to the effective functioning of capital markets, means that the securities-related costs of mistakes is unusually high. It is no wonder, then, that the SEC told the District Court (con-

sistent with what the Government tells us here) that a "failure to hold that the alleged conduct was immunized would threaten to disrupt the full range of the Commission's ability to exercise its regulatory authority," adding that it would have a "chilling effect" on "lawful joint activities . . . of tremendous importance to the economy of the country." Brief for SEC 39–40, App. D to Pet. for Cert. 157a.

We believe it fair to conclude that, where conduct at the core of the marketing of new securities is at issue; where securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden; where the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets.

Second, any enforcement-related need for an antitrust lawsuit is unusually small. For one thing, the SEC actively enforces the rules and regulations that forbid the conduct in question. For another, as we have said, investors harmed by underwriters' unlawful practices may bring lawsuits and obtain damages under the securities law. See *supra*, at 276–277. Finally, the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations. And that fact makes it somewhat less necessary to rely upon antitrust actions to address anticompetitive behavior. See 15 U. S. C. § 77b(b) (instructing the SEC to consider, "in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation"); § 78w(a)(2) (the SEC "shall consider among other matters the impact any such rule or regulation would have on competition"); *Trinko*, 540 U. S., at 412 ("[T]he additional benefit to competition provided by antitrust enforcement will tend to be small" where other laws and regulatory structures are "designed to deter and remedy anticompetitive harm").

We also note that Congress, in an effort to weed out unmeritorious securities lawsuits, has recently tightened the procedural requirements that plaintiffs must satisfy when they file those suits. To permit an antitrust lawsuit risks circumventing these requirements by permitting plaintiffs to dress what is essentially a securities complaint in antitrust clothing. See generally Private Securities Litigation Reform Act of 1995, 109 Stat. 737; Securities Litigation Uniform Standards Act of 1998, 112 Stat. 3227.

In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct. Together these considerations indicate a serious conflict between, on the one hand, application of the antitrust laws and, on the other, proper enforcement of the securities law.

We are aware that the Solicitor General, while recognizing the conflict, suggests a procedural device that he believes will avoid it (in effect, a compromise between the differing positions that the SEC and Antitrust Division of the Department of Justice took in the courts below). Compare Brief for Dept. of Justice, Antitrust Division, as *Amicus Curiae* in Case No. 01 CIV 2014, p. 23 (seeking no preclusion of the antitrust laws), with Brief for SEC 39–40, App. D to Pet. for Cert. 155a–157a (seeking total preclusion of the antitrust laws). He asks us to remand this case to the District Court so that it can determine "whether respondents' allegations of prohibited conduct can, as a practical matter, be separated from conduct that is permitted by the regulatory scheme," and in doing so, the lower court should decide whether SEC-permitted and SEC-prohibited conduct are "inextricably intertwined." See Brief for United States as *Amicus Curiae* 9, 26. The Solicitor General fears that otherwise, we might read the law as totally precluding application of the antitrust law to underwriting syndicate behavior, even were underwriters, say, overtly to divide markets.

The Solicitor General's proposed disposition, however, does not convincingly address the concerns we have set forth here—the difficulty of drawing a complex, sinuous line separating securities-permitted from securities-forbidden conduct, the need for securities-related expertise to draw that line, the likelihood that litigating parties will depend upon the same evidence yet expect courts to draw different inferences from it, and the serious risk that antitrust courts will produce inconsistent results that, in turn, will overly deter syndicate practices important in the marketing of new issues. (We also note that market divisions appear to fall well outside the heartland of activities related to the underwriting process than the conduct before us here, and we express no view in respect to that kind of activity.)

The upshot is that all four elements present in *Gordon* are present here: (1) an area of conduct squarely within the heartland of securities regulations; (2) clear and adequate SEC authority to regulate; (3) active and ongoing agency regulation; and (4) a serious conflict between the antitrust and regulatory regimes. We therefore conclude that the securities laws are "clearly incompatible" with the application of the antitrust laws in this context.

The Second Circuit's contrary judgment is

Reversed.

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

JUSTICE STEVENS, concurring in the judgment.

When investment bankers cooperate in underwriting an initial public offering (IPO), they increase the amount of capital available to firms producing goods and services and make additional securities available for purchase. By agglomerating networks of investors and spreading the risk of overvaluation, syndicates make positive contributions to the economy that could not be achieved through independent action. See 426 F. 3d 130, 137–138 (CA2 2005). In my view, agreements

among underwriters on how best to market IPOs, including agreements on price and other terms of sale to initial investors, should be treated as procompetitive joint ventures for purposes of antitrust analysis. In all but the rarest of cases, they cannot be conspiracies in restraint of trade within the meaning of § 1 of the Sherman Act, 15 U. S. C. § 1.

After the initial purchase, the prices of newly issued stocks or bonds are determined by competition among the vast multitude of other securities traded in a free market. To suggest that an underwriting syndicate can restrain trade in that market by manipulating the terms of IPOs is frivolous. See *United States* v. *Morgan*, 118 F. Supp. 621, 689 (SDNY 1953) (Medina, J.) ("[T]he syndicate system has no effect whatever on general market prices, nor do the participating underwriters and dealers intend it to have any. On the contrary, it is the general market prices of securities of comparable rating and quality which control the public offering price . . . . The particular issue, even if a large one, is but an infinitesimal unit of trade in the ocean of security issues running into the billions, which constitutes the general market"); see also Hovenkamp, Antitrust Violations in Securities Markets, 28 J. Corp. L. 607, 615–618 (2003). It is possible, of course, that the practices described in the complaints in these two cases may have enabled the underwriters to divert some of the benefits of the offerings from the issuers to themselves, thus breaching the agents' fiduciary obligations to their principals. But if such an injury did occur, it is not an "antitrust injury" giving rise to a damages claim by investors. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 489 (1977).

Nor do I believe that the so-called "laddering" and "tying" described in the complaints constitute vertical restraints that violate either the Sherman Act or § 2(c) of the Robinson-Patman Act, 15 U. S. C. § 13(c). Given the magnitude of the market these practices are alleged to have influenced, I think it obvious as a matter of law that there has

been no injury to any relevant competition. Unlike in *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544 (2007), there is no need to engage in discovery to determine whether there is any merit to the plaintiffs' claims. See *id.*, at 593–595 (STEVENS, J., dissenting).

The defendants moved to dismiss for failure to state a claim on the ground, among others, that the plaintiffs' claims challenge "the ordinary activities of participants in underwriting syndicates, which are recognized to be completely lawful and pro-competitive." Record, Doc. 98, p. 72. I agree and would hold, as we did in *Parker* v. *Brown*, 317 U. S. 341, 351–352 (1943), that the defendants' alleged conduct does not violate the antitrust laws, rather than holding that Congress has implicitly granted them immunity from those laws. Surely I would not suggest, as the Court did in *Twombly*, and as it does again today, that either the burdens of antitrust litigation or the risk "that antitrust courts are likely to make unusually serious mistakes," *ante*, at 282, should play any role in the analysis of the question of law presented in a case such as this.

Accordingly, I concur in the Court's judgment but not in its opinion.

JUSTICE THOMAS, dissenting.

The Court believes it must decide whether the securities laws implicitly preclude application of the antitrust laws because the securities statutes "are silent in respect to antitrust." See *ante*, at 271. I disagree with that basic premise. The securities statutes are not silent. Both the Securities Act and the Securities Exchange Act contain broad saving clauses that preserve rights and remedies existing outside of the securities laws.

Section 16 of the Securities Act of 1933 states that "the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." 15 U. S. C. § 77p(a). In parallel

fashion, § 28 of the Securities Exchange Act of 1934 states that "the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." § 78bb(a). This Court has previously characterized those clauses as "confirm[ing] that the remedies in each Act were to be supplemented by 'any and all' additional remedies." *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 383 (1983).

The Sherman Act was enacted in 1890. See 26 Stat. 209. Accordingly, rights and remedies under the federal antitrust laws certainly would have been thought of as "rights and remedies" that existed "at law or in equity" by the Congresses that enacted that Securities Act and the Securities Exchange Act in the early 1930's. See § 77p; § 78bb. Therefore, both statutes explicitly save the very remedies the Court holds to be impliedly precluded. There is no convincing argument for why these saving provisions should not resolve this case in respondents' favor.

The Court's opinion overlooks the saving clauses seemingly because they do not "explicitly state whether they preclude application of the antitrust laws." *Ante*, at 270; see also Brief for Petitioners 33, n. 5.[1] As the Court observes, some statutes contain saving clauses specific to antitrust. See, *e. g.*, *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398, 406 (2004) ("'[N]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of

[1] The Court suggests that the argument advanced in my opinion was not preserved by respondents. See *ante*, at 275. Respondents' principal contention in the Court of Appeals below was that "[t]he federal securities laws do not expressly immunize Defendants' alleged conduct from prosecution under the federal antitrust laws." See, *e. g.*, Brief for Appellants in No. 03–9288 (CA2), pp. 15–16. Because a full reading of the securities laws is essential to analyzing respondents' central argument, I do not consider arguments based on the saving clauses unpreserved. Cf. *United States* v. *Morton*, 467 U. S. 822, 828 (1984) ("[W]e read statutes as a whole").

any of the antitrust laws' " (quoting Telecommunications Act of 1996, § 601(b)(1), 110 Stat. 143, note following 47 U. S. C. § 152)). But the mere existence of targeted saving clauses does not demonstrate—or even suggest—that antitrust remedies are not included within the "any and all" other remedies to which the securities saving clauses refer. Although Congress may have singled out antitrust remedies for special treatment in some statutes, it is not precluded from using more general saving provisions that encompass antitrust and other remedies. Surely Congress is not required to enumerate every cause of action—state and federal—that may be brought. When Congress wants to preserve all other remedies, using the word "all" is sufficient.

Petitioners also argue that the saving clauses should not apply because the clauses did not play a role in the Court's prior securities-antitrust pre-emption cases. Brief for Petitioners 33, n. 5 ("[N]either provision was found to bar immunity in *Gordon* [v. *New York Stock Exchange, Inc.*, 422 U. S. 659 (1975),] or *[United States* v. *National Assn. of Securities Dealers, Inc.*, 422 U. S. 694 (1975) *(NASD)]*"). Be that as it may, none of the opinions in *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963), *Gordon*, or *NASD*—majority or dissent—offered any analysis of the saving clauses. Omitted reasoning has little claim to precedential value. Absent any indication that these omissions were the product of reasoned analysis instead of inadvertent oversight, I would not allow the Court's prior silence on this issue to erect a perpetual bar to arguments based on a full reading of the statute's relevant text.

Finally, it might be argued that the saving clauses preserve only state-law rights and remedies. This argument has no textual basis. If Congress had intended to limit the clauses to state law, it surely would not have phrased them to preserve "*any and all*" rights and remedies. Other provisions in both Acts, including a later sentence in the section containing the Securities Exchange Act's saving clause,

suggest that Congress explicitly referred to States when it intended to impose a state-law limitation. See, *e. g.*, 15 U. S. C. § 77v(a) (referring to "State and Territorial courts"); § 78bb(a) (referring to the "securities commission . . . of any State"); cf. 17 U. S. C. § 301(b) ("Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State . . . "). Given Congress' demonstrated ability to limit provisions of the securities laws to States and the lack of any such limitation here, the saving clauses cannot be understood as limited only to state-law rights and remedies.[2]

A straightforward application of the saving clauses to this case leads to the conclusion that respondents' antitrust suits must proceed. Accordingly, we do not need to reconcile any conflict between the securities laws and the antitrust laws. I respectfully dissent.

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[2] The Court's suggestion that the clauses were intended to save only securities-related rights and remedies is subject to many of the same criticisms. See *ante*, at 275. The Securities Act of 1933 provided no private federal remedy for fraud in the purchase or sale of registered securities. On the Court's proposed reading of § 77p, however, a federal action for mail or wire fraud and a state-law action for fraud, which are not securities-related rights or remedies, would not have been included within the Securities Act's saving provision.

Syllabus

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION *v.* BRENTWOOD ACADEMY

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

No. 06–427. Argued April 18, 2007—Decided June 21, 2007

Petitioner association (TSSAA) regulates interscholastic sports among its members, Tennessee public and private high schools. TSSAA sanctioned respondent (Brentwood), one of those private schools, because its football coach sent eighth-grade boys a letter that violated TSSAA's rule prohibiting members from using "undue influence" in recruiting middle school students for their athletic programs. Following internal TSSAA review, Brentwood sued TSSAA and its executive director under 42 U. S. C. § 1983, claiming, *inter alia,* that enforcement of the antirecruiting rule was state action violative of the First and Fourteenth Amendments and that TSSAA's flawed adjudication of its appeal deprived Brentwood of due process. The District Court granted Brentwood relief, but the Sixth Circuit reversed, holding that TSSAA was a private voluntary association that did not act under color of state law. This Court reversed that determination, *Brentwood Academy* v. *Tennessee Secondary School Athletic Assn.*, 531 U. S. 288, and the District Court again ruled for Brentwood on remand. The Sixth Circuit affirmed, holding that the antirecruiting rule is a content-based regulation of speech that is not narrowly tailored to serve its permissible purposes and that the TSSAA Board improperly considered *ex parte* evidence, thereby violating Brentwood's due process rights.

Held: The judgment is reversed, and the case is remanded.

442 F. 3d 410, reversed and remanded.

JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I, II–B, III, and IV, concluding:

1. Enforcing a rule that prohibits high school coaches from recruiting middle school athletes does not violate the First Amendment. Brentwood made a voluntary decision to join TSSAA and to abide by its antirecruiting rule. See 531 U. S., at 291. An athletic league's interest in enforcing its rules may warrant curtailing the speech of its voluntary participants. See, *e. g., Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568. TSSAA does not have unbounded authority to condition membership on the relinquishment of

constitutional rights, see *Garcetti* v. *Ceballos*, 547 U. S. 410, 419, and can impose only those conditions that are necessary to managing an efficient and effective state-sponsored high school athletic league. That necessity is obviously present here. No empirical data is needed to credit TSSAA's commonsense conclusion that hard-sell tactics directed at middle school students could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics. TSSAA's rule discourages precisely the sort of conduct that might lead to those harms, any one of which would detract from a high school sports league's ability to operate "efficiently and effectively." *Ibid.* Pp. 299–300.

2. TSSAA did not violate Brentwood's due process rights. The sanction decision was preceded by an investigation, several meetings, correspondence, the TSSAA executive director's adverse written determination, a hearing before the director and an advisory panel, and a *de novo* review by the entire TSSAA Board. During the investigation, Brentwood was notified of all the charges against it. At each of the hearings, it was represented by counsel and given the opportunity to adduce evidence, none of which was excluded. The Court rejects Brentwood's argument that its due process rights were nevertheless violated when the full TSSAA Board, acting *ex parte*, heard from investigators and other witnesses and considered the investigators' notes and other evidence concerning a separate incident in which a basketball coach named King, who was not a Brentwood employee, pushed a middle school basketball star to attend Brentwood. Even accepting the questionable holding that TSSAA's closed-door deliberations were unconstitutional, any due process violation was harmless beyond a reasonable doubt. It is unlikely the King allegations increased the severity of the penalties leveled against Brentwood. More importantly, Brentwood's prejudice claim rests on the unsupported premise that it would have adopted a different and more effective strategy at the board hearing had it been given an opportunity to cross-examine the investigators and review their notes. Brentwood has identified nothing the investigators shared with the board that Brentwood did not already know. Pp. 300–304.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B, III, and IV, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, GINSBURG, BREYER, and ALITO, JJ., joined, and an opinion with respect to Part II–A, in which SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed an opin-

ion concurring in part and concurring in the judgment, in which ROBERTS, C. J., and SCALIA and ALITO, JJ., joined, *post*, p. 304. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 306.

Maureen E. Mahoney argued the cause for petitioner. With her on the briefs were *J. Scott Ballenger*, *Alexander Maltas*, and *Richard L. Colbert*.

Dan Himmelfarb argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Garre*, and *Mark B. Stern*.

James F. Blumstein argued the cause for respondent. With him on the brief were *H. Lee Barfield II*, *W. Brantley Phillips, Jr.*, and *Ross I. Booher*.*

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*Briefs of *amici curiae* urging reversal were filed for the Arizona Interscholastic Association, Inc., et al. by *James B. Gessford*, *Mark Mignella*, *Alexander Halpern*, *Kenneth L. Mallea*, *Mallory V. Mayse*, *Mark Geiger*, and *Don G. Carter;* for the Boyd-Buchanan School et al. by *W. Lee Maddux* and *Rosemarie L. Bryan;* for the National Federation of State High School Associations by *William E. Quirk;* and for the National School Boards Association by *Pamela S. Karlan*, *Jeffrey L. Fisher*, *Francisco M. Negrón, Jr.*, *Amy Howe*, *Kevin K. Russell*, and *Thomas C. Goldstein*.

Briefs of *amici curiae* urging affirmance were filed for the Association of Christian Schools International by *Floyd Abrams;* for Brentwood Academy Parents et al. by *Robert M. Bastress, Jr.;* for the Bridges Academy of Nashville, Tennessee, by *Christopher D. Kratovil;* for the Center for Education Reform and Excellent Education for Everyone by *Martin S. Kaufman* and *Briscoe R. Smith;* for the Institute for Justice by *Andrew McBride* and *Clark M. Neily III;* for the National Alliance for Public Charter Schools et al. by *Christopher P. Ferragamo;* for the National Women's Law Center et al. by *Virginia A. Seitz*, *Marcia D. Greenberger*, *Jocelyn F. Samuels*, and *Dina R. Lassow;* for the Roman Catholic Diocese of Nashville, Tennessee, et al. by *William Bradford Reynolds;* and for the Tennessee Lawyers' Association for Women by *Linda Carver Whitlow Knight*.

A brief of *amicus curiae* was filed for the National Collegiate Athletic Association by *William C. Odle*.

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B, III, and IV, and an opinion with respect to Part II–A, in which JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join.

The principal issue before us is whether the enforcement of a rule prohibiting high school coaches from recruiting middle school athletes violates the First Amendment. We also must decide whether the sanction imposed on respondent for violating that rule was preceded by a fair hearing.

I

Although this case has had a long history, the relevant facts may be stated briefly. The Tennessee Secondary School Athletic Association (TSSAA) is a not-for-profit membership corporation organized to regulate interscholastic sports among its members, which include some 290 public and 55 private high schools in Tennessee. Brentwood Academy is one of those private schools.

Since the early 1950's, TSSAA has prohibited high schools from using "undue influence" in recruiting middle school students for their athletic programs. In April 1997, Brentwood's football coach sent a letter to a group of eighth-grade boys inviting them to attend spring practice sessions. See App. 119. The letter explained that football equipment would be distributed and that "getting involved as soon as possible would definitely be to your advantage." *Ibid.* It was signed "Your Coach." *Ibid.* While the boys who received the letter had signed a contract signaling their intent to attend Brentwood, none had enrolled within the meaning of TSSAA rules. See *id.*, at 182 (defining "enrolled" as having "attended 3 days of school"). All of the boys attended at least some of the spring practice sessions. As the case comes to us, it is settled that the coach's pre-enrollment solicitation violated the TSSAA's antirecruiting rule and that he had ample notice that his conduct was prohibited.

TSSAA accordingly sanctioned Brentwood. After proceeding through two layers of internal TSSAA review, Brentwood brought this action against TSSAA and its executive director in federal court under Rev. Stat. § 1979, 42 U. S. C. § 1983. As relevant here, Brentwood made two claims: first, that enforcement of the rule was state action in violation of the First and Fourteenth Amendments; and second, that TSSAA's flawed adjudication of its appeal had deprived the school of due process of law. The District Court granted relief to Brentwood, but the Court of Appeals reversed, holding that TSSAA was a private voluntary association that did not act under color of state law. We granted certiorari and reversed, holding that the District Court was correct on the threshold issue. *Brentwood Academy* v. *Tennessee Secondary School Athletic Assn.*, 531 U. S. 288 (2001). On remand, the Sixth Circuit sent the case back to the District Court, which once again ruled for Brentwood. 304 F. Supp. 2d 981 (MD Tenn. 2003). TSSAA appealed, and the Court of Appeals affirmed over one judge's dissent. 442 F. 3d 410 (2006). The majority held that the antirecruiting rule is a content-based regulation of speech that is not narrowly tailored to serve its permissible purposes. *Id.*, at 420–431. It also concluded that the TSSAA Board improperly considered *ex parte* evidence during its deliberations, thereby violating Brentwood's due process rights. *Id.*, at 433–438.

We again granted certiorari, 549 U. S. 1105 (2007), and we again reverse.

II

The First Amendment protects Brentwood's right to publish truthful information about the school and its athletic programs. It likewise protects the school's right to try to persuade prospective students and their parents that its excellence in sports is a reason for enrolling. But Brentwood's speech rights are not absolute. It chose to join TSSAA, an athletic league and a state actor invested with a

three-fold obligation to prevent the exploitation of children, to ensure that high school athletics remain secondary to academics, and to promote fair competition among its members. TSSAA submits that these interests adequately support the enforcement against its member schools of a rule prohibiting coaches from trying to recruit impressionable middle school athletes. Brentwood disagrees, and maintains that TSSAA's asserted interests are too flimsy and its rule too broad to support what the school views as a serious curtailment of its constitutional rights. Two aspects of the case taken together persuade us that TSSAA should prevail.

A

The antirecruiting rule strikes nowhere near the heart of the First Amendment. TSSAA has not banned the dissemination of truthful information relating to sports, nor has it claimed that it could. Cf. *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976) (striking down a prohibition on advertising prices for prescription drugs). It has only prevented its member schools' coaches from recruiting individual middle school students. Our cases teach that there is a difference of constitutional dimension between rules prohibiting appeals to the public at large, see *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 495–500 (1996), and rules prohibiting direct, personalized communication in a coercive setting.

Ohralik v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978), nicely illustrates the point. In *Ohralik*, we considered whether the First Amendment disabled a state bar association from disciplining a lawyer for the in-person solicitation of clients. The lawyer argued that under our decision in *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 384 (1977), which invalidated on First Amendment grounds a ban on truthful advertising relating to the "availability and terms of routine legal services," his solicitation was protected speech. We rejected the lawyer's argument, holding that the "in-person

solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment." 436 U. S., at 455. We reasoned that the solicitation ban was more akin to a conduct regulation than a speech restriction:

> "'[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.' Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees . . . . Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Id.*, at 456 (citations omitted).

Drawing on these examples, we found that the "[i]n-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component," *id.*, at 457, the prohibition of which raised few (if any) First Amendment problems.

Ohralik identified several evils associated with direct solicitation distinct from the harms presented by conventional commercial speech. Direct solicitation "may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection," *ibid.;* its goal "may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking," *ibid.;* and it short circuits the "opportunity for intervention

or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual," *ibid.* For these reasons, we concluded that in-person solicitation "actually may disserve the individual and societal interest, identified in *Bates*, in facilitating 'informed and reliable decisionmaking.'" *Id.*, at 458 (quoting *Bates*, 433 U. S., at 364).

We have since emphasized that *Ohralik*'s "narrow" holding is limited to conduct that is "'inherently conducive to overreaching and other forms of misconduct.'" *Edenfield* v. *Fane*, 507 U. S. 761, 774 (1993) (quoting *Ohralik*, 436 U. S., at 464); see also *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 641 (1985) (emphasizing that *Ohralik* involved a "practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud"). And we have not been chary of invalidating state restrictions on solicitation and commercial advertising in the absence of the acute risks associated with in-person legal solicitation. See *Edenfield*, 507 U. S., at 775 (striking down a restriction on in-person solicitation by accountants because such solicitation "poses none of the same dangers" identified in *Ohralik*); *Zauderer*, 471 U. S., at 639–647 (invalidating a restriction on truthful, nondeceptive legal advertising directed at people with specific legal problems); *Shapero* v. *Kentucky Bar Assn.*, 486 U. S. 466, 472–478 (1988) (overturning a blanket proscription on all forms of legal solicitation). In our view, however, the dangers of undue influence and overreaching that exist when a lawyer chases an ambulance are also present when a high school coach contacts an eighth grader.

After all, it is a heady thing for an eighth-grade student to be contacted directly by a coach—here, "Your Coach"—and invited to join a high school sports team. In too many cases, the invitation will come accompanied with a suggestion, subtle or otherwise, that failure to accept will hurt the student's chances to play high school sports and diminish the odds that she could continue on to college or (dream of

dreams) professional sports. Cf. App. 119 ("I do feel that getting involved as soon as possible would definitely be to your advantage").[1] Such a potent entreaty, playing as it does on youthful hopes and fears, could well exert the kind of undue pressure that "disserve[s] the individual and societal interest . . . in facilitating 'informed and reliable decision-making.'" *Ohralik*, 436 U. S., at 458. Given that TSSAA member schools remain free to send brochures, post billboards, and otherwise advertise their athletic programs, TSSAA's limited regulation of recruiting conduct poses no significant First Amendment concerns.

B

Brentwood made a voluntary decision to join TSSAA and to abide by its antirecruiting rule. See *Brentwood*, 531 U. S., at 291 ("No school is forced to join"); cf. *Grove City College* v. *Bell*, 465 U. S. 555, 575 (1984). Just as the government's interest in running an effective workplace can in some circumstances outweigh employee speech rights, see *Connick* v. *Myers*, 461 U. S. 138 (1983), so too can an athletic league's interest in enforcing its rules sometimes warrant curtailing the speech of its voluntary participants. See *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968) (holding that the scope of a government employee's First Amendment rights depends on the "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"); see also *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 679 (1996) ("eschew-[ing]" a formal approach to determining which contractual relationships call for the application of *Pickering* balancing).

[1] When asked at trial about this language from the offending letter, the Brentwood football coach acknowledged that "[i]n some cases" the middle school student is "not going to think that's optional." App. 301.

This is not to say that TSSAA has unbounded authority to condition membership on the relinquishment of any and all constitutional rights. As we recently emphasized in the employment context, "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti* v. *Ceballos*, 547 U. S. 410, 419 (2006). Assuming, without deciding, that the coach in this case was "speaking as [a] citize[n] about matters of public concern," *ibid.*, TSSAA can similarly impose only those conditions on such speech that are necessary to managing an efficient and effective state-sponsored high school athletic league.

That necessity is obviously present here. We need no empirical data to credit TSSAA's commonsense conclusion that hard-sell tactics directed at middle school students could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics. See *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 60 (1973). TSSAA's rule discourages precisely the sort of conduct that might lead to those harms, any one of which would detract from a high school sports league's ability to operate "efficiently and effectively." *Garcetti*, 547 U. S., at 419. For that reason, the First Amendment does not excuse Brentwood from abiding by the same antirecruiting rule that governs the conduct of its sister schools. To hold otherwise would undermine the principle, succinctly articulated by the dissenting judge at the Court of Appeals, that "[h]igh school football is a game. Games have rules." 442 F. 3d, at 444 (opinion of Rogers, J.). It is only fair that Brentwood follow them.

III

The decision to sanction Brentwood for engaging in prohibited recruiting was preceded by an investigation, several meetings, exchanges of correspondence, see App. 120–123

(fax from Brentwood's coach to TSSAA's executive director); *id.*, at 124–127 (memorandum from director to Brentwood's headmaster); *id.*, at 128–133 (letter from the headmaster responding to the director's memorandum); *id.*, at 204–211 (letter from TSSAA director to headmaster with further questions); *id.*, at 212–229 (responsive letter from Brentwood's headmaster), an adverse written determination from TSSAA's executive director, *id.*, at 238–244, a hearing before the director and an advisory panel composed of three members of TSSAA's Board of Control, see *id.*, at 254–258, and finally a *de novo* review by the entire TSSAA Board of Directors, see *id.*, at 269–271. During the investigation, Brentwood was notified of all the charges against it. At each of the two hearings, Brentwood was represented by counsel and given the opportunity to adduce evidence. No evidence offered by Brentwood was excluded.

Brentwood nevertheless maintains that its due process rights were violated when the full TSSAA Board, during its deliberations, heard from witnesses and considered evidence that the school had no opportunity to respond to. Some background is necessary to understand the claim. One of the matters under investigation was whether an Amateur Athletic Union basketball coach named Bart King had pushed talented middle school students—including a basketball star named Jacques Curry—to attend Brentwood. See, *e. g.*, *id.*, at 220, 222 (letter from Brentwood's headmaster discussing the allegation that King had told Curry that if he attended Brentwood, he "would *probably* have a car when he is in the tenth grade"). Brentwood consistently maintained that King had no affiliation with the school and no authority to act on its behalf. See, *e. g.*, *id.*, at 221–222. Nevertheless, the initial decision by TSSAA's executive director, as well as the subsequent decision by the director and the advisory panel, declared Curry (as well as several other players) ineligible to play for Brentwood. See *id.*, at 243 (blanket ineligibility), 255 (ineligibility for varsity sports).

As it had in earlier stages of the case, in Brentwood's final appeal to the TSSAA Board, the school offered live testimony from Curry and an affidavit from King denying the alleged recruiting violations. See *id.*, at 264–267 (Curry's testimony); *id.*, at 261 (listing "Affidavit of Bart King" as an exhibit).[2] Once Curry had testified, Brentwood's counsel advised the board that King was available to answer any questions, but did not call him as a witness.[3] After reviewing the evidence, the board found that Brentwood had committed three specific violations of its rules, none of which appeared to involve either King or Curry, and it reinstated Curry's eligibility. *Id.*, at 269–271. As a penalty for the three violations, the board put Brentwood's athletic program on probation for four years, excluded the boys' basketball

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[2] The District Court's conclusion that "[t]here was no indication from the TSSAA before the final hearing . . . that the organization was still considering the Bart King allegations" is clearly erroneous. 304 F. Supp. 2d 981, 1004, n. 29 (MD Tenn. 2003); see also 442 F. 3d 410, 435, and n. 20 (CA6 2006) (affirming finding). Brentwood appealed to the full board in part to overturn the ineligibility sanction that had been leveled against Curry and several other players. See App. 255. Because the only justification for declaring Curry ineligible was that King had improperly recruited him to play for Brentwood, the King allegations were obviously at issue. Brentwood understood as much. It otherwise would have been wasted effort for King to submit an affidavit and for Curry to testify.

Similarly, given that Curry testified in some detail about his relationship with King, *id.*, at 264–267, the Court of Appeals incorrectly concluded that the discussion of King was limited to a brief exchange about whether King would testify. See 442 F. 3d, at 435 ("Evidently this was the only discussion of King at the hearing").

[3] "[Brentwood's lawyer]: Any other questions? That's going to be it for our proof. If I could make just a few concluding remarks.

"By the way, we have Bart King here to answer any questions. And it was our intention to put him on, but I don't know if you all are interested in extending for five minutes to hear from Bart King or not. He's here if you want him.

"[TSSAA's executive director]: No.

"[Brentwood's lawyer]: No. All right." App. 267.

and football teams from tournament playoffs for two years, and imposed a $3,000 fine. *Id.*, at 270.

During its deliberations, the board discussed the case with the executive director who had presided at the earlier proceedings and two TSSAA investigators, none of whom had been cross-examined. The investigators also provided handwritten notes to the board detailing their investigations; Brentwood never received those notes. The District Court found that the consideration of the *ex parte* evidence influenced the board's penalty decision and contravened the Due Process Clause. 304 F. Supp. 2d, at 1003–1006. The Court of Appeals accepted that finding, as well as the conclusion that the evidence tainted the fairness of the proceeding. 442 F. 3d, at 433–438. TSSAA now maintains that the lower courts erred.

We agree. Even accepting the questionable holding that TSSAA's closed-door deliberations were unconstitutional, we can safely conclude that any due process violation was harmless beyond a reasonable doubt. To begin with, it is hard to believe that the King allegations increased the severity of the penalties leveled against Brentwood.[4] But more impor-

[4] At trial, a board member testified that the board "dropped" the charges relating to King, *id.*, at 347 (testimony of Michael Hammond), which explains why the board restored Curry's eligibility. The fine, the probationary period, and the playoff suspension had all been imposed at earlier stages of the proceedings, see *id.*, at 243, 255, suggesting that the board was as a practical matter just affirming penalties associated with the remaining recruiting violations. The King allegations appear to have played a negligible role in choosing which penalties to assess.

The District Court drew its contrary conclusion from a single piece of evidence: the board president's affirmative response during a deposition to a question about whether the King allegations supported the board's finding that the recruiting rule had been violated. 442 F. 3d, at 435–436. As the board president clarified at trial, however, while the King allegations were a "'factor'" in the board's discussions, the "'final penalty did not involve Bart King . . . . [T]he final penalty really dealt with the letter from Mr. Flatt.'" *Id.*, at 436. Thinking it a close call, *ibid.* ("Whether the King issue was actually a factor in the penalties ultimately imposed is

tantly, Brentwood's claim of prejudice rests on the unsupported premise that it would have adopted a different and more effective strategy at the board hearing had it been given an opportunity to cross-examine the investigators and review their notes. Despite having had nearly a decade since the hearing to undertake that cross-examination and review, Brentwood has identified nothing the investigators shared with the board that Brentwood did not already know.[5] Perhaps that is why Brentwood never explains what a more effective strategy might have looked like. Brentwood obliquely suggests it might have had King testify at the hearing, but it gives no inkling of what his testimony would have added to the proceedings. We are not inclined to speculate on its behalf.

IV

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

It is so ordered.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE ALITO join, concurring in part and concurring in the judgment.

Although I have little difficulty concluding that the regulation at issue does not contravene the First Amendment, I do not agree with the principal opinion's reliance on *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978). *Ohralik*, as the

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far less certain"), the Court of Appeals held that the District Court could credit the board president's deposition testimony over his subsequent qualification of that testimony. We agree with the dissenting judge below that "so slender an evidentiary reed" cannot support the conclusion that TSSAA violated Brentwood's procedural rights. *Id.*, at 454 (opinion of Rogers, J.).

[5] Nor has our independent review of the investigators' notes unearthed any allegation of misconduct that would have been new to Brentwood. See XV App. in No. 03–5245 etc. (CA6 2006), pp. 4178–4193.

principal opinion notes, involved communications between attorney and client, or, more to the point, the in-person solicitation by an attorney of an accident victim as a potential client. *Ohralik* was later extended to attorney solicitation of accident victims through direct mail, though the Court was closely divided as to the constitutionality of that extension. See *Florida Bar* v. *Went For It, Inc.*, 515 U. S. 618 (1995). But the Court has declined to extend the *Ohralik* rule beyond the attorney-client relationship.

In *Edenfield* v. *Fane*, 507 U. S. 761 (1993), the Court struck down a ban on solicitation from accountants to potential clients. The Court there made clear that *Ohralik* "did not hold that all personal solicitation is without First Amendment protection." 507 U. S., at 765, 774. It further noted that "*Ohralik*'s holding was narrow and depended upon certain 'unique features of in-person solicitation by lawyers' that were present in the circumstances of that case." *Ibid.* (quoting *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 641 (1985)).

In my view it is both unnecessary and ill advised to rely upon *Ohralik* in the instant matter. By doing so, the principal opinion, at a minimum, is open to the implication that the speech at issue is subject to state regulation whether or not the school has entered a voluntary contract with a state-sponsored association in order to promote a code of conduct affecting solicitation. To allow freestanding state regulation of speech by coaches and other representatives of nonmember schools would be a dramatic expansion of *Ohralik* to a whole new field of endeavor. Yet by relying on *Ohralik* the principal opinion undermines the argument that, in the absence of Brentwood Academy's consensual membership in the Tennessee Secondary School Athletic Association, the speech by the head coach would be entitled to First Amendment protection.

For these reasons I must decline to join Part II–A of the principal opinion and any other portion of Part II that sug-

gests *Ohralik* is applicable here. It is evident, furthermore, that a majority of the Court agrees with this position. See *post* this page and 307 (THOMAS, J., concurring in judgment). I do join the remainder of the Court's opinion and the judgment that ensues.

JUSTICE THOMAS, concurring in the judgment.

In resolving this case, the Court applies the *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968), line of cases to hold that the Tennessee Secondary School Athletic Association (TSSAA) did not violate Brentwood's First Amendment rights. *Ante*, at 299–300. Until today, *Pickering* governed limitations on the speech rights of government employees and contractors. The Court uproots *Pickering* from its context and applies it to speech by a private school that is a member of a private athletic association. The need to stretch *Pickering* to fit this case was occasioned by the Court when it held that TSSAA, a private organization, was a state actor. *Brentwood Academy* v. *Tennessee Secondary School Athletic Assn.*, 531 U. S. 288 (2001) *(Brentwood I)*. Because *Brentwood I* departed so dramatically from our earlier state-action cases, it is unsurprising that no First Amendment framework readily applies to this case. Rather than going through the bizarre exercise of extending obviously inapplicable First Amendment doctrine to these circumstances, I would simply overrule *Brentwood I*.* See *id.*, at 305–315 (THOMAS, J., dissenting).

The Court's extension of *Pickering* to this context is therefore unnecessary, but the principal opinion's application of *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978), *ante*, at 296–299, is outright wrong. For the reasons expressed in JUSTICE KENNEDY's opinion concurring in part and concurring in the judgment, *ante*, at 304–305 and this page, *Ohralik*

*Holding that TSSAA is not a state actor would also resolve Brentwood's due process claim.

is a narrow rule addressed to a particular context that has no application to the facts of this case. For these reasons, I concur in the Court's judgment.

Syllabus

TELLABS, INC., ET AL. *v.* MAKOR ISSUES & RIGHTS, LTD., ET AL.

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

No. 06–484. Argued March 28, 2007—Decided June 21, 2007

As a check against abusive litigation in private securities fraud actions, the Private Securities Litigation Reform Act of 1995 (PSLRA) includes exacting pleading requirements. The PSLRA requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter, *i. e.*, the defendant's intention "to deceive, manipulate, or defraud." *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 194, and n. 12. As set out in § 21D(b)(2), plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U. S. C. § 78u–4(b)(2). Congress left the key term "strong inference" undefined.

Petitioner Tellabs, Inc., manufactures specialized equipment for fiber optic networks. Respondents (Shareholders) purchased Tellabs stock between December 11, 2000, and June 19, 2001. They filed a class action, alleging that Tellabs and petitioner Notebaert, then Tellabs' chief executive officer and president, had engaged in securities fraud in violation of § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b–5, and that Notebaert was a "controlling person" under the 1934 Act, and therefore derivatively liable for the company's fraudulent acts. Tellabs moved to dismiss the complaint on the ground that the Shareholders had failed to plead their case with the particularity the PSLRA requires. The District Court agreed, dismissing the complaint without prejudice. The Shareholders then amended their complaint, adding references to 27 confidential sources and making further, more specific, allegations concerning Notebaert's mental state. The District Court again dismissed, this time with prejudice. The Shareholders had sufficiently pleaded that Notebaert's statements were misleading, the court determined, but they had insufficiently alleged that he acted with scienter. The Seventh Circuit reversed in relevant part. Like the District Court, it found that the Shareholders had pleaded the misleading character of Notebaert's statements with sufficient particularity. Unlike the District Court, however, it concluded that the Shareholders had sufficiently alleged that Note-

baert acted with the requisite state of mind. In evaluating whether the PSLRA's pleading standard is met, the Circuit said, courts should examine all of the complaint's allegations to decide whether collectively they establish an inference of scienter; the complaint would survive, the court stated, if a reasonable person could infer from the complaint's allegations that the defendant acted with the requisite state of mind.

Held: To qualify as "strong" within the intendment of § 21D(b)(2), an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent. Pp. 318–329.

(a) Setting a uniform pleading standard for § 10(b) actions was among Congress' objectives in enacting the PSLRA. Designed to curb perceived abuses of the § 10(b) private action, the PSLRA installed both substantive and procedural controls. As relevant here, § 21D(b) of the PSLRA "impose[d] heightened pleading requirements in [§ 10(b) and Rule 10b–5] actions." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit,* 547 U. S. 71, 81. In the instant case, the District Court and the Seventh Circuit agreed that the complaint sufficiently specified Notebaert's alleged misleading statements and the reasons why the statements were misleading. But those courts disagreed on whether the Shareholders, as required by § 21D(b)(2), "state[d] with particularity facts giving rise to a strong inference that [Notebaert] acted with [scienter]," § 78u–4(b)(2). Congress did not shed much light on what facts would create a strong inference or how courts could determine the existence of the requisite inference. With no clear guide from Congress other than its "inten[tion] to strengthen existing pleading requirements," H. R. Conf. Rep. No. 104–369, p. 41, Courts of Appeals have diverged in construing the term "strong inference." Among the uncertainties, should courts consider competing inferences in determining whether an inference of scienter is "strong"? This Court's task is to prescribe a workable construction of the "strong inference" standard, a reading geared to the PSLRA's twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims. Pp. 318–322.

(b) The Court establishes the following prescriptions: *First,* faced with a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss a § 10(b) action, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true. See *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U. S. 163, 164. *Sec-*

ond, courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions. The inquiry is whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard. *Third*, in determining whether the pleaded facts give rise to a "strong" inference of scienter, the court must take into account plausible opposing inferences. The Seventh Circuit expressly declined to engage in such a comparative inquiry. But in § 21D(b)(2), Congress did not merely require plaintiffs to allege facts from which an inference of scienter rationally *could* be drawn. Instead, Congress required plaintiffs to plead with particularity facts that give rise to a "strong"—*i. e.*, a powerful or cogent—inference. To determine whether the plaintiff has alleged facts giving rise to the requisite "strong inference," a court must consider plausible, nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff. The inference that the defendant acted with scienter need not be irrefutable, but it must be more than merely "reasonable" or "permissible"—it must be cogent and compelling, thus strong in light of other explanations. A complaint will survive only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any plausible opposing inference one could draw from the facts alleged. Pp. 322–324.

(c) Tellabs contends that when competing inferences are considered, Notebaert's evident lack of pecuniary motive will be dispositive. The Court agrees that motive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference. The absence of a motive allegation, however, is not fatal for allegations must be considered collectively; the significance that can be ascribed to an allegation of motive, or lack thereof, depends on the complaint's entirety. Tellabs also maintains that several of the Shareholders' allegations are too vague or ambiguous to contribute to a strong inference of scienter. While omissions and ambiguities count against inferring scienter, the court's job is not to scrutinize each allegation in isolation but to assess all the allegations holistically. Pp. 325–326.

(d) The Seventh Circuit was unduly concerned that a court's comparative assessment of plausible inferences would impinge upon the Seventh Amendment right to jury trial. Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it has power to determine what must be proved to prevail on the merits. It is the federal lawmaker's prerogative, therefore, to allow, disallow, or shape the contours of—including the pleading and

Syllabus

proof requirements for—§ 10(b) private actions. This Court has never questioned that authority in general, or suggested, in particular, that the Seventh Amendment inhibits Congress from establishing whatever pleading requirements it finds appropriate for federal statutory claims. Provided that the Shareholders have satisfied the congressionally "prescribe[d] . . . means of making an issue," *Fidelity & Deposit Co. of Md.* v. *United States*, 187 U. S. 315, 320, the case will fall within the jury's authority to assess the credibility of witnesses, resolve genuine issues of fact, and make the ultimate determination whether Notebaert and, by imputation, Tellabs acted with scienter. Under this Court's construction of the "strong inference" standard, a plaintiff is not forced to plead more than she would be required to prove at trial. A plaintiff alleging fraud under § 10(b) must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference. At trial, she must then prove her case by a "preponderance of the evidence." Pp. 326–329.

(e) Neither the District Court nor the Court of Appeals had the opportunity to consider whether the Shareholders' allegations warrant "a strong inference that [Notebaert and Tellabs] acted with the required state of mind," 15 U. S. C. § 78u–4(b)(2), in light of the prescriptions announced today. Thus, the case is remanded for a determination under this Court's construction of § 21D(b)(2). P. 329.

437 F. 3d 588, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. SCALIA, J., *post*, p. 329, and ALITO, J., *post*, p. 333, filed opinions concurring in the judgment. STEVENS, J., filed a dissenting opinion, *post*, p. 335.

Carter G. Phillips argued the cause for petitioners. With him on the briefs were *Richard D. Bernstein*, *Eamon P. Joyce*, *David F. Graham*, and *Robert N. Hochman*.

Kannon K. Shanmugam argued the cause for the United States as *amicus curiae* in support of petitioners. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Hungar*, *Michael Jay Singer*, *John S. Koppel*, *Andrew N. Vollmer*, *Jacob H. Stillman*, *Luis de la Torre*, and *Michael L. Post*.

Counsel

Arthur R. Miller argued the cause for respondents. With him on the brief were *Melvyn I. Weiss*, *Jerome M. Congress*, *Richard H. Weiss*, and *Clifford S. Goodstein*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Institute of Certified Public Accountants et al. by *Theodore B. Olson*, *Douglas R. Cox*, *Mark A. Perry*, and *Scott A. Fink;* for the New England Legal Foundation by *Warren R. Stern*, *Martin J. Newhouse*, and *Michael E. Malamut;* for the Pixelplus Co., Ltd., et al. by *William F. Sullivan*, *Steven T. Catlett*, *Peter M. Stone*, *Johanna S. Wilson*, and *Matthew F. Stowe;* for the Securities Industry and Financial Markets Association et al. by *Stephen M. Shapiro*, *Timothy S. Bishop*, *J. Brett Busby*, *Robin S. Conrad*, and *Amar D. Sarwal;* for TechNet et al. by *Brian D. Boyle* and *Seth Aronson;* for the Washington Legal Foundation by *Daniel J. Popeo*, *Paul D. Kamenar*, *Michael L. Kichline*, *Steven B. Feirson*, and *Michael J. Newman;* and for Joseph A. Grundfest et al. by *Louis R. Cohen*, *William T. Lake*, *Craig Goldblatt*, and *Robert B. McCaw*.

Briefs of *amici curiae* urging affirmance were filed for the State of Arkansas et al. by *Stanley D. Bernstein* and by the Attorneys General for their respective States as follows: *Dustin McDaniel* of Arkansas, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Stuart Rabner* of New Jersey, *Gary K. King* of New Mexico, and *Patrick C. Lynch* of Rhode Island; for the State of Ohio et al. by *Marc Dann*, Attorney General of Ohio, *Elise W. Porter*, Acting Solicitor General, *Robert J. Krummen* and *Christopher R. Geidner*, Deputy Solicitors, and *Randall W. Knutti* and *Andrea L. Seidt*, Assistant Attorneys General, and by the Attorneys General and Acting Attorneys General for their respective jurisdictions as follows: *Talis J. Colberg* of Alaska, *Frederick O'Brien* of American Samoa, *Edmund G. Brown, Jr.*, of California, *Richard Blumenthal* of Connecticut, *Joseph R. Biden III* of Delaware, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Douglas F. Gansler* of Maryland, *Lori Swanson* of Minnesota, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Andrew M. Cuomo* of New York, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Roberto J. Sánchez-Ramos* of Puerto Rico, *Lawrence E. Long* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, and *Darrell V. McGraw, Jr.*, of West Virginia; for the American Association for Justice by *Jeffrey Robert White;* for the Center for Study of Responsive Law et al. by *Jonathan W. Cuneo*, *William H. Anderson*, *R. Brent Walton*, and *Matthew Wiener;* for the German Association

JUSTICE GINSBURG delivered the opinion of the Court.

This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC). See, *e. g.*, *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 345 (2005); *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964). Private securities fraud actions, however, if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law. See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U. S. 71, 81 (2006). As a check against abusive litigation by private parties, Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737.

Exacting pleading requirements are among the control measures Congress included in the PSLRA. The PSLRA requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter, *i. e.*, the defendant's intention "to deceive, manipulate, or defraud." *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 194, and n. 12 (1976); see 15 U. S. C. § 78u–4(b)(1), (2).

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for the Protection of Shareholders et al. by *William H. Narwold;* for the National Conference on Public Employee Retirement Systems et al. by *Kevin P. Roddy;* for the New York State Common Retirement Fund et al. by *Max W. Berger*, *Jay W. Eisenhofer*, *Geoffrey C. Jarvis*, *David L. Muir*, *Roy A. Mongrue, Jr.*, and *Robert D. Klausner;* for the North American Securities Administrators Association, Inc., by *Alfred E. T. Rusch;* for Regents of the University of California et al. by *Sanford Svetcov*, *Susan K. Alexander*, *William S. Lerach*, *Patrick J. Coughlin*, *Joseph D. Daley*, and *Byron S. Georgiou;* and for Allan N. Littman et al. by *Mr. Littman*, *pro se*, and *William I. Edlund.*

Briefs of *amici curiae* were filed for Amalgamated Bank et al. by *Patrick J. Szymanski;* and for the Council of Institutional Investors by *Mark C. Hansen* and *Priya R. Aiyar.*

This case concerns the latter requirement. As set out in § 21D(b)(2) of the PSLRA, plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U. S. C. § 78u–4(b)(2).

Congress left the key term "strong inference" undefined, and Courts of Appeals have divided on its meaning. In the case before us, the Court of Appeals for the Seventh Circuit held that the "strong inference" standard would be met if the complaint "allege[d] facts from which, if true, a reasonable person could infer that the defendant acted with the required intent." 437 F. 3d 588, 602 (2006). That formulation, we conclude, does not capture the stricter demand Congress sought to convey in § 21D(b)(2). It does not suffice that a reasonable factfinder plausibly could infer from the complaint's allegations the requisite state of mind. Rather, to determine whether a complaint's scienter allegations can survive threshold inspection for sufficiency, a court governed by § 21D(b)(2) must engage in a comparative evaluation; it must consider, not only inferences urged by the plaintiff, as the Seventh Circuit did, but also competing inferences rationally drawn from the facts alleged. An inference of fraudulent intent may be plausible, yet less cogent than other, nonculpable explanations for the defendant's conduct. To qualify as "strong" within the intendment of § 21D(b)(2), we hold, an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.

I

Petitioner Tellabs, Inc., manufactures specialized equipment used in fiber optic networks. During the time period relevant to this case, petitioner Richard Notebaert was Tellabs' chief executive officer and president. Respondents (Shareholders) are persons who purchased Tellabs stock between December 11, 2000, and June 19, 2001. They accuse

Tellabs and Notebaert (as well as several other Tellabs executives) of engaging in a scheme to deceive the investing public about the true value of Tellabs' stock. See 437 F. 3d, at 591; App. 94–98.[1]

Beginning on December 11, 2000, the Shareholders allege, Notebaert (and by imputation Tellabs) "falsely reassured public investors, in a series of statements . . . that Tellabs was continuing to enjoy strong demand for its products and earning record revenues," when, in fact, Notebaert knew the opposite was true. *Id.*, at 94–95, 98. From December 2000 until the spring of 2001, the Shareholders claim, Notebaert knowingly misled the public in four ways. 437 F. 3d, at 596. First, he made statements indicating that demand for Tellabs' flagship networking device, the TITAN 5500, was continuing to grow, when, in fact, demand for that product was waning. *Id.*, at 596, 597. Second, Notebaert made statements indicating that the TITAN 6500, Tellabs' next-generation networking device, was available for delivery, and that demand for that product was strong and growing, when in truth the product was not ready for delivery and demand was weak. *Id.*, at 596, 597–598. Third, he falsely represented Tellabs' financial results for the fourth quarter of 2000 (and, in connection with those results, condoned the practice of "channel stuffing," under which Tellabs flooded its customers with unwanted products). *Id.*, at 596, 598. Fourth, Notebaert made a series of overstated revenue projections, when demand for the TITAN 5500 was drying up and production of the TITAN 6500 was behind schedule. *Id.*, at 596, 598–599. Based on Notebaert's sunny assessments, the

[1] The Shareholders brought suit against Tellabs executives other than Notebaert, including Richard Birck, Tellabs' chairman and former chief executive officer. Because the claims against the other executives, many of which have been dismissed, are not before us, we focus on the allegations as they relate to Notebaert. We refer to the defendant-petitioners collectively as "Tellabs."

Shareholders contend, market analysts recommended that investors buy Tellabs' stock. See *id.*, at 592.

The first public glimmer that business was not so healthy came in March 2001 when Tellabs modestly reduced its first quarter sales projections. *Ibid.* In the next months, Tellabs made progressively more cautious statements about its projected sales. On June 19, 2001, the last day of the class period, Tellabs disclosed that demand for the TITAN 5500 had significantly dropped. *Id.*, at 593. Simultaneously, the company substantially lowered its revenue projections for the second quarter of 2001. The next day, the price of Tellabs stock, which had reached a high of $67 during the period, plunged to a low of $15.87. *Ibid.*

On December 3, 2002, the Shareholders filed a class action in the District Court for the Northern District of Illinois. *Ibid.* Their complaint stated, *inter alia*, that Tellabs and Notebaert had engaged in securities fraud in violation of § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j(b), and SEC Rule 10b–5, 17 CFR § 240.10b–5 (2006), also that Notebaert was a "controlling person" under § 20(a) of the 1934 Act, 15 U. S. C. § 78t(a), and therefore derivatively liable for the company's fraudulent acts. See App. 98–101, 167–171. Tellabs moved to dismiss the complaint on the ground that the Shareholders had failed to plead their case with the particularity the PSLRA requires. The District Court agreed, and therefore dismissed the complaint without prejudice. App. to Pet. for Cert. 80a–117a; see *Johnson* v. *Tellabs, Inc.*, 303 F. Supp. 2d 941, 945 (ND Ill. 2004).

The Shareholders then amended their complaint, adding references to 27 confidential sources and making further, more specific, allegations concerning Notebaert's mental state. See 437 F. 3d, at 594; App. 91–93, 152–160. The District Court again dismissed, this time with prejudice. 303 F. Supp. 2d, at 971. The Shareholders had sufficiently pleaded that Notebaert's statements were misleading, the

court determined, *id.*, at 955–961, but they had insufficiently alleged that he acted with scienter, *id.*, at 954–955, 961–969.

The Court of Appeals for the Seventh Circuit reversed in relevant part. 437 F. 3d, at 591. Like the District Court, the Court of Appeals found that the Shareholders had pleaded the misleading character of Notebaert's statements with sufficient particularity. *Id.*, at 595–600. Unlike the District Court, however, the Seventh Circuit concluded that the Shareholders had sufficiently alleged that Notebaert acted with the requisite state of mind. *Id.*, at 603–605.

The Court of Appeals recognized that the PSLRA "unequivocally raise[d] the bar for pleading scienter" by requiring plaintiffs to "plea[d] sufficient facts to create a strong inference of scienter." *Id.*, at 601 (internal quotation marks omitted). In evaluating whether that pleading standard is met, the Seventh Circuit said, "courts [should] examine all of the allegations in the complaint and then . . . decide whether collectively they establish such an inference." *Ibid.* "[W]e will allow the complaint to survive," the court next and critically stated, "if it alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent . . . . If a reasonable person could not draw such an inference from the alleged facts, the defendants are entitled to dismissal." *Id.*, at 602.

In adopting its standard for the survival of a complaint, the Seventh Circuit explicitly rejected a stiffer standard adopted by the Sixth Circuit, *i. e.*, that "plaintiffs are entitled only to the most plausible of competing inferences." *Id.*, at 601, 602 (quoting *Fidel* v. *Farley*, 392 F. 3d 220, 227 (2004)). The Sixth Circuit's standard, the court observed, because it involved an assessment of competing inferences, "could potentially infringe upon plaintiffs' Seventh Amendment rights." 437 F. 3d, at 602. We granted certiorari to resolve the disagreement among the Circuits on whether, and to what extent, a court must consider competing inferences in determining whether a securities fraud complaint

gives rise to a "strong inference" of scienter.[2] 549 U. S. 1105 (2007).

II

Section 10(b) of the Securities Exchange Act of 1934 forbids the "use or employ, in connection with the purchase or sale of any security . . . , [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U. S. C. § 78j(b). SEC Rule 10b–5 implements § 10(b) by declaring it unlawful:

> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 CFR § 240.10b–5.

Section 10(b), this Court has implied from the statute's text and purpose, affords a right of action to purchasers or sellers of securities injured by its violation. See, *e. g.*, *Dura Pharmaceuticals*, 544 U. S., at 341. See also *id.*, at 345 ("The securities statutes seek to maintain public confidence in the marketplace . . . by deterring fraud, in part, through the availability of private securities fraud actions."); *Borak*, 377 U. S., at 432 (private securities fraud actions provide "a most effective weapon in the enforcement" of securities laws and

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[2] See, *e. g.*, 437 F. 3d 588, 602 (CA7 2006) (decision below); *In re Credit Suisse First Boston Corp.*, 431 F. 3d 36, 49, 51 (CA1 2005); *Ottmann* v. *Hanger Orthopedic Group, Inc.*, 353 F. 3d 338, 347–349 (CA4 2003); *Pirraglia* v. *Novell, Inc.*, 339 F. 3d 1182, 1187–1188 (CA10 2003); *Gompper* v. *VISX, Inc.*, 298 F. 3d 893, 896–897 (CA9 2002); *Helwig* v. *Vencor, Inc.*, 251 F. 3d 540, 553 (CA6 2001) (en banc).

are "a necessary supplement to Commission action"). To establish liability under § 10(b) and Rule 10b–5, a private plaintiff must prove that the defendant acted with scienter, "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst*, 425 U. S., at 193–194, and n. 12.[3]

In an ordinary civil action, the Federal Rules of Civil Procedure require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2). Although the rule encourages brevity, the complaint must say enough to give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Dura Pharmaceuticals*, 544 U. S., at 346 (internal quotation marks omitted). Prior to the enactment of the PSLRA, the sufficiency of a complaint for securities fraud was governed not by Rule 8, but by the heightened pleading standard set forth in Rule 9(b). See *Greenstone* v. *Cambex Corp.*, 975 F. 2d 22, 25 (CA1 1992) (Breyer, J.) (collecting cases). Rule 9(b) applies to "all averments of fraud or mistake"; it requires that "the circumstances constituting fraud . . . be stated with particularity" but provides that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally."

Courts of Appeals diverged on the character of the Rule 9(b) inquiry in § 10(b) cases: Could securities fraud plaintiffs allege the requisite mental state "simply by saying that scienter existed," *In re GlenFed, Inc. Securities Litigation*, 42 F. 3d 1541, 1546–1547 (CA9 1994) (en banc), or were they required to allege with particularity facts giving rise to an

[3] We have previously reserved the question whether reckless behavior is sufficient for civil liability under § 10(b) and Rule 10b–5. See *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 194, n. 12 (1976). Every Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of recklessness required. See *Ottmann*, 353 F. 3d, at 343 (collecting cases). The question whether and when recklessness satisfies the scienter requirement is not presented in this case.

inference of scienter? Compare *id.*, at 1546 ("We are not permitted to add new requirements to Rule 9(b) simply because we like the effects of doing so."), with, *e. g., Greenstone*, 975 F. 2d, at 25 (were the law to permit a securities fraud complaint simply to allege scienter without supporting facts, "a complaint could evade too easily the 'particularity' requirement in Rule 9(b)'s first sentence"). Circuits requiring plaintiffs to allege specific facts indicating scienter expressed that requirement variously. See 5A C. Wright & A. Miller, Federal Practice and Procedure § 1301.1, pp. 300–302 (3d ed. 2004) (hereinafter Wright & Miller). The Second Circuit's formulation was the most stringent. Securities fraud plaintiffs in that Circuit were required to "specifically plead those [facts] which they assert give rise to a *strong inference* that the defendants had" the requisite state of mind. *Ross* v. *A. H. Robins Co.*, 607 F. 2d 545, 558 (1979) (emphasis added). The "strong inference" formulation was appropriate, the Second Circuit said, to ward off allegations of "fraud by hindsight." See, *e. g., Shields* v. *Citytrust Bancorp, Inc.*, 25 F. 3d 1124, 1129 (1994) (quoting *Denny* v. *Barber*, 576 F. 2d 465, 470 (CA2 1978) (Friendly, J.)).

Setting a uniform pleading standard for § 10(b) actions was among Congress' objectives when it enacted the PSLRA. Designed to curb perceived abuses of the § 10(b) private action—"nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests and manipulation by class action lawyers," *Dabit*, 547 U. S., at 81 (quoting H. R. Conf. Rep. No. 104–369, p. 31 (1995) (hereinafter H. R. Conf. Rep.))—the PSLRA installed both substantive and procedural controls.[4] Notably, Congress prescribed new proce-

[4] Nothing in the PSLRA, we have previously noted, casts doubt on the conclusion "that private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses"—a matter crucial to the integrity of domestic capital markets. See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U. S. 71, 81 (2006) (internal quotation marks omitted).

dures for the appointment of lead plaintiffs and lead counsel. This innovation aimed to increase the likelihood that institutional investors—parties more likely to balance the interests of the class with the long-term interests of the company—would serve as lead plaintiffs. See *id.*, at 33–34; S. Rep. No. 104–98, p. 11 (1995). Congress also "limit[ed] recoverable damages and attorney's fees, provide[d] a 'safe harbor' for forward-looking statements, . . . mandate[d] imposition of sanctions for frivolous litigation, and authorize[d] a stay of discovery pending resolution of any motion to dismiss." *Dabit*, 547 U. S., at 81. And in § 21D(b) of the PSLRA, Congress "impose[d] heightened pleading requirements in actions brought pursuant to § 10(b) and Rule 10b–5." *Ibid.*

Under the PSLRA's heightened pleading instructions, any private securities complaint alleging that the defendant made a false or misleading statement must: (1) "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading," 15 U. S. C. § 78u–4(b)(1); and (2) "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind," § 78u–4(b)(2). In the instant case, as earlier stated, see *supra*, at 317, the District Court and the Seventh Circuit agreed that the Shareholders met the first of the two requirements: The complaint sufficiently specified Notebaert's alleged misleading statements and the reasons why the statements were misleading. 303 F. Supp. 2d, at 955–961; 437 F. 3d, at 596–600. But those courts disagreed on whether the Shareholders, as required by § 21D(b)(2), "state[d] with particularity facts giving rise to a strong inference that [Notebaert] acted with [scienter]," § 78u–4(b)(2). See *supra*, at 317.

The "strong inference" standard "unequivocally raise[d] the bar for pleading scienter," 437 F. 3d, at 601, and signaled Congress' purpose to promote greater uniformity among the Circuits, see H. R. Conf. Rep., p. 41. But "Congress did not . . . throw much light on what facts . . . suffice to create

[a strong] inference," or on what "degree of imagination courts can use in divining whether" the requisite inference exists. 437 F. 3d, at 601. While adopting the Second Circuit's "strong inference" standard, Congress did not codify that Circuit's case law interpreting the standard. See § 78u–4(b)(2). See also Brief for United States as *Amicus Curiae* 18. With no clear guide from Congress other than its "inten[tion] to strengthen existing pleading requirements," H. R. Conf. Rep., p. 41, Courts of Appeals have diverged again, this time in construing the term "strong inference." Among the uncertainties, should courts consider competing inferences in determining whether an inference of scienter is "strong"? See 437 F. 3d, at 601–602 (collecting cases). Our task is to prescribe a workable construction of the "strong inference" standard, a reading geared to the PSLRA's twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims.

III

A

We establish the following prescriptions: *First*, faced with a Rule 12(b)(6) motion to dismiss a § 10(b) action, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true. See *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 164 (1993). On this point, the parties agree. See Reply Brief 8; Brief for Respondents 26; Brief for United States as *Amicus Curiae* 8, 20, 21.

Second, courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. See 5B Wright & Miller § 1357 (3d ed. 2004 and Supp. 2007). The inquiry, as several Courts of Appeals have recognized, is

whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard. See, *e. g.*, *Abrams* v. *Baker Hughes Inc.*, 292 F. 3d 424, 431 (CA5 2002); *Gompper* v. *VISX, Inc.*, 298 F. 3d 893, 897 (CA9 2002). See also Brief for United States as *Amicus Curiae* 25.

Third, in determining whether the pleaded facts give rise to a "strong" inference of scienter, the court must take into account plausible opposing inferences. The Seventh Circuit expressly declined to engage in such a comparative inquiry. A complaint could survive, that court said, as long as it "alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent"; in other words, only "[i]f a reasonable person could not draw such an inference from the alleged facts" would the defendant prevail on a motion to dismiss. 437 F. 3d, at 602. But in §21D(b)(2), Congress did not merely require plaintiffs to "provide a factual basis for [their] scienter allegations," *ibid.* (quoting *In re Cerner Corp. Securities Litigation*, 425 F. 3d 1079, 1084, 1085 (CA8 2005)), *i. e.*, to allege facts from which an inference of scienter rationally *could* be drawn. Instead, Congress required plaintiffs to plead with particularity facts that give rise to a "strong"—*i. e.*, a powerful or cogent—inference. See American Heritage Dictionary 1717 (4th ed. 2000) (defining "strong" as "[p]ersuasive, effective, and cogent"); 16 Oxford English Dictionary 949 (2d ed. 1989) (defining "strong" as "[p]owerful to demonstrate or convince" (definition 16b)); cf. 7 *id.*, at 924 (defining "inference" as "a conclusion [drawn] from known or assumed facts or statements"; "reasoning from something known or assumed to something else which follows from it").

The strength of an inference cannot be decided in a vacuum. The inquiry is inherently comparative: How likely is it that one conclusion, as compared to others, follows from the underlying facts? To determine whether the plaintiff

has alleged facts that give rise to the requisite "strong inference" of scienter, a court must consider plausible, nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff. The inference that the defendant acted with scienter need not be irrefutable, *i. e.*, of the "smoking-gun" genre, or even the "most plausible of competing inferences," *Fidel*, 392 F. 3d, at 227 (quoting *Helwig* v. *Vencor, Inc.*, 251 F. 3d 540, 553 (CA6 2001) (en banc)). Recall in this regard that § 21D(b)'s pleading requirements are but one constraint among many the PSLRA installed to screen out frivolous suits, while allowing meritorious actions to move forward. See *supra*, at 320–321, and n. 4. Yet the inference of scienter must be more than merely "reasonable" or "permissible"—it must be cogent and compelling, thus strong in light of other explanations. A complaint will survive, we hold, only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.[5]

[5] JUSTICE SCALIA objects to this standard on the ground that "[i]f a jade falcon were stolen from a room to which only A and B had access," it could not "*possibly* be said there was a 'strong inference' that B was the thief." *Post*, at 329 (opinion concurring in judgment) (emphasis in original). We suspect, however, that law enforcement officials as well as the owner of the precious falcon would find the inference of guilt as to B quite strong—certainly strong enough to warrant further investigation. Indeed, an inference at least as likely as competing inferences can, in some cases, warrant recovery. See *Summers* v. *Tice*, 33 Cal. 2d 80, 84–87, 199 P. 2d 1, 3–5 (1948) (plaintiff wounded by gunshot could recover from two defendants, even though the most he could prove was that each defendant was at least as likely to have injured him as the other); Restatement (Third) of Torts § 28(b), Comment *e*, p. 504 (Proposed Final Draft No. 1, Apr. 6, 2005) ("Since the publication of the Second Restatement in 1965, courts have generally accepted the alternative-liability principle of [*Summers* v. *Tice*, adopted in] § 433B(3), while fleshing out its limits."). In any event, we disagree with JUSTICE SCALIA that the hardly stock term "strong inference" has only one invariably right ("natural" or "normal") reading—his. See *post*, at 331–332.

JUSTICE ALITO agrees with JUSTICE SCALIA, and would transpose to the pleading stage "the test that is used at the summary-judgment and judgment-as-a-matter-of-law stages." *Post*, at 335 (opinion concurring in

B

Tellabs contends that when competing inferences are considered, Notebaert's evident lack of pecuniary motive will be dispositive. The Shareholders, Tellabs stresses, did not allege that Notebaert sold any shares during the class period. See Brief for Petitioners 50 ("The absence of any allegations of motive color all the other allegations putatively giving rise to an inference of scienter."). While it is true that motive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference, we agree with the Seventh Circuit that the absence of a motive allegation is not fatal. See 437 F. 3d, at 601. As earlier stated, *supra*, at 322–323, allegations must be considered collectively; the significance that can be ascribed to an allegation of motive, or lack thereof, depends on the entirety of the complaint.

Tellabs also maintains that several of the Shareholders' allegations are too vague or ambiguous to contribute to a strong inference of scienter. For example, the Shareholders alleged that Tellabs flooded its customers with unwanted products, a practice known as "channel stuffing." See *supra*, at 315. But they failed, Tellabs argues, to specify whether the channel stuffing allegedly known to Notebaert was the illegitimate kind (*e. g.*, writing orders for products customers had not requested) or the legitimate kind (*e. g.*, offering customers discounts as an incentive to buy). Brief for Petitioners 44–46; Reply Brief 8. See also *id.*, at 8–9 (complaint lacks precise dates of reports critical to distinguish legitimate conduct from culpable conduct). But see 437 F. 3d, at 598, 603–604 (pointing to multiple particulars

judgment). But the test at each stage is measured against a different backdrop. It is improbable that Congress, without so stating, intended courts to test pleadings, unaided by discovery, to determine whether there is "no genuine issue as to any material fact." See Fed. Rule Civ. Proc. 56(c). And judgment as a matter of law is a post-trial device, turning on the question whether a party has produced evidence "legally sufficient" to warrant a jury determination in that party's favor. See Rule 50(a)(1).

alleged by the Shareholders, including specifications as to timing). We agree that omissions and ambiguities count against inferring scienter, for plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." § 78u–4(b)(2). We reiterate, however, that the court's job is not to scrutinize each allegation in isolation but to assess all the allegations holistically. See *supra*, at 322–323; 437 F. 3d, at 601. In sum, the reviewing court must ask: When the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of scienter at least as strong as any opposing inference?[6]

IV

Accounting for its construction of § 21D(b)(2), the Seventh Circuit explained that the court "th[ought] it wis[e] to adopt an approach that [could not] be misunderstood as a usurpation of the jury's role." 437 F. 3d, at 602. In our view, the Seventh Circuit's concern was undue.[7] A court's comparative assessment of plausible inferences, while constantly as-

[6] The Seventh Circuit held that allegations of scienter made against one defendant cannot be imputed to all other individual defendants. 437 F. 3d, at 602–603. See also *id.*, at 603 (to proceed beyond the pleading stage, the plaintiff must allege as to each defendant facts sufficient to demonstrate a culpable state of mind regarding his or her violations (citing *Phillips* v. *Scientific-Atlanta, Inc.*, 374 F. 3d 1015, 1018 (CA11 2004))). Though there is disagreement among the Circuits as to whether the group pleading doctrine survived the PSLRA, see, *e. g.*, *Southland Securities Corp.* v. *Inspire Ins. Solutions Inc.*, 365 F. 3d 353, 364 (CA5 2004), the Shareholders do not contest the Seventh Circuit's determination, and we do not disturb it.

[7] The Seventh Circuit raised the possibility of a Seventh Amendment problem on its own initiative. The Shareholders did not contend below that dismissal of their complaint under § 21D(b)(2) would violate their right to trial by jury. Cf. *Monroe Employees Retirement System* v. *Bridgestone Corp.*, 399 F. 3d 651, 683, n. 25 (CA6 2005) (noting possible Seventh Amendment argument but declining to address it when not raised by plaintiffs).

suming the plaintiff's allegations to be true, we think it plain, does not impinge upon the Seventh Amendment right to jury trial.[8]

Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it has power to determine what must be proved to prevail on the merits. It is the federal lawmaker's prerogative, therefore, to allow, disallow, or shape the contours of—including the pleading and proof requirements for—§ 10(b) private actions. No decision of this Court questions that authority in general, or suggests, in particular, that the Seventh Amendment inhibits Congress from establishing whatever pleading requirements it finds appropriate for federal statutory claims. Cf. *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 512–513 (2002); *Leatherman*, 507 U. S., at 168 (both recognizing that heightened pleading requirements can be established by Federal Rule, citing Fed. Rule Civ. Proc. 9(b), which requires that fraud or mistake be pleaded with particularity).[9]

Our decision in *Fidelity & Deposit Co. of Md.* v. *United States*, 187 U. S. 315 (1902), is instructive. That case concerned a rule adopted by the Supreme Court of the District of Columbia in 1879 pursuant to rulemaking power delegated by Congress. The rule required defendants, in certain con-

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[8] In numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment. See, *e. g.*, *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 589 (1993) (expert testimony can be excluded based on judicial determination of reliability); *Neely* v. *Martin K. Eby Constr. Co.*, 386 U. S. 317, 321 (1967) (judgment as a matter of law); *Pease* v. *Rathbun-Jones Engineering Co.*, 243 U. S. 273, 278 (1917) (summary judgment).

[9] Any heightened pleading rule, including Fed. Rule Civ. Proc. 9(b), could have the effect of preventing a plaintiff from getting discovery on a claim that might have gone to a jury, had discovery occurred and yielded substantial evidence. In recognizing Congress' or the Federal Rule makers' authority to adopt special pleading rules, we have detected no Seventh Amendment impediment.

tract actions, to file an affidavit "specifically stating . . . , in precise and distinct terms, the grounds of his defen[s]e." *Id.*, at 318 (internal quotation marks omitted). The defendant's affidavit was found insufficient, and judgment was entered for the plaintiff, whose declaration and supporting affidavit had been found satisfactory. *Ibid.* This Court upheld the District's rule against the contention that it violated the Seventh Amendment. *Id.*, at 320. Just as the purpose of § 21D(b) is to screen out frivolous complaints, the purpose of the prescription at issue in *Fidelity & Deposit Co.* was to "preserve the court from frivolous defen[s]es," *ibid.* Explaining why the Seventh Amendment was not implicated, this Court said that the heightened pleading rule simply "prescribes the means of making an issue," and that, when "[t]he issue [was] made as prescribed, the right of trial by jury accrues." *Ibid.;* accord *Ex parte Peterson*, 253 U. S. 300, 310 (1920) (Brandeis, J.) (citing *Fidelity & Deposit Co.*, and reiterating: "It does not infringe the constitutional right to a trial by jury [in a civil case], to require, with a view to formulating the issues, an oath by each party to the facts relied upon."). See also *Walker* v. *New Mexico & Southern Pacific R. Co.*, 165 U. S. 593, 596 (1897) (Seventh Amendment "does not attempt to regulate matters of pleading").

In the instant case, provided that the Shareholders have satisfied the congressionally "prescribe[d] . . . means of making an issue," *Fidelity & Deposit Co.*, 187 U. S., at 320, the case will fall within the jury's authority to assess the credibility of witnesses, resolve any genuine issues of fact, and make the ultimate determination whether Notebaert and, by imputation, Tellabs acted with scienter. We emphasize, as well, that under our construction of the "strong inference" standard, a plaintiff is not forced to plead more than she would be required to prove at trial. A plaintiff alleging fraud in a § 10(b) action, we hold today, must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference. At trial, she must then prove her

case by a "preponderance of the evidence." Stated otherwise, she must demonstrate that it is *more likely* than not that the defendant acted with scienter. See *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 390 (1983).

* * *

While we reject the Seventh Circuit's approach to § 21D(b)(2), we do not decide whether, under the standard we have described, see *supra*, at 322–326, the Shareholders' allegations warrant "a strong inference that [Notebaert and Tellabs] acted with the required state of mind," 15 U. S. C. § 78u–4(b)(2). Neither the District Court nor the Court of Appeals had the opportunity to consider the matter in light of the prescriptions we announce today. We therefore vacate the Seventh Circuit's judgment so that the case may be reexamined in accord with our construction of § 21D(b)(2).

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 SCALIA, concurring in the judgment.

I fail to see how an inference that is merely "at least as compelling as any opposing inference," *ante*, at 314, can conceivably be called what the statute here at issue requires: a "strong inference," 15 U. S. C. § 78u–4(b)(2). If a jade falcon were stolen from a room to which only A and B had access, could it *possibly* be said there was a "strong inference" that B was the thief? I think not, and I therefore think that the Court's test must fail. In my view, the test should be whether the inference of scienter (if any) is *more plausible* than the inference of innocence.*

*The Court suggests that "the owner of the precious falcon would find the inference of guilt as to B quite strong." *Ante*, at 324, n. 5. If he should draw such an inference, it would only prove the wisdom of the ancient maxim "*aliquis non debet esse Judex in propria causa*"—no man

The Court's explicit rejection of this reading, *ante*, at 323–324, and n. 5, rests on two assertions. The first (doubtless true) is that the statute does not require that "[t]he inference that the defendant acted with scienter . . . be irrefutable, *i. e.*, of the 'smoking-gun' genre," *ante*, at 324. It is up to Congress, however, and not to us, to determine what pleading standard would avoid those extremities while yet effectively deterring baseless actions. Congress has expressed its determination in the phrase "strong inference"; it is our job to give that phrase its normal meaning. And if we are to abandon text in favor of unexpressed purpose, as the Court does, it is inconceivable that Congress's enactment of stringent pleading requirements in the Private Securities Litigation Reform Act of 1995 somehow manifests the purpose of giving plaintiffs the edge in close cases.

The Court's second assertion (also true) is that "an inference at least as likely as competing inferences can, in some cases, warrant recovery." *Ante*, at 324, n. 5 (citing *Summers* v. *Tice*, 33 Cal. 2d 80, 84–87, 199 P. 2d 1, 3–5 (1948)). *Summers* is a famous case, however, because it sticks out of the ordinary body of tort law like a sore thumb. It represented "a relaxation" of "such proof as is ordinarily required" to succeed in a negligence action. *Id.*, at 86, 199 P. 2d, at 4 (internal quotation marks omitted). There is no indication that the statute at issue here was meant to relax the ordinary rule under which a tie goes to the defendant. To the contrary, it explicitly strengthens that rule by extending it to the pleading stage of a case.

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ought to be a judge of his own cause. *Dr. Bonham's Case*, 8 Co. Rep. 107a, 114a, 118a, 77 Eng. Rep. 638, 646, 652 (C. P. 1610). For it is quite clear (from the dispassionate perspective of one who does not own a jade falcon) that a *possibility*, even a strong possibility, that B is responsible is not a strong *inference* that B is responsible. "Inference" connotes "belief" in what is inferred, and it would be impossible to form a strong belief that it was B and not A, or A and not B.

One of petitioners' *amici* suggests that my reading of the statute would transform the text from requiring a "strong" inference to requiring the "strongest" inference. See Brief for American Association for Justice as *Amicus Curiae* 27. The point might have some force if Congress could have more clearly adopted my standard by using the word "strongest" instead of the word "strong." But the use of the superlative would not have made any sense given the provision's structure: What does it mean to require a plaintiff to plead "facts giving rise to *the strongest* inference that the defendant acted with the required state of mind"? It is certainly true that, if Congress had wanted to adopt my standard with even greater clarity, it could have restructured the entire provision—to require, for example, that the plaintiff plead "facts giving rise to *an inference of scienter that is more compelling than the inference that the defendant acted with a nonculpable state of mind.*" But if one is to consider the possibility of total restructuring, it is equally true that, to express the Court's standard, Congress could have demanded "*an inference of scienter that is at least as compelling as the inference that the defendant acted with a nonculpable state of mind.*" Argument from the possibility of saying it differently is clearly a draw. We must be content to give "strong inference" its normal meaning. I hasten to add that, while precision of interpretation should always be pursued for its own sake, I doubt that in this instance what I deem to be the correct test will produce results much different from the Court's. How often is it that inferences are precisely in equipoise? All the more reason, I think, to read the language for what it says.

The Court and the dissent criticize me for suggesting that there is only one reading of the text. *Ante*, at 324–325, n. 5; *post*, at 336, n. 1 (STEVENS, J., dissenting). They are both mistaken. I assert only that mine is the natural reading of the statute (*i. e.*, the normal reading), not that it is the only

conceivable one. The Court has no standing to object to this approach, since it concludes that, in another respect, the statute admits of only one natural reading, namely, that competing inferences must be weighed because the strong-inference requirement "is inherently comparative," *ante*, at 323. As for the dissent, it asserts that the statute cannot possibly have a natural and discernible meaning, since "Courts of Appeals" and "Members of this Court" "have divided" over the question. *Post*, at 336, n. 1. It was just weeks ago, however, that the author of the dissent, joined by the author of today's opinion for the Court, concluded that a statute's meaning was "plain," *Rockwell Int'l Corp.* v. *United States*, 549 U. S. 457, 479 (2007) (STEVENS, J., dissenting), even though the Courts of Appeals and Members of this Court divided over the question, *id.*, at 470, n. 5. Was plain meaning then, as the dissent claims it is today, *post*, at 336, n. 1, "in the eye of the beholder"?

It is unremarkable that various Justices in this case reach different conclusions about the correct interpretation of the statutory text. It is remarkable, however, that the dissent believes that Congress "implicitly delegated significant lawmaking authority to the Judiciary in determining how th[e] [strong-inference] standard should operate in practice." *Post*, at 335. This is language usually employed to describe the discretion conferred upon administrative agencies, which need not adopt what courts would consider the interpretation most faithful to the text of the statute, but may choose some other interpretation, so long as it is within the bounds of the reasonable, and may later change to some *other* interpretation that is within the bounds of the reasonable. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). Courts, by contrast, *must* give the statute its single, most plausible, reading. To describe this as an exercise of "delegated lawmaking authority" seems to me peculiar—unless one believes in lawmakers who have no discretion. Courts must apply judgment, to be sure. But judgment is not discretion.

Even if I agreed with the Court's interpretation of "strong inference," I would not join the Court's opinion because of its frequent indulgence in the last remaining legal fiction of the West: that the report of a single committee of a single House expresses the will of Congress. The Court says, for example, that "Congress'[s] purpose" was "to promote greater uniformity among the Circuits," *ante,* at 321, relying for that certitude upon the statement of managers accompanying a House Conference Committee Report whose text was never adopted by the House, much less by the Senate, and as far as we know was read by almost no one. The Court is sure that Congress " 'inten[ded] to strengthen existing pleading requirements,' " *ante,* at 322, because—again—the statement of managers said so. I come to the same conclusion for the much safer reason that the law which Congress adopted (and which the Members of both Houses actually *voted* on) so indicates. And had the legislation not done so, the statement of managers assuredly could not have remedied the deficiency.

With the above exceptions, I am generally in agreement with the Court's analysis, and so concur in its judgment.

JUSTICE ALITO, concurring in the judgment.

I agree with the Court that the Seventh Circuit used an erroneously low standard for determining whether the plaintiffs in this case satisfied their burden of pleading "with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U. S. C. § 78u–4(b)(2). I further agree that the case should be remanded to allow the lower courts to decide in the first instance whether the allegations survive under the correct standard. In two respects, however, I disagree with the opinion of the Court. First, the best interpretation of the statute is that only those facts that are alleged "with particularity" may properly be considered in determining whether the allegations of scienter are sufficient. Second, I agree with JUSTICE SCALIA that a "strong inference" of scienter,

in the present context, means an inference that is more likely than not correct.

I

On the first point, the statutory language is quite clear. Section 78u–4(b)(2) states that "the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." Thus, "a strong inference" of scienter must arise from those facts that are stated "with particularity." It follows that facts not stated with the requisite particularity cannot be considered in determining whether the strong-inference test is met.

In dicta, however, the Court states that "omissions and ambiguities" merely "count against" inferring scienter, and that a court should consider all allegations of scienter, even nonparticularized ones, when considering whether a complaint meets the "strong inference" requirement. *Ante*, at 326. Not only does this interpretation contradict the clear statutory language on this point, but it undermines the particularity requirement's purpose of preventing a plaintiff from using vague or general allegations in order to get by a motion to dismiss for failure to state a claim. Allowing a plaintiff to derive benefit from such allegations would permit him to circumvent this important provision.

Furthermore, the Court's interpretation of the particularity requirement in no way distinguishes it from normal pleading review, under which a court naturally gives less weight to allegations containing "omissions and ambiguities" and more weight to allegations stating particularized facts. The particularity requirement is thus stripped of all meaning.

Questions certainly may arise as to whether certain allegations meet the statutory particularity requirement, but where that requirement is violated, the offending allegations cannot be taken into account.

II

I would also hold that a "strong inference that the defendant acted with the required state of mind" is an inference that is stronger than the inference that the defendant lacked the required state of mind. Congress has provided very little guidance regarding the meaning of "strong inference," and the difference between the Court's interpretation (the inference of scienter must be at least as strong as the inference of no scienter) and JUSTICE SCALIA's (the inference of scienter must be at least marginally stronger than the inference of no scienter) is unlikely to make any practical difference. The two approaches are similar in that they both regard the critical question as posing a binary choice (either the facts give rise to a "strong inference" of scienter or they do not). But JUSTICE SCALIA's interpretation would align the pleading test under § 78u–4(b)(2) with the test that is used at the summary-judgment and judgment-as-a-matter-of-law stages, whereas the Court's test would introduce a test previously unknown in civil litigation. It seems more likely that Congress meant to adopt a known quantity and thus to adopt JUSTICE SCALIA's approach.

JUSTICE STEVENS, dissenting.

As the Court explains, when Congress enacted a heightened pleading requirement for private actions to enforce the federal securities laws, it "left the key term 'strong inference' undefined." *Ante*, at 314. It thus implicitly delegated significant lawmaking authority to the Judiciary in determining how that standard should operate in practice. Today the majority crafts a perfectly workable definition of the term, but I am persuaded that a different interpretation would be both easier to apply and more consistent with the statute.

The basic purpose of the heightened pleading requirement in the context of securities fraud litigation is to protect defendants from the costs of discovery and trial in unmeritori-

ous cases. Because of its intrusive nature, discovery may also invade the privacy interests of the defendants and their executives. Like citizens suspected of having engaged in criminal activity, those defendants should not be required to produce their private effects unless there is probable cause to believe them guilty of misconduct. Admittedly, the probable-cause standard is not capable of precise measurement, but it is a concept that is familiar to judges. As a matter of normal English usage, its meaning is roughly the same as "strong inference." Moreover, it is most unlikely that Congress intended us to adopt a standard that makes it more difficult to commence a civil case than a criminal case.[1]

In addition to the benefit of its grounding in an already familiar legal concept, using a probable-cause standard would avoid the unnecessary conclusion that "in determining whether the pleaded facts give rise to a 'strong' inference of scienter, the court *must* take into account plausible opposing inferences." *Ante*, at 323 (emphasis added). There are times when an inference can easily be deemed strong without any need to weigh competing inferences. For example, if a known drug dealer exits a building immediately after a

[1] The meaning of a statute can only be determined on a case-by-case basis and will, in each case, turn differently on the clarity of the statutory language, its context, and the intent of its drafters. Here, in my judgment, a probable-cause standard is more faithful to the intent of Congress, as expressed in both the specific pleading requirement and the statute as a whole, than the more defendant-friendly interpretation that JUSTICE SCALIA prefers. He is clearly wrong in concluding that in divining the meaning of this term, we can merely "read the language for what it says," and that it is susceptible to only one reading. *Ante*, at 331 (opinion concurring in judgment). He argues that we "must be content to give 'strong inference' its normal meaning," *ibid.*, and yet the "normal meaning" of a term such as "strong inference" is surely in the eye of the beholder. As the Court's opinion points out, Courts of Appeals have divided on the meaning of the standard, see *ante*, at 314, 322, and today, the Members of this Court have done the same. Although JUSTICE SCALIA may disagree with the Court's reading of the term, he should at least acknowledge that, in this case, the term itself is open to interpretation.

confirmed drug transaction, carrying a suspicious looking package, a judge could draw a strong inference that the individual was involved in the aforementioned drug transaction without debating whether the suspect might have been leaving the building at that exact time for another unrelated reason.

If, using that same methodology, we assume (as we must, see *ante*, at 322, 326) the truth of the detailed factual allegations attributed to 27 different confidential informants described in the complaint, App. 91–93, and view those allegations collectively, I think it clear that they establish probable cause to believe that Tellabs' chief executive officer "acted with the required intent," as the Seventh Circuit held.[2] 437 F. 3d 588, 602 (2006).

Accordingly, I would affirm the judgment of the Court of Appeals.

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[2] The "channel stuffing" allegations in ¶¶ 62–72 of the amended complaint, App. 110–113, are particularly persuasive. Contrary to petitioners' arguments that respondents' allegations of channel stuffing "are too vague or ambiguous to contribute to a strong inference of scienter," *ante*, at 325, this portion of the complaint clearly alleges that Notebaert himself had specific knowledge of illegitimate channel stuffing during the relevant time period, see, *e. g.*, App. 111, ¶ 67 ("Defendant Notebaert worked directly with Tellabs' sales personnel to channel stuff SBC"); *id.*, at 110–112 (alleging, in describing such channel stuffing, that Tellabs took "extraordinary" steps that amounted to "an abnormal practice in the industry"; that "distributors were upset and later returned the inventory" (and, in the case of Verizon's chairman, called Tellabs to complain); that customers "did not want" products that Tellabs sent and that Tellabs employees wrote purchase orders for; that "returns were so heavy during January and February 2001 that Tellabs had to lease extra storage space to accommodate all the returns"; and that Tellabs "backdat[ed] sales" that actually took place in 2001 to appear as having occurred in 2000). If these allegations are actually taken as true and viewed in the collective, it is hard to imagine what competing inference could effectively counteract the inference that Notebaert and Tellabs "'acted with the required state of mind.'" *Ante*, at 329 (opinion of the Court) (quoting 15 U. S. C. § 78u–4(b)(2)).

Syllabus

RITA *v.* UNITED STATES

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

No. 06–5754. Argued February 20, 2007—Decided June 21, 2007

Petitioner Rita sought a sentence lower than the recommended Federal Guidelines range of 33 to 41 months based on his physical condition, likely vulnerability in prison, and military experience. The judge concluded that the appropriate sentence was 33 months, the bottom of the Guidelines range. In affirming, the Fourth Circuit observed that a sentence imposed within a properly calculated Guidelines range is presumptively reasonable.

Held:

1. A court of appeals may apply a presumption of reasonableness to a district court sentence within the Guidelines. Pp. 347–356.

(a) Such a presumption is not binding. It does not reflect strong judicial deference of the kind that leads appeals courts to grant greater factfinding leeway to an expert agency than to a district judge. It reflects the nature of the Guidelines-writing task that Congress set for the Sentencing Commission and how the Commission carries out that task. In 18 U. S. C. § 3553(a), Congress instructed the *sentencing judge* to consider (1) offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution. Statutes then tell the *Commission* to write Guidelines that will carry out the same basic § 3553(a) objectives. The Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and had the help of the law enforcement community over a long period in an effort to fulfill this statutory mandate. They also reflect the fact that judges (and others) can differ as to how best to reconcile the disparate ends of punishment. The resulting Guidelines seek to embody the § 3553(a) considerations, both in principle and in practice, and it is fair to assume that they, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives. An individual sentence reflects the sentencing judge's determination that the Commission's application of § 3553(a) is appropriate in the mine run of cases, that the individual case does not differ significantly, and consequently that a Guidelines sentence reflects a proper application of § 3553(a) in the case at hand. The "rea-

sonableness" presumption simply recognizes these real-world circumstances. It applies only on appellate review. The sentencing court does not enjoy the presumption's benefit when determining the merits of the arguments by prosecution or defense that a Guidelines sentence should not apply. Pp. 347–351.

(b) Even if the presumption increases the likelihood that the judge, not the jury, will find "sentencing facts," it does not violate the Sixth Amendment. This Court's Sixth Amendment cases do not forbid a sentencing court to take account of factual matters not determined by a jury and increase the sentence accordingly to take account of the Sentencing Commission's factual findings or recommended sentences. The relevant Sixth Amendment inquiry is whether a law forbids a judge to increase a sentence *unless* the judge finds facts that the jury did not find. A nonbinding appellate reasonableness presumption for Guidelines sentences does not *require* the sentencing judge to impose a Guidelines sentence. Still less does it *forbid* the judge to impose a sentence higher than the Guidelines provide for the jury-determined facts standing alone. In addition, any general conflict between § 3553(a) and the Guidelines for appellate review purposes is alleviated where judge and Commission both determine that the Guidelines sentence is appropriate in the case at hand, for that sentence likely reflects § 3553(a)'s factors. Pp. 352–356.

2. The District Court properly analyzed the relevant sentencing factors, and given the record, its ultimate sentence was reasonable. Section 3553(c) calls for the judge to "state" his "reasons," but does not insist on a full opinion in every case. The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances. The law leaves much, in this respect, to the judge's own professional judgment. In the present context, the sentencing judge should articulate enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority. He may say less when his decision rests upon the Commission's own reasoning that the Guidelines sentence is proper in the typical case, and the judge has found that the case before him is typical. But where a party presents nonfrivolous reasons for imposing a different sentence, the judge will normally go further and explain why he has rejected those arguments. Here, the sentencing judge's statement of reasons was brief but legally sufficient. The record makes clear that the judge listened to each of Rita's arguments for a downward departure and considered the supporting evidence before finding those circumstances insufficient to warrant a sentence lower than the Guidelines range. Where, as here, the matter is conceptually simple and the record makes clear that the sentencing

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judge considered the evidence and arguments, the law does not require a judge to write more extensively. Pp. 356–359.

3. The Fourth Circuit, after applying the presumption, was legally correct in holding that Rita's sentence was not "unreasonable." Like the District Court and the Fourth Circuit, this Court simply cannot say that Rita's special circumstances—his health, fear of retaliation, and military record—are special enough, in light of § 3553(a), to require a sentence lower than the one the Guidelines provide. Rita's argument that the Guidelines sentence is not reasonable under § 3553(a) because it expressly declines to consider various personal characteristics, such as his physical condition, employment record, and military service, was not raised below and will not be considered here. Pp. 359–360.

177 Fed. Appx. 357, affirmed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, GINSBURG, and ALITO, JJ., joined, and in which SCALIA and THOMAS, JJ., joined as to Part III. STEVENS, J., filed a concurring opinion, in which GINSBURG, J., joined as to all but Part II, *post*, p. 360. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined, *post*, p. 368. SOUTER, J., filed a dissenting opinion, *post*, p. 384.

Thomas N. Cochran argued the cause for petitioner. With him on the briefs were *Louis C. Allen III*, *William C. Ingram*, *Elizabeth A. Flagg*, *Jeffrey T. Green*, *Robert N. Hochman*, and *Eric A. Shumsky*.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Fisher*, *Dan Himmelfarb*, *Matthew D. Roberts*, *Nina Goodman*, and *Jeffrey P. Singdahlsen*.*

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*Briefs of *amici curiae* urging reversal were filed for Families Against Mandatory Minimums by *Gregory L. Poe*, *Mary Price*, and *Peter Goldberger;* for Federal Public and Community Defenders et al. by *Thomas W. Hillier II*, *Amy Baron-Evans*, *Laura E. Mate*, and *Sara E. Noonan;* for the National Association of Criminal Defense Lawyers by *Miguel A. Estrada*, *David Debold*, and *Jeffrey L. Fisher;* for the National Veterans Legal Services Program et al. by *Louis R. Cohen* and *Jonathan Nuechterlein;* for the New York Council of Defense Lawyers by *Alexandra A. E. Shapiro* and *Paul H. Schwartz;* for the Washington Legal Foundation

JUSTICE BREYER delivered the opinion of the Court.

The federal courts of appeals review federal sentences and set aside those they find "unreasonable." See, *e. g.*, *United States* v. *Booker*, 543 U. S. 220, 261–263 (2005). Several Circuits have held that, when doing so, they will presume that a sentence imposed within a properly calculated United States Sentencing Guidelines range is a reasonable sentence. See, *e. g.*, 177 Fed. Appx. 357, 358 (CA4 2006) *(per curiam)* (case below); see also United States Sentencing Commission, Guidelines Manual (Nov. 2006) (USSG or Guidelines). The most important question before us is whether the law permits the courts of appeals to use this presumption. We hold that it does.

I

A

The basic crime in this case concerns two false statements which Victor Rita, the petitioner, made under oath to a federal grand jury. The jury was investigating a gun company called InterOrdnance. Prosecutors believed that buyers of an InterOrdnance kit, called a "PPSH 41 machinegun 'parts kit,'" could assemble a machinegun from the kit, that those kits consequently amounted to machineguns, and that InterOrdnance had not secured proper registrations for the importation of the guns. App. 7, 16–19, 21–22.

Rita had bought a PPSH 41 machinegun parts kit. Rita, when contacted by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), agreed to let a federal agent inspect the kit. *Id.*, at 119–120; Supp. App. 5–8. But before meeting with the agent, Rita called InterOrdnance and then sent

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et al. by *Daniel J. Popeo* and *Paul D. Kamenar;* and for Marc L. Miller et al. by *Mr. Miller, pro se, Robert B. Fiske, Earl J. Silbert,* and *Peter Vaira.*

Briefs of *amici curiae* were filed for Law Professors Who Study Sentencing Reform by *Edward S. Lee;* and for the United States Sentencing Commission by *David C. Frederick* and *Pamela O. Barron.*

back the kit. He subsequently turned over to ATF a different kit that apparently did not amount to a machinegun. App. 23–24, 120; Supp. App. 2–5, 8–10, 13–14.

The investigating prosecutor brought Rita before the grand jury, placed him under oath, and asked him about these matters. Rita denied that the Government agent had asked him for the PPSH kit, and also denied that he had spoken soon thereafter about the PPSH kit to someone at InterOrdnance. App. 19, 120–121; Supp. App. 11–12. The Government claimed these statements were false, charged Rita with perjury, making false statements, and obstructing justice, and, after a jury trial, obtained convictions on all counts. App. 7–13, 94, 103.

B

The parties subsequently proceeded to sentencing. Initially, a probation officer, with the help of the parties, and after investigating the background both of the offenses and of the offender, prepared a presentence report. See Fed. Rules Crim. Proc. 32(c)–(d); 18 U. S. C. § 3552(a). The completed report describes "offense characteristics," "offender characteristics," and other matters that might be relevant to the sentence, and then calculates a Guidelines sentence. The report also sets forth factors potentially relevant to a departure from the Guidelines or relevant to the imposition of an other-than-Guidelines sentence. It ultimately makes a sentencing recommendation based on the Guidelines. App. 115–136.

In respect to "offense characteristics," for example, the report points out that the five counts of conviction all stem from a single incident. *Id.*, at 122. Hence, pursuant to the Guidelines, the report, in calculating a recommended sentence, groups the five counts of conviction together, treating them as if they amounted to the single most serious count among them (and ignoring all others). See USSG § 3D1.1. The single most serious offense in Rita's case is "perjury."

The relevant Guideline, § 2J1.3(c)(1), instructs the sentencing court (and the probation officer) to calculate the Guidelines sentence for "perjury . . . in respect to a criminal offense" by applying the Guideline for an "accessory after the fact," as to that criminal offense, § 2X3.1. And that latter Guideline says that the judge, for calculation purposes, should take as a base offense level, a level that is "6 levels lower than the offense level for the *underlying offense*" (emphasis added) (the offense that the perjury may have helped someone commit). Here the "underlying offense" consisted of InterOrdnance's possible violation of the machinegun registration law. App. 124; USSG § 2M5.2 (providing sentence for violation of 22 U. S. C. § 2778(b)(2), importation of defense articles without authorization). The base offense level for the gun registration crime is 26. See USSG § 2M5.2. Six levels less is 20. And 20, says the presentence report, is the base offense level applicable to Rita for purposes of Guidelines sentence calculation. App. 45.

The presentence report next considers Rita's "Criminal History." *Id.*, at 125. Rita was convicted in May 1986, and sentenced to five years' probation for making false statements in connection with the purchase of firearms. Because this conviction took place more than 10 years before the present offense, it did not count against Rita. And because Rita had no other relevant convictions, the Guidelines considered him as having no "criminal history points." *Ibid.* The report consequently places Rita in criminal history category I, the lowest category for purposes of calculating a Guidelines' sentence.

The report goes on to describe other "Offender Characteristics." *Id.*, at 126. The description includes Rita's personal and family data, Rita's physical condition (including a detailed description of ailments), Rita's mental and emotional health, the lack of any history of substance abuse, Rita's vocational and nonvocational education, and Rita's employment record. It states that he served in the Armed Forces for

over 25 years, on active duty and in the Reserve. During that time he received 35 commendations, awards, or medals of different kinds. The report analyzes Rita's financial condition. *Id.*, at 126–132.

Ultimately, the report calculates the Guidelines sentencing range. *Id.*, at 132. The Guidelines specify for base level 20, criminal history category I, a sentence of 33-to-41 months' imprisonment. *Ibid.* The report adds that there "appears to be no circumstance or combination of circumstances that warrant a departure from the prescribed sentencing guidelines." *Id.*, at 133.

C

At the sentencing hearing, both Rita and the Government presented their sentencing arguments. Each side addressed the report. Rita argued for a sentence outside (and lower than) the recommended Guidelines 33-to-41 month range.

The judge made clear that Rita's argument for a lower sentence could take either of two forms. First, Rita might argue *within the Guidelines' framework*, for a departure from the applicable Guidelines range on the ground that his circumstances present an "atypical case" that falls outside the "heartland" to which the United States Sentencing Commission intends each individual Guideline to apply. USSG § 5K2.0(a)(2). Second, Rita might argue that, independent of the Guidelines, application of the sentencing factors set forth in 18 U. S. C. § 3553(a) (2000 ed. and Supp. IV) warrants a lower sentence. See *Booker*, 543 U. S., at 259–260.

Thus, the judge asked Rita's counsel, "Are you going to put on evidence to show that [Rita] should be getting a downward departure, or under 3553, your client would be entitled to a different sentence than he should get under sentencing guidelines?" App. 52. And the judge later summarized:

> "[Y]ou're asking for a departure from the guidelines or a sentence under 3553 that is lower than the guidelines, and here are the reasons:

> "One, he is a vulnerable defendant because he's been involved in [government criminal justice] work which has caused people to become convicted criminals who are in prison and there may be retribution against him.
>
> "Two, his military experience . . . ." *Id.*, at 64–65.

Counsel agreed, while adding that Rita's poor physical condition constituted a third reason. And counsel said that he rested his claim for a lower sentence on "[j]ust [those] three" special circumstances, "[p]hysical condition, vulnerability in prison and the military service." *Id.*, at 65. Rita presented evidence and argument related to these three factors. The Government, while not asking for a sentence higher than the report's recommended Guidelines range, said that Rita's perjury had interfered with the Government's potential "obstruction of justice" claim against InterOrdnance and that Rita, as a former Government criminal justice employee, should have known better than to commit perjury. *Id.*, at 74–77. The sentencing judge asked questions about each factor.

After hearing the arguments, the judge concluded that he was "unable to find that the [report's recommended] sentencing guideline range . . . is an inappropriate guideline range for that, and under 3553 . . . the public needs to be protected if it is true, and I must accept as true the jury verdict." *Id.*, at 87. The court concluded: "So the Court finds that it is appropriate to enter" a sentence at the bottom of the Guidelines range, namely, a sentence of imprisonment "for a period of 33 months." *Ibid.*

D

On appeal, Rita argued that his 33-month sentence was "unreasonable" because (1) it did not adequately take account of "the defendant's history and characteristics," and (2) it "is greater than necessary to comply with the purposes of sentencing set forth in 18 U. S. C. § 3553(a)(2)." Brief for Appellant in No. 05–4674 (CA4), pp. i, 8. The Fourth Circuit

observed that it must set aside a sentence that is not "reasonable." The Circuit stated that "a sentence imposed within the properly calculated Guidelines range . . . is presumptively reasonable." 177 Fed. Appx., at 358 (internal quotation marks and citations omitted). It added that "while we believe that the appropriate circumstances for imposing a sentence outside the guideline range will depend on the facts of individual cases, we have no reason to doubt that most sentences will continue to fall within the applicable guideline range." The Fourth Circuit then rejected Rita's arguments and upheld the sentence. *Ibid.* (internal quotation marks omitted).

E

Rita petitioned for a writ of certiorari. He pointed out that the Circuits are split as to the use of a presumption of reasonableness for within-Guidelines sentences. Compare *United States* v. *Dorcely*, 454 F. 3d 366, 376 (CADC 2006) (uses presumption); *United States* v. *Green*, 436 F. 3d 449, 457 (CA4 2006) (same); *United States* v. *Alonzo*, 435 F. 3d 551, 554 (CA5 2006) (same); *United States* v. *Williams*, 436 F. 3d 706, 708 (CA6 2006) (same); *United States* v. *Mykytiuk*, 415 F. 3d 606, 608 (CA7 2005) (same); *United States* v. *Lincoln*, 413 F. 3d 716, 717 (CA8 2005) (same); and *United States* v. *Kristl*, 437 F. 3d 1050, 1053–1054 (CA10 2006) *(per curiam)* (same), with *United States* v. *Jimenez-Beltre*, 440 F. 3d 514, 518 (CA1 2006) (en banc) (does not use presumption); *United States* v. *Fernandez*, 443 F. 3d 19, 27 (CA2 2006) (same); *United States* v. *Cooper*, 437 F. 3d 324, 331 (CA3 2006) (same); and *United States* v. *Talley*, 431 F. 3d 784, 788 (CA11 2005) *(per curiam)* (same).

We consequently granted Rita's petition. We agreed to decide whether a court of appeals may afford a "presumption of reasonableness" to a "within-Guidelines" sentence. We also agreed to decide whether the District Court properly analyzed the relevant sentencing factors and whether, given

the record, the District Court's ultimate choice of a 33-month sentence was "unreasonable."

II

The first question is whether a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines. We conclude that it can.

A

For one thing, the presumption is not binding. It does not, like a trial-related evidentiary presumption, insist that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case. Cf., *e. g.*, *Raytheon Co.* v. *Hernandez*, 540 U. S. 44, 49–50, n. 3 (2003) (citing *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 143 (2000), and *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973)). Nor does the presumption reflect strong judicial deference of the kind that leads appeals courts to grant greater factfinding leeway to an expert agency than to a district judge. Rather, the presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one.

Further, the presumption reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the Commission carried out that task. In instructing both the *sentencing judge* and the *Commission* what to do, Congress referred to the basic sentencing objectives that the statute sets forth in 18 U. S. C. § 3553(a) (2000 ed. and Supp. IV). That provision tells the *sentencing judge* to consider (1) offense and offender characteristics; (2) the need for a sentence to reflect the basic aims

of sentencing, namely, (a) "just punishment" (retribution), (b) deterrence, (c) incapacitation, (d) rehabilitation; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution. The provision also tells the sentencing judge to "impose a sentence sufficient, but not greater than necessary, to comply with" the basic aims of sentencing as set out above.

Congressional statutes then tell the *Commission* to write Guidelines that will carry out these same § 3553(a) objectives. Thus, 28 U. S. C. § 991(b) indicates that one of the Commission's basic objectives is to "assure the meeting of the purposes of sentencing as set forth in [§ 3553(a)(2)]." The provision adds that the Commission must seek to "provide certainty and fairness" in sentencing, to "avoi[d] unwarranted sentencing disparities," to "maintai[n] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices," and to "reflect, to the extent practicable, [sentencing-relevant] advancement in [the] knowledge of human behavior." Later provisions specifically instruct the Commission to write the Guidelines with reference to this statement of purposes, the statement that itself refers to § 3553(a). See 28 U. S. C. §§ 994(f), 994(m).

The upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale.

The Commission has made a serious, sometimes controversial, effort to carry out this mandate. The Commission, in describing its Guidelines-writing efforts, refers to these same statutory provisions. It says that it has tried to embody in the Guidelines the factors and considerations set forth in § 3553(a). The Commission's introductory statement recognizes that Congress "foresees guidelines that will

further the basic purposes of criminal punishment, *i. e.*, deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender." USSG § 1A1.1, intro. to comment., pt. A, ¶ 2 (The Statutory Mission). It adds that Congress "sought *uniformity* in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct," as well as "*proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity." *Id.*, ¶ 3, at 2 (The Basic Approach).

The Guidelines commentary explains how, despite considerable disagreement within the criminal justice community, the Commission has gone about writing Guidelines that it intends to embody these ends. It says, for example, that the goals of *uniformity* and *proportionality* often conflict. The commentary describes the difficulties involved in developing a practical sentencing system that sensibly reconciles the two ends. It adds that a "philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment." Some would emphasize moral culpability and "just punishment"; others would emphasize the need for "crime control." Rather than choose among differing practical and philosophical objectives, the Commission took an "empirical approach," beginning with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past and then modifying and adjusting past practice in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like. *Id.*, ¶ 3, at 3.

The Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill this statutory mandate. They also reflect the fact that different judges (and others) can differ as to how best to reconcile the disparate ends of punishment.

The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases, may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The courts of appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly. See generally 28 U. S. C. § 994(p) and note following § 994 (Commission should review and amend Guidelines as necessary, and Congress has power to revoke or amend Guidelines); *Mistretta* v. *United States*, 488 U. S. 361, 393–394 (1989); USSG § 1B1.10(c) (listing 24 amendments promulgated in response to evolving sentencing concerns); USSG § 1A1.1, comment.

The result is a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice. Given the difficulties of doing so, the abstract and potentially conflicting nature of § 3553(a)'s general sentencing objectives, and the differences of philosophical view among those who work within the criminal justice community as to how best to apply general sentencing objectives, it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.

An individual judge who imposes a sentence within the range recommended by the Guidelines thus makes a decision that is fully consistent with the Commission's judgment in general. Despite JUSTICE SOUTER's fears to the contrary, *post*, at 390–392 (dissenting opinion), the courts of appeals' "reasonableness" presumption, rather than having independent legal effect, simply recognizes the real-world circum-

stance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable. Indeed, even the Circuits that have declined to adopt a formal presumption also recognize that a Guidelines sentence will usually be reasonable, because it reflects both the Commission's and the sentencing court's judgment as to what is an appropriate sentence for a given offender. See *Fernandez*, 443 F. 3d, at 27; *Cooper*, 437 F. 3d, at 331; *Talley*, 431 F. 3d, at 788.

We repeat that the presumption before us is an *appellate* court presumption. Given our explanation in *Booker* that appellate "reasonableness" review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review. The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines. 18 U. S. C. § 3552(a); Fed. Rule Crim. Proc. 32. He may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the "heartland" to which the Commission intends individual Guidelines to apply, USSG § 5K2.0, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless, see Rule 32(f). Thus, the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure. See Rules 32(f), (h), (i)(1)(C), and (i)(1)(D); see also *Burns* v. *United States*, 501 U. S. 129, 136 (1991) (recognizing importance of notice and meaningful opportunity to be heard at sentencing). In determining the merits of these arguments, the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply. *Booker*, 543 U. S., at 259–260.

B

Rita and his supporting *amici* make two further arguments against use of the presumption. First, Rita points out that many individual Guidelines apply higher sentences in the presence of special facts, for example, brandishing a weapon. In many cases, the sentencing judge, not the jury, will determine the existence of those facts. A pro-Guidelines "presumption of reasonableness" will increase the likelihood that courts of appeals will affirm such sentences, thereby increasing the likelihood that sentencing judges will impose such sentences. For that reason, Rita says, the presumption raises Sixth Amendment "concerns." Brief for Petitioner 28.

In our view, however, the presumption, even if it increases the likelihood that the judge, not the jury, will find "sentencing facts," does not violate the Sixth Amendment. This Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence. Nor do they prohibit the sentencing judge from taking account of the Sentencing Commission's factual findings or recommended sentences. See *Cunningham* v. *California*, 549 U. S. 270, 281–282 (2007) (citing *Booker*, *supra*, at 243–244; *Blakely* v. *Washington*, 542 U. S. 296, 304–305 (2004); *Ring* v. *Arizona*, 536 U. S. 584, 602 (2002); and *Apprendi* v. *New Jersey*, 530 U. S. 466, 471 (2000)).

The Sixth Amendment question, the Court has said, is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede). *Blakely*, *supra*, at 303–304 ("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 and the judge exceeds his proper authority" (internal quotation marks and citation omitted)); see *Cunningham*, *supra*, at 283–284 (discussing *Blakely*) ("The judge could not have sen-

tenced Blakely above the standard range without finding the additional fact of deliberate cruelty," "[b]ecause the judge in Blakely's case could not have imposed a sentence outside the standard range without finding an additional fact, the top of that range . . . was the relevant" maximum sentence for Sixth Amendment purposes); *Booker*, 543 U. S., at 244 ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt"); *id.*, at 232 (discussing *Blakely*) ("We rejected the State's argument that the jury verdict was sufficient to authorize a sentence within the general 10-year sentence for class B felonies, noting that under Washington law, the judge was *required* to find additional facts in order to impose the greater 90-month sentence" (emphasis in original)).

A nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence. Still less does it *prohibit* the sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone. As far as the law is concerned, the judge could disregard the Guidelines and apply the same sentence (higher than the statutory minimum or the bottom of the unenhanced Guidelines range) in the absence of the special facts (say, gun brandishing) which, in the view of the Sentencing Commission, would warrant a higher sentence within the statutorily permissible range. Thus, our Sixth Amendment cases do not forbid appellate court use of the presumption.

JUSTICE SCALIA concedes that the Sixth Amendment concerns he foresees are not presented by this case. *Post*, at 373–374 (opinion concurring in part and concurring in judgment). And his need to rely on *hypotheticals* to make his point is consistent with our view that the approach adopted here will not "raise a multitude of constitutional problems."

Clark v. *Martinez,* 543 U. S. 371, 380–381 (2005). Similarly, JUSTICE SCALIA agrees that we have never held that "the Sixth Amendment prohibits judges from ever finding any facts" relevant to sentencing. *Post,* at 373. In sentencing, as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur. Our decision in *Booker* recognized as much, 543 U. S., at 260–264. *Booker* held unconstitutional that portion of the Guidelines that made them mandatory. *Id.,* at 233–234, 243–244. It also recognized that when district courts impose discretionary sentences, which are reviewed under normal appellate principles by courts of appeals, such a sentencing scheme will ordinarily raise no Sixth Amendment concern. *Ibid.;* see *id.,* at 233 (opinion for the Court by STEVENS, J.) ("Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [federal sentencing statute] the provisions that make the Guidelines binding on district judges"). That being so, our opinion in *Booker* made clear that today's holding does not violate the Sixth Amendment.

Rita may be correct that the presumption will encourage sentencing judges to impose Guidelines sentences. But we do not see how that fact could change the constitutional calculus. Congress sought to diminish unwarranted sentencing disparity. It sought a Guidelines system that would bring about greater fairness in sentencing through increased uniformity. The fact that the presumption might help achieve these congressional goals does not provide cause for holding the presumption unlawful as long as the presumption remains constitutional. And, given our case law, we cannot conclude that the presumption itself violates the Sixth Amendment.

The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may

adopt a presumption of unreasonableness. Even the Government concedes that appellate courts may not presume that every variance from the advisory Guidelines is unreasonable. See Brief for United States 34–35. Several courts of appeals have also rejected a presumption of unreasonableness. See, *e. g.*, *United States* v. *Howard*, 454 F. 3d 700, 703 (CA7 2006); *United States* v. *Matheny*, 450 F. 3d 633, 642 (CA6 2006); *United States* v. *Myers*, 439 F. 3d 415, 417 (CA8 2006); *United States* v. *Moreland*, 437 F. 3d 424, 433 (CA4 2006). However, a number of Circuits adhere to the proposition that the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the degree of the variance. See, *e. g.*, *United States* v. *Smith*, 445 F. 3d 1, 4 (CA1 2006); *Moreland*, *supra*, at 434; *United States* v. *Armendariz*, 451 F. 3d 352, 358 (CA5 2006); *United States* v. *Davis*, 458 F. 3d 491, 496 (CA6 2006); *United States* v. *Dean*, 414 F. 3d 725, 729 (CA7 2005); *United States* v. *Dalton*, 404 F. 3d 1029, 1033 (CA8 2005); *United States* v. *Bishop*, 469 F. 3d 896, 907 (CA10 2006); *United States* v. *Crisp*, 454 F. 3d 1285, 1291–1292 (CA11 2006). We will consider that approach next Term in *Gall* v. *United States*, No. 06–7949, cert. granted, *post*, p. 1113.

Second, Rita and his *amici* claim that use of a pro-Guidelines presumption on appeal conflicts with Congress' insistence that sentencing judges apply the factors set forth in 18 U. S. C. § 3553(a) (2000 ed., Supp. IV) (and that the resulting sentence be "sufficient, but not greater than necessary, to comply with the purposes" of sentencing set forth in that statute). We have explained above, however, why we believe that, where judge and Commission *both* determine that the Guidelines sentence is an appropriate sentence for the case at hand, that sentence likely reflects the § 3553(a) factors (including its "not greater than necessary" requirement). See *supra*, at 348. This circumstance alleviates any serious general conflict between § 3553(a) and the Guidelines, for the purposes of appellate review. And, for that reason,

we find that nothing in § 3553(a) renders use of the presumption unlawful.

III

We next turn to the question whether the District Court properly analyzed the relevant sentencing factors. In particular, Rita argues that the court took inadequate account of § 3553(c) (2000 ed., Supp. IV), a provision that requires a sentencing judge, "at the time of sentencing," to "state in open court the reasons for its imposition of the particular sentence." In our view, given the straightforward, conceptually simple arguments before the judge, the judge's statement of reasons here, though brief, was legally sufficient.

The statute does call for the judge to "state" his "reasons." And that requirement reflects sound judicial practice. Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust.

That said, we cannot read the statute (or our precedent) as insisting upon a full opinion in every case. The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances. Sometimes a judicial opinion responds to every argument; sometimes it does not; sometimes a judge simply writes the word "granted" or "denied" on the face of a motion while relying upon context and the parties' prior arguments to make the reasons clear. The law leaves much, in this respect, to the judge's own professional judgment.

In the present context, a statement of reasons is important. The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority. See, *e. g.*, *United States* v. *Taylor*, 487 U. S. 326, 336–337 (1988). Nonetheless, when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explana-

tion. Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical. Unless a party contests the Guidelines sentence generally under § 3553(a)—that is, argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way—or argues for departure, the judge normally need say no more. Cf. § 3553(c)(2) (2000 ed., Supp. IV). (Although, often at sentencing a judge will speak at length to a defendant, and this practice may indeed serve a salutary purpose.)

Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments. Sometimes the circumstances will call for a brief explanation; sometimes they will call for a lengthier explanation. Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so. To our knowledge, an ordinary explanation of judicial reasons as to why the judge has, or has not, applied the Guidelines triggers no Sixth Amendment "jury trial" requirement. Cf. *Booker*, 543 U. S., at 233 ("For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant"), and *id.*, at 242 (requirement of finding, not articulation of it, creates Sixth Amendment problem).

By articulating reasons, even if brief, the sentencing judge not only assures reviewing courts (and the public) that the sentencing process is a reasoned process but also helps that process evolve. The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals

court. That being so, his reasoned sentencing judgment, resting upon an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors, can provide relevant information to both the court of appeals and ultimately the Sentencing Commission. The reasoned responses of these latter institutions to the sentencing judge's explanation should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw. See generally *supra,* at 351.

In the present case the sentencing judge's statement of reasons was brief but legally sufficient. Rita argued for a downward departure from the 33-to-41 month Guidelines sentence on the basis of three sets of special circumstances: health, fear of retaliation in prison, and military record. See App. 40–47. He added that, in any event, these same circumstances warrant leniency beyond that contemplated by the Guidelines.

The record makes clear that the sentencing judge listened to each argument. The judge considered the supporting evidence. The judge was fully aware of defendant's various physical ailments and imposed a sentence that takes them into account. The judge understood that Rita had previously worked in the immigration service where he had been involved in detecting criminal offenses. And he considered Rita's lengthy military service, including over 25 years of service, both on active duty and in the Reserve, and Rita's receipt of 35 medals, awards, and nominations.

The judge then simply found these circumstances insufficient to warrant a sentence lower than the Guidelines range of 33 to 45 months. *Id.*, at 87. He said that this range was not "inappropriate." (This, of course, is not the legal standard for imposition of sentence, but taken in context it is plain that the judge so understood.) He immediately added that he found that the 33-month sentence at the bottom of the Guidelines range was "appropriate." *Ibid.* He must have believed that there was not much more to say.

We acknowledge that the judge might have said more. He might have added explicitly that he had heard and considered the evidence and argument; that (as no one before him denied) he thought the Commission in the Guidelines had determined a sentence that was proper in the mine run of roughly similar perjury cases; and that he found that Rita's personal circumstances here were simply not different enough to warrant a different sentence. But context and the record make clear that this, or similar, reasoning underlies the judge's conclusion. Where a matter is as conceptually simple as in the case at hand and the record makes clear that the sentencing judge considered the evidence and arguments, we do not believe the law requires the judge to write more extensively.

IV

We turn to the final question: Was the Court of Appeals, after applying its presumption, legally correct in holding that Rita's sentence (a sentence that applied, and did not depart from, the relevant Sentencing Guideline) was not "unreasonable"? In our view, the Court of Appeals' conclusion was lawful.

As we previously said, see Part I, *supra*, the crimes at issue are perjury and obstruction of justice. In essence those offenses involved the making of knowingly false, material statements under oath before a grand jury, thereby impeding its criminal investigation. The Guidelines provide for a typical such offense a base offense level of 20, 6 levels below the level provided for a simple violation of the crime being investigated (here, the unlawful importation of machineguns). The offender, Rita, has no countable prior offenses and consequently falls within criminal history category I. The intersection of base offense level 20 and criminal history category I sets forth a sentencing range of imprisonment of 33 to 41 months.

Rita argued at sentencing that his circumstances are special. He based this argument upon his health, his fear of

retaliation, and his prior military record. His sentence explicitly takes health into account by seeking assurance that the Bureau of Prisons will provide appropriate treatment. The record makes out no special fear of retaliation, asserting only that the threat is one that any former law enforcement official might suffer. Similarly, though Rita has a lengthy and distinguished military record, he did not claim at sentencing that military service should ordinarily lead to a sentence more lenient than the sentence the Guidelines impose. Like the District Court and the Court of Appeals, we simply cannot say that Rita's special circumstances are special enough that, in light of § 3553(a), they require a sentence lower than the sentence the Guidelines provide.

Finally, Rita and supporting *amici* here claim that the Guidelines sentence is not reasonable under § 3553(a) because it expressly declines to consider various personal characteristics of the defendant, such as physical condition, employment record, and military service, under the view that these factors are "not ordinarily relevant." USSG §§ 5H1.4, 5H1.5, 5H1.11. Rita did not make this argument below, and we shall not consider it.

* * *

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins as to all but Part II, concurring.

It is no secret that the Court's remedial opinion in *United States* v. *Booker*, 543 U. S. 220 (2005), was not unanimous. See *id.*, at 272 (STEVENS, J., dissenting). But *Booker* is now settled law and must be accepted as such. See B. Cardozo, The Nature of the Judicial Process 149 (1921) ("[T]he labor of judges would be increased almost to the breaking point if

every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him"). Therefore, our task today is to apply *Booker*'s "reasonableness" standard to a District Judge's decision to impose a sentence within the range recommended by United States Sentencing Guidelines that are now advisory, rather than binding.

I

Simply stated, *Booker* replaced the *de novo* standard of review required by 18 U. S. C. § 3742(e) with an abuse-of-discretion standard that we called " 'reasonableness' " review. 543 U. S., at 262. We noted in *Booker* that the *de novo* standard was a recent addition to the law. Prior to 2003, appellate courts reviewed sentencing departures for abuse of discretion under our decision in *Koon* v. *United States*, 518 U. S. 81 (1996). In 2003, however, Congress overruled *Koon* and added the *de novo* standard to § 3742(e). See Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, § 401(d)(1), 117 Stat. 670. Recognizing that "the reasons for th[is] revisio[n]—to make Guidelines sentencing even more mandatory than it had been— . . . ceased to be relevant" in light of the Court's constitutional holding,[1] *Booker* excised the portion of § 3742(e) that directed courts of appeals to apply the *de novo* standard. 543 U. S., at 261. Critically, we did not touch the portions of § 3742(e) requiring appellate courts to "give due regard to the opportunity of the district court to judge the

[1] See 543 U. S., at 233 (opinion for the Court by STEVENS, J.) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act of 1984] the provisions that make the Guidelines binding on district judges" (citations omitted)).

credibility of the witnesses," to "accept the findings of fact of the district court unless they are clearly erroneous," and to "give due deference to the district court's application of the guidelines to the facts." By leaving those portions of the statute intact while severing the portion mandating a *de novo* standard of review, *Booker* restored the abuse-of-discretion standard identified in three earlier cases: *Pierce* v. *Underwood*, 487 U. S. 552, 558–560 (1988), *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 403–405 (1990), and *Koon*. See *Booker*, 543 U. S., at 260.[2]

In *Pierce*, we considered whether the District Court had properly awarded attorney's fees based on a determination that the Government's litigation position was not "substantially justified" within the meaning of the Equal Access to Justice Act, 28 U. S. C. § 2412(d). Because the Act did not specify a standard of review, we found it necessary to rely on several "significant relevant factors" that persuaded us to apply an "'abuse of discretion'" standard. 487 U. S., at 559. One factor was that a district judge was "'better positioned'" than an appellate judge to decide the issue. *Id.*, at 560 (quoting *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985)). We noted that a district court, through its participation in "settlement conferences and other pretrial activities," "may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon." 487 U. S., at 560. We likewise noted that "even where the district judge's full knowledge of the factual set-

[2] In fact, *Booker* expressly equated the new "reasonableness" standard with the old abuse-of-discretion standard used to review sentencing departures. See *id.*, at 262 ("'Reasonableness' standards are not foreign to sentencing law. The Act has long required their use in important sentencing circumstances—both *on review of departures*, see 18 U. S. C. § 3742(e)(3) (1994 ed.), and on review of sentences imposed where there was no applicable Guideline, see §§ 3742(a)(4), (b)(4), (e)(4)" (emphasis added)).

ting can be acquired by the appellate court, that acquisition will often come at unusual expense." *Ibid.* A second factor that we found significant was the impracticability of formulating a rule of decision for an issue that may involve "'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *Id.*, at 561–562. In *Cooter & Gell*, we held that both of these factors supported an "abuse-of-discretion" standard for review of a district judge's imposition of sanctions for violations of Rule 11 of the Federal Rules of Civil Procedure. See 496 U. S., at 403–405. A third factor, the District Court's special knowledge about "the local bar's litigation practices," also supported the abuse-of-discretion standard. *Id.*, at 404. We further noted that "[d]eference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them." *Ibid.*

Recognizing that these factors bear equally upon a trial judge's sentencing decision, *Koon* expressly applied the principles of *Pierce* and *Cooter & Gell* to the sentencing context. See *Koon*, 518 U. S., at 99. We adopted the same abuse-of-discretion standard, unanimously holding that a district court's decision to depart from the Guidelines "will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." *Id.*, at 98. Echoing our earlier opinions, we added that "[d]istrict courts have an institutional advantage over appellate courts" because they "must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Ibid.* We also relied on the following statement in our opinion in *Williams* v. *United States*, 503 U. S. 193 (1992):

> "The development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the

sentencing court as to the appropriateness of a particular sentence.'" *Id.*, at 205 (quoting *Solem* v. *Helm*, 463 U. S. 277, 290, n. 16 (1983)).

These basic considerations about the nature of sentencing have not changed in a post-*Booker* world. While the specific holding in *Koon* concerned only the scope of the trial judge's discretion on whether to depart from the Guidelines, now that the Guidelines are no longer mandatory, our reasoning applies with equal force to the sentencing judge's decision "'as to the appropriateness of a particular sentence.'" *Williams*, 503 U. S., at 205. After *Booker*, appellate courts are now to assess a district court's exercise of discretion "with regard to § 3553(a)." 543 U. S., at 261. As we explained: "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." *Ibid.*

Guided by these § 3553(a) factors, *Booker*'s abuse-of-discretion standard directs appellate courts to evaluate what motivated the district judge's individualized sentencing decision. While reviewing courts may presume that a sentence within the advisory Guidelines is reasonable, appellate judges must still always defer to the sentencing judge's individualized sentencing determination. As we stated in *Koon*, "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." 518 U. S., at 113. The Commission has not developed any standards or recommendations that affect sentencing ranges for many individual characteristics. Matters such as age, education, mental or emotional condition, medical condition (including drug or alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civic, charita-

ble, or public service are not ordinarily considered under the Guidelines. See United States Sentencing Commission, Guidelines Manual §§5H1.1–6, 11, and 12 (Nov. 2006).[3] These are, however, matters that §3553(a) authorizes the sentencing judge to consider. See, *e. g.*, 18 U. S. C. §3553(a)(1). As such, they are factors that an appellate court must consider under *Booker*'s abuse-of-discretion standard.

My disagreement with JUSTICE SCALIA and JUSTICE SOUTER rests on the above understanding of *Booker*'s standard of appellate review. I do not join JUSTICE SCALIA's opinion because I believe that the purely procedural review he advocates is inconsistent with our remedial opinion in *Booker*, which plainly contemplated that reasonableness review would contain a substantive component. See 543 U. S., at 260–264. After all, a district judge who gives harsh sentences to Yankees fans and lenient sentences to Red Sox fans would not be acting reasonably even if her procedural rulings were impeccable. Moreover, even if some future unusually harsh sentence might violate the Sixth Amendment because it exceeds some yet-to-be-defined judicial standard of reasonableness, JUSTICE SCALIA correctly acknowledges this case does not present such a problem. See *post*, at 373–374 (opinion concurring in part and concurring in judgment) ("Nor is my claim that the Sixth Amendment was violated in this case, for petitioner cannot demonstrate that his relatively low sentence would have been unreasonable if the Dis-

[3] See also Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 19–20 (1988) ("The Commission extensively debated which offender characteristics should make a difference in sentencing; that is, which characteristics were important enough to warrant formal reflection within the Guidelines and which should constitute possible grounds for departure. . . . Eventually, in light of the arguments based in part on considerations of fairness and in part on the uncertainty as to how a sentencing judge would actually account for the aggravating and/or mitigating factors . . . the current offender characteristics rules look primarily to past records of convictions").

trict Court had relied on nothing but jury-found or admitted facts"); see also *ante*, at 353–354 ("JUSTICE SCALIA concedes that the Sixth Amendment concerns he foresees are not presented by this case. *Post*, at 373–374 (opinion concurring in part and concurring in judgment). And his need to rely on *hypotheticals* to make his point is consistent with our view that the approach adopted here will not 'raise a multitude of constitutional problems.' *Clark* v. *Martinez*, 543 U. S. 371, 380–381 (2005)"). Such a hypothetical case should be decided if and when it arises. See, *e. g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982).

As to JUSTICE SOUTER's opinion, I think he overestimates the "gravitational pull" toward the advisory Guidelines that will result from a presumption of reasonableness. *Post*, at 390 (dissenting opinion). *Booker*'s standard of review allows—indeed, requires—district judges to consider *all* of the factors listed in § 3553(a) and to apply them to the individual defendants before them. Appellate courts must then give deference to the sentencing decisions made by those judges, whether the resulting sentence is inside or outside the advisory Guidelines range, under traditional abuse-of-discretion principles. As the Court acknowledges, moreover, *presumptively* reasonable does not mean *always* reasonable; the presumption, of course, must be genuinely rebuttable. See *ante*, at 347. I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in *Booker*. See *post*, at 373–374, n. 3 (SCALIA, J., concurring in part and concurring in judgment). One well-respected federal judge has even written that, "after watching this Court—and the other Courts of Appeals, whether they have formally adopted such a presumption or not—affirm hundreds upon hundreds of within-Guidelines sentences, it seems to me that the rebuttability of the presumption is more theoretical than real." *United States* v.

Pruitt, No. 06–3152, 2007 U. S. App. LEXIS 12872, *35–*36 (CA10, June 4, 2007) (McConnell, J., concurring). Our decision today makes clear, however, that the rebuttability of the presumption is real. It should also be clear that appellate courts must review sentences individually and deferentially whether they are inside the Guidelines range (and thus potentially subject to a formal "presumption" of reasonableness) or outside that range. Given the clarity of our holding, I trust that those judges who had treated the Guidelines as virtually mandatory during the post-*Booker* interregnum will now recognize that the Guidelines are truly advisory.

Applying this standard, I would affirm the sentence imposed by the District Court. Although I would have imposed a lower sentence had I been the District Judge, I agree that he did not abuse his discretion in making the particular decision that he did. I also agree with the Court that his decision is entitled to added respect because it was consistent with the advice in the Guidelines.

II

That said, I do believe that there was a significant flaw in the sentencing procedure in this case. The petitioner is a veteran who received significant recognition for his service to his country. That aspect of his background is not taken into consideration in the Sentencing Guidelines and was not mentioned by the District Judge in his explanation of his choice of the sentence that defendant received. I regard this as a serious omission because I think the judge's statement to the defendant, made at the time of sentencing, is an especially important part of the criminal process. If the defendant is convinced that justice has been done in his case—that society has dealt with him fairly—the likelihood of his successful rehabilitation will surely be enhanced. Nevertheless, given the importance of paying appropriate respect to the exercise of a sentencing judge's discretion, I join the Court's opinion and judgment.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part and concurring in the judgment.

In *United States* v. *Booker*, 543 U. S. 220 (2005), five Justices of this Court, I among them, held that our previous decision in *Blakely* v. *Washington*, 542 U. S. 296 (2004), applied to sentences imposed under the Federal Sentencing Guidelines because those Guidelines were mandatory and binding on judges. See 543 U. S., at 233–234, 243–244. We thus reaffirmed that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.*, at 244. In response to this constitutional holding, a different majority of five Justices held that the appropriate remedy was to make the Guidelines nonmandatory in all cases and to review sentences on appeal only for reasonableness. See *id.*, at 258–265. I disagreed with the Court's remedial choice, believing instead that the proper remedy was to maintain the mandatory character of the Guidelines and simply to require, for that small category of cases in which a fact was legally essential to the sentence imposed, that the fact be proved to a jury beyond a reasonable doubt or admitted by the defendant. See *id.*, at 272–291 (STEVENS, J., joined by SCALIA and SOUTER, JJ., dissenting in part).

I do not mean to reopen that debate. As a matter of statutory *stare decisis*, I accept *Booker*'s remedial holding that district courts are no longer bound by the Guidelines and that appellate courts should review the sentences imposed for reasonableness. As should be clear from our need to decide the case today, however, precisely what "reasonableness" review entails is not dictated by *Booker*. As I lamented then, "[t]he worst feature of the scheme is that no one knows—and perhaps no one is meant to know—how advisory Guidelines and 'unreasonableness' review will function in practice." *Id.*, at 311 (SCALIA, J., dissenting in part).

Earlier this Term, the Court intensified its silence when it declined to flesh out what it had in mind in the face of an argument that the form of reasonableness review had constitutional implications. In *Cunningham* v. *California*, 549 U. S. 270 (2007), JUSTICE ALITO defended the constitutionality of California's sentencing system in part by arguing that, even post-*Booker*, some federal sentences will be upheld as reasonable only if the judge makes additional findings of fact beyond those encompassed by the jury verdict or guilty plea. 549 U. S., at 309, and n. 11 (dissenting opinion). The *Cunningham* majority's response, much like the *Booker* remedial opinion, was cryptic. While the Court did not explain *why* JUSTICE ALITO was incorrect, it strongly intimated that his premise was wrong: that he had erroneously "'anticipate[d]'" how "reasonableness review operates in practice." *Cunningham*, 549 U. S., at 293, n. 15. Because that question is squarely presented in this case that was then pending, the Court found it "neither necessary nor proper . . . to join issue with JUSTICE ALITO on this matter," suggesting that all would be revealed in the opinion we issue today. See *id.*, at 288, n. 13.

Today has arrived, and the Court has broken its promise. Nothing in the Court's opinion explains why, under the advisory Guidelines scheme, judge-found facts are *never* legally necessary to justify the sentence. By this I mean the Court has failed to establish that every sentence which will be imposed under the advisory Guidelines scheme could equally have been imposed had the judge relied upon no facts other than those found by the jury or admitted by the defendant. In fact, the Court implicitly, but quite plainly, acknowledges that this will not be the case, by treating as a permissible post-*Booker* claim petitioner's challenge of his within-Guidelines sentence as substantively excessive. See *ante*, at Part IV. Under the scheme promulgated today, some sentences reversed as excessive will be legally authorized in later cases only because additional judge-found facts are

present; and, as JUSTICE ALITO argued in *Cunningham*, some lengthy sentences will be affirmed (*i. e.*, held lawful) only because of the presence of aggravating facts, not found by the jury, that distinguish the case from the mine run. The Court does not even attempt to explain how this is consistent with the Sixth Amendment.

No explanation is given because no explanation is possible. The Court has reintroduced the constitutional defect that *Booker* purported to eliminate. I cannot acquiesce in this course. If a sentencing system is permissible in which some sentences cannot lawfully be imposed by a judge unless the judge finds certain facts by a preponderance of the evidence, then we should have left in place the compulsory Guidelines that Congress enacted, instead of imposing this jerry-rigged scheme of our own. In order to avoid the possibility of a Sixth Amendment violation, which was the object of the *Booker* remedy, district courts must be able, without finding any facts not embraced in the jury verdict or guilty plea, to sentence to the maximum of the *statutory* range. Because, therefore, appellate courts cannot reverse within-range sentences for being too high; and because no one would contend that Congress intended that sentences be reviewed only for being too low; I would hold that reasonableness review cannot contain a substantive component at all. I believe, however, that appellate courts can nevertheless secure some amount of sentencing uniformity through the procedural reasonableness review made possible by the *Booker* remedial opinion.

I

A

The Sixth Amendment requires that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."

Booker, 543 U. S., at 244. Two hypotheticals will suffice to reveal why the notion of excessive sentences within the statutory range, and the ability of appellate courts to reverse such sentences, inexorably produces, in violation of the Sixth Amendment, sentences whose legality is premised on a judge's finding some fact (or combination of facts) by a preponderance of the evidence.

First, consider two brothers with similar backgrounds and criminal histories who are convicted by a jury of respectively robbing two banks of an equal amount of money. Next assume that the district judge finds that one brother, fueled by racial animus, had targeted the first bank because it was owned and operated by minorities, whereas the other brother had selected the second bank simply because its location enabled a quick getaway. Further assume that the district judge imposes the statutory maximum upon both brothers, basing those sentences primarily upon his perception that bank robbery should be punished much more severely than the Guidelines base level advises, but explicitly noting that the racially biased decisionmaking of the first brother further justified his sentence. Now imagine that the appellate court reverses as excessive only the sentence of the nonracist brother. Given the dual holdings of the appellate court, the racist has a valid Sixth Amendment claim that his sentence was reasonable (and hence lawful) only because of the judicial finding of his motive in selecting his victim.[1]

Second, consider the common case in which the district court imposes a sentence *within* an advisory Guidelines range that has been substantially enhanced by certain judge-found facts. For example, the base offense level for robbery under the Guidelines is 20, United States Sentencing Commission, Guidelines Manual § 2B3.1(a) (Nov. 2006), which,

[1] Of course, it may be that some fact other than racial animus would also have sufficed to sustain the increased sentence. But it is undeniable that in the case at hand the judicial finding of racial animus filled that role. See *Blakely* v. *Washington*, 542 U. S. 296, 305 (2004).

if the defendant has a criminal history of I, corresponds to an advisory range of 33–41 months, *id.*, ch. 5, pt. A, Sentencing Table. If, however, a judge finds that a firearm was discharged, that a victim incurred serious bodily injury, and that more than $5 million was stolen, then the base level jumps by 18, §§2B3.1(b)(2), (3), (7), producing an advisory range of 235–293 months, *id.*, ch. 5, pt. A, Sentencing Table. When a judge finds all of those facts to be true and then imposes a within-Guidelines sentence of 293 months, those judge-found facts, or some combination of them, are not merely facts that the judge finds relevant in exercising his discretion; they are the legally essential predicate for his imposition of the 293-month sentence. His failure to find them would render the 293-month sentence unlawful. That is evident because, were the district judge explicitly to find *none* of those facts true and nevertheless to impose a 293-month sentence (simply because he thinks robbery merits seven times the sentence that the Guidelines provide) the sentence would surely be reversed as unreasonably excessive.

These hypotheticals are stylized ways of illustrating the basic problem with a system in which district courts lack full discretion to sentence within the statutory range. Under such a system, for every given crime there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant. *Every* sentence higher than that is legally authorized only by some judge-found fact, in violation of the Sixth Amendment. Appellate courts' excessiveness review will explicitly or implicitly accept those judge-found facts as justifying sentences that would otherwise be unlawful. The only difference between this system and the pre-*Booker* mandatory Guidelines is that the maximum sentence based on the jury verdict or guilty plea was specified under the latter but must be established by appellate courts, in case-by-case fashion, under the former. This is, if anything, an additional constitutional disease, not a constitutional cure.

To be clear, I am not suggesting that the Sixth Amendment prohibits judges from ever finding any facts. We have repeatedly affirmed the proposition that judges can find facts that help guide their discretion *within* the sentencing range that is authorized by the facts found by the jury or admitted by the defendant. See, *e. g.*, *Booker*, *supra*, at 233; *Apprendi* v. *New Jersey*, 530 U. S. 466, 481 (2000). But there is a fundamental difference, one underpinning our entire *Apprendi* jurisprudence, between facts that *must* be found in order for a sentence to be lawful, and facts that individual judges *choose* to make relevant to the exercise of their discretion. The former, but not the latter, must be found by the jury beyond a reasonable doubt in order "to give intelligible content to the right of jury trial." *Blakely*, 542 U. S., at 305.[2]

I am also not contending that there is a Sixth Amendment problem with the Court's affirmation of a presumption of reasonableness for within-Guidelines sentences. I agree with the Court that such a presumption never itself makes judge-found facts legally essential to the sentence imposed, since it has no direct relevance to whether the sentence would have been *unreasonable* in the *absence* of any judge-found facts. See *ante*, at 352–354.[3] Nor is my claim that the Sixth

[2] For similar reasons, I recognize that the Sixth Amendment problem with reasonableness review is created only by the lack of district court discretion to impose *high* sentences, since eliminating discretion to impose *low* sentences is the equivalent of judicially creating mandatory minimums, which are not a concern of the Sixth Amendment. See *Harris* v. *United States*, 536 U. S. 545, 568–569 (2002). But since reasonableness review should not function as a one-way ratchet, *United States* v. *Booker*, 543 U. S. 220, 257–258, 266 (2005), we must forswear the notion that sentences can be too low in light of the need to abandon the concept that sentences can be too high.

[3] For this reason, I do not join JUSTICE SOUTER's dissent. He wishes to give "district courts [assurance] that the entire sentencing range set by statute is available to them." *Post*, at 391. That is a proper goal—indeed, an essential one to prevent the *Booker* remedy from effectively overturning *Apprendi* and *Blakely*. But eliminating the presumption of rea-

Amendment was violated in this case, for petitioner cannot demonstrate that his relatively low sentence would have been unreasonable if the District Court had relied on nothing but jury-found or admitted facts.

Rather, my position is that there will inevitably be *some* constitutional violations under a system of substantive reasonableness review, because there will be some sentences that will be upheld as reasonable only because of the existence of judge-found facts. *Booker* itself reveals why that reality dooms the construct of reasonableness review established and applied by today's opinion. *Booker* made two things quite plain. First, reasonableness is the standard of review implicitly contained within the Sentencing Reform Act of 1984 (SRA). 543 U. S., at 260–261. Second, Congress wanted a uniform system of sentencing review, rather than different schemes depending on whether there were Sixth Amendment problems in particular cases. *Id.*, at 265–267. Thus, if the contours of reasonableness review must be narrowed in *some* cases because of constitutional concerns, then they must be narrowed in *all* cases in light of Congress's desire for a uniform standard of review. The Justices composing today's Court were in total agreement with this principle of statutory interpretation the day *Booker* was decided:

> "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary

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sonableness will not achieve it. In those Circuits that *already* decline to employ the presumption, a within-Guidelines sentence has *never* been reversed as substantively excessive, Brief for New York Council of Defense Lawyers as *Amicus Curiae* 5, refuting the belief that mere elimination of the presumption will destroy the "gravitational pull," *post*, at 390 (SOUTER, J., dissenting), to stay safely within the Guidelines. The only way to assure district courts that they can deviate from the advisory Guidelines, and to ensure that judge-found facts are never legally essential to the sentence, is to prohibit appellate courts from reviewing the *substantive* sentencing choices made by district courts.

> consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark* v. *Martinez*, 543 U. S. 371, 380–381 (2005) (opinion for the Court by SCALIA, J., joined by, *inter alios*, STEVENS, KENNEDY, GINSBURG, and BREYER, JJ.).

Yet they now adopt substantive reasonableness review without offering any rebuttal to my charge of patent constitutional flaw inherent in such review. The one comfort to be found in the Court's opinion—though it does not excuse the failure to apply *Martinez*'s interpretive principle—is that it does not rule out as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea. *Ante*, at 353–354; *ante*, at 365–366 (STEVENS, J., joined by GINSBURG, J., concurring).[4]

B

Had the Court bothered to frame objections to the constitutional analysis undertaken above, there are four conceivable candidates.

1

The most simplistic objection is that the Sixth Amendment is not violated because the judge-found facts are made le-

[4] The Court suggests that my reliance on hypotheticals indicates that its interpretation of reasonableness will not create a multitude of constitutional problems. *Ante*, at 353–354; see also *ante*, at 366 (STEVENS, J., concurring). Setting aside the question whether the volume of constitutional violations has any relevance to the application of *Martinez*'s interpretive principle, the Court is wrong to think that the constitutional problem today's opinion ignores is hypothetical, merely because I have used hypotheticals to describe it. It is all too real that advisory Guidelines sentences routinely change months and years of imprisonment to decades and centuries on the basis of judge-found facts—as *Booker* itself recognized, see 543 U. S., at 236–237 (citing, *inter alia*, a case in which a defendant's sentence increased from 57 months to 155 years).

gally necessary by the decision of appellate courts rather than the decision of Congress. This rebuttal errs both in premise and in conclusion.

The premise is wrong because, according to the remedial majority in *Booker*, the facts that excessiveness review renders legally essential are made such by Congress. Reasonableness is the standard of review *implicitly* contained within 18 U. S. C. § 3742 (2000 ed. and Supp. IV). See *Booker*, *supra*, at 260–261. But the Sixth Amendment would be violated even if appellate courts really were exercising some type of common-law power to prescribe the facts legally necessary to support specific sentences. Neither *Apprendi* nor any of its progeny suggests that violation of the Sixth Amendment depends upon what branch of government has made the prescription. To the contrary, *Booker* flatly rejected the argument that the mandatory Guidelines were constitutional because it was the Sentencing Commission rather than Congress that specified the facts essential to punishment. See 543 U. S., at 237–239. And for good reason. The Sixth Amendment is "a reservation of jury power." *Blakely*, 542 U. S., at 308. It makes no difference whether it is a legislature, a Sentencing Commission, or an appellate court that usurps the jury's prerogative. Were it otherwise, this Court could prescribe that the only reasonable sentences are those consistent with the same mandatory Guidelines that *Booker* invalidated. And the California Supreme Court could effectively reverse our decision in *Cunningham* simply by setting aside as unreasonable any trial-court sentence that does not conform to pre-*Cunningham* California law.

2

The next objection minimizes the extent to which excessiveness review makes judge-found facts legally essential to punishment. If appellate courts will uphold, based only on the facts found by the jury, a district court's decision to impose all but the lengthiest sentences, then the number of

sentences that are legally dependent on judge-found facts will be quite small. Thus, the argument goes, there is no reason to prohibit substantive reasonableness review altogether: Absent a claim that such review creates a constitutional problem in a given case, why prohibit it? I have already explained why this line of defense is inconsistent with established principles of statutory interpretation. See *supra*, at 374–375. But even on its own terms, the defense is inconsistent with *Booker* because reasonableness review is an improper and inadequate remedial scheme unless it ensures that judge-found facts are *never* legally necessary to justify the sentence imposed under the advisory Guidelines.

The mandatory Guidelines system that was invalidated in *Booker* had the same attribute of producing unconstitutional results in only a small proportion of cases. Because of guilty pleas and Guidelines ranges that did not depend on judge-found facts, the overwhelming majority of sentences imposed under the pre-*Booker* federal system were perfectly in accord with the Sixth Amendment. See *Booker*, 543 U. S., at 248; *id.*, at 275–277 (STEVENS, J., dissenting in part). *Booker* nevertheless excised key statutory provisions governing federal sentencing, *in order to eliminate constitutional violations entirely.* If our conjured-up system does not accomplish that goal, then by what right have we supplanted the congressionally enacted mandatory Guidelines?

If it is true that some sentences under today's Court-prescribed system will still violate the Sixth Amendment, nonetheless allowing the system to go forward will produce chaos. Most cases do not resemble my stylized hypotheticals, and ordinarily defendants and judges will be unable to figure out, based on a comparison of the facts in their case with the facts of all of the previously decided appellate cases, whether the sentence imposed would have been upheld as reasonable based only on the facts supporting the jury verdict or guilty plea. That will not stop defendants from mak-

ing the argument, however, and the Court certainly has not foreclosed them from trying. See *supra*, at 375, and n. 4. Judges will have in theory two options: create complicated charts and databases, based on appellate precedents, to ascertain what facts are legally essential to justify what sentences; or turn a deaf ear to these claims, though knowing full well that some of them are justified. I bet on the latter.[5] Things were better under the mandatory Guidelines system, where every judge could readily identify when the Sixth Amendment was being violated, and could rule accordingly.

3

Proponents of substantive reasonableness review could next argue that actual sentencing involves the consideration of dozens of different facts in order to make an individualized determination about each defendant. In the real world, they would contend, it is difficult, if not impossible, to determine whether any given fact was legally essential to the punishment imposed. But identifying the particular fatal fact is not necessary to identifying a constitutional violation. In the second hypothetical given above, for example, it is not possible to say which single fact, or which combination of facts, sufficed to bring the sentence within the bounds of the "reasonable." But it *is* possible to say (indeed, it *must* be said) that *some* judge-found fact or combination of facts had that effect—and that suffices to establish a Sixth Amendment violation.

> "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact . . . , one

[5] Perhaps I am too cynical. At least one conscientious District Judge has decided to shoulder the burden of ascertaining what the maximum reasonable sentence is in each case based only on the verdict and appellate precedent, correctly concluding that this is the *only* way to eliminate Sixth Amendment problems after *Cunningham* v. *California*, 549 U. S. 270 (2007), if *Booker* mandates substantive reasonableness review. See *United States* v. *Griffin*, 494 F. Supp. 2d 1, 12–14 (D. Mass. 2007) (Young, J.) (Sentencing Memorandum).

> of several specified facts . . . , or *any* aggravating fact . . . , 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." *Blakely*, 542 U. S., at 305.

4

The last conceivable defense of the Guidelines-light would be to wrap them in the mantle of history and tradition.

> "[W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of [constitutional] adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed." *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62, 95–96 (1990) (SCALIA, J., dissenting) (footnote omitted).

This consideration has no application here. In the federal system, prior to the SRA, substantive appellate review of a district court's sentencing discretion essentially did not exist. See, *e. g.*, *Dorszynski* v. *United States*, 418 U. S. 424, 431 (1974) (noting "the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end"); *id.*, at 443 ("[W]ell-established doctrine bars review of the exercise of sentencing discretion"). As for state appellate review of sentences, as late as 1962, at least 39 States did not permit appellate courts to modify sentences imposed within the statutory limits. See Appellate Review of Sentences, A Symposium at the Judicial Conference of the

United States Court of Appeals for the Second Circuit, 32 F. R. D. 249, 260 (1962). It would be an exaggeration to say that history reflects an established understanding that appellate review of excessive sentences conflicts with the Sixth Amendment. But it would also be an exaggeration to say that the historical pedigree of substantive appellate review of sentencing is so strong and clear as to overcome the basic principle underlying the jury-trial right applied by this Court in *Apprendi*, *Blakely*, *Booker*, and *Cunningham*.

C

A final defense of substantive reasonableness review would be to invoke the intent of Congress or of the *Booker* remedial opinion. As for congressional intent: *Of course* Congress intended that judge-found facts be legally essential to the punishment imposed; that was the whole reason the mandatory Guidelines violated the Sixth Amendment. If we are now to indulge a newfound respect for unconstitutional congressional intent, we should reimpose the mandatory Guidelines system. The quasi-Guidelines system the Court creates today manages to contravene *both* congressional intent *and* the Sixth Amendment.

As for the "intent" of the *Booker* remedial opinion: That opinion purported to be divining congressional intent *in light of what the Sixth Amendment compelled*. See 543 U. S., at 263–265. Absent some explanation of why substantive reasonableness review does not cause judge-found facts to justify greater punishment than the jury's verdict or the defendant's guilty plea would sustain, I fail to understand how such review could possibly have been intended by all five Justices who composed the *Booker* remedial majority. After all, at least one of them did not intend "to override *Blakely*, and to render academic the entire first part of *Booker* itself," and has confirmed that "[t]here would have been no majority in *Booker* for the revision of *Blakely* es-

sayed in [JUSTICE ALITO's *Cunningham*] dissent." *Cunningham*, 549 U. S., at 293, n. 15 (opinion for the Court by GINSBURG, J.).

II

Abandoning substantive reasonableness review does not require a return to the pre-SRA regime that the *Booker* remedial opinion sought to avoid. See 543 U. S., at 263–265. As I said at the outset, I believe it is possible to give some effect to the *Booker* remedial opinion and the purposes that it sought to serve while still avoiding the constitutional defect identified in the *Booker* merits opinion. Specifically, I would limit reasonableness review to the sentencing *procedures* mandated by statute.

A

A central feature of the *Booker* remedial opinion was its conclusion that the SRA was not completely inseverable. See *id.*, at 258–265. As a result, the Sentencing Commission "remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly." *Id.*, at 264. Likewise, sentencing courts remain obligated to consider the various factors delineated in 18 U. S. C. § 3553(a) (2000 ed., Supp. IV), including the now-advisory Guidelines range. 543 U. S., at 259–260. And they are still instructed by that subsection to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of [that] subsection." Significantly, § 3553(c) (2000 ed. and Supp. IV) continues to require that district courts give reasons for their sentencing decisions, a requirement the requisite detail of which depends on whether the sentence is: (1) within the advisory Guidelines range; (2) within an advisory Guidelines range that spans more than 24 months; or (3) outside the advisory Guidelines

range. These explanations, in turn, help the Commission revise the advisory Guidelines to reflect actual sentencing practices consistent with the statutory goals. See *Booker*, *supra*, at 264 (citing 28 U. S. C. § 994 (2000 ed. and Supp. IV)).

Booker's retention of these statutory procedural provisions furthered the congressional purpose of "iron[ing] out sentencing differences," 543 U. S., at 263, and "avoid[ing] excessive sentencing disparities," *id.*, at 264. It is important that appellate courts police their observance. *Booker* excised the provision of the SRA containing the standards for appellate review, see *id.*, at 260 (invalidating 18 U. S. C. § 3742(e) (2000 ed. and Supp. IV)), but the remedial majority's creation of reasonableness review gave appellate courts the necessary means to reverse a district court that: appears not to have considered § 3553(a); considers impermissible factors; selects a sentence based on clearly erroneous facts; or does not comply with § 3553(c)'s requirement for a statement of reasons.[6] In addition to its direct effect on sentencing uniformity, this procedural review will indirectly produce, over time, reduction of sentencing disparities. By ensuring that district courts give reasons for their sentences, and more specific reasons when they decline to follow the advisory Guidelines range, see § 3553(c)(2) (2000 ed., Supp. IV), appellate courts will enable the Sentencing Commission to perform its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts. See *Booker*, *supra*, at 264 (citing 28 U. S. C. § 994 (2000 ed. and Supp. IV)). And as that occurs, district courts will have less

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[6] "Substance" and "procedure" are admittedly chameleon-like terms. See *Sun Oil Co.* v. *Wortman*, 486 U. S. 717, 726–727 (1988). As the text indicates, my use of the term "procedure" here includes the limiting of sentencing factors to permissible ones—as opposed to using permissible factors but reaching a result that is "substantively" wrong. I therefore disagree with JUSTICE STEVENS that a district court which discriminates against Yankees fans is acting in a procedurally "impeccable" way. *Ante*, at 365 (concurring opinion).

reason to depart from the Commission's recommendations, leading to more sentencing uniformity.[7]

One possible objection to procedural review that the *Booker* remedial opinion appears not to have considered is 18 U. S. C. § 3742(f) (2000 ed., Supp. IV), which limits appellate courts to reversing sentences that are imposed "in violation of law" or "as a result of an incorrect application of the sentencing guidelines," § 3742(f)(1), or that fall in certain categories and are either "too high" or "too low," § 3742(f)(2).[8] But, as I noted in *Booker*, § 3742(e) and § 3742(f) are inextricably intertwined: Having excised § 3742(e)'s provisions setting forth the standards for appellate review, it is nonsensical to continue to apply § 3742(f)'s provisions governing the "Decision and Disposition" of appeals, which clearly track those now-excised standards. See 543 U. S., at 306–307 (SCALIA, J., dissenting in part). I would hold that § 3742(f) is "incapable of functioning independently" of the provisions excised in *Booker*, and is thus inseverable from them. See *Alaska*

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[7] Courts must resist, however, the temptation to make procedural review more stringent because substantive review is off the table. The judicial role when conducting severability analysis is limited to determining whether the balance of a statute that contains an unconstitutional provision is capable "of functioning independently." *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987). Courts have no power to add provisions that might be desirable now that certain provisions have been excised. Thus, when engaging in reasonableness review to determine whether the district court has complied with the various procedures in § 3553, an appellate court cannot subject the district court to any greater requirements than existed pre-*Booker*.

[8] I say "possible" because one could claim that the failure to comply with 18 U. S. C. § 3553's procedural requirements results in a sentence imposed in violation of law, and thereby covered by § 3742(f)(1). But § 3742(f)(1)'s applicability to such procedural errors is called into question by § 3742(f)(2) (2000 ed., Supp. IV), which specifically addresses sentences where "the district court failed to provide the required statement of reasons [mandated by § 3553(c)(2)]." For the reasons specified in the text, however, I see no need to grapple, post-*Booker*, with the proper interpretation of § 3742(f).

Airlines, Inc. v. *Brock*, 480 U. S. 678, 684 (1987); 2 N. Singer, Sutherland Statutes and Statutory Construction § 44:4, p. 576 (6th ed. 2001) ("Even where part of an act is independent and valid, other parts which are not themselves substantively invalid but have no separate function to perform independent of the invalid portions of the act are also held invalid").

B

Applying procedural review in this case does not require much further discussion on my part. I join Part III of the Court's opinion. See *ante*, at 356–359.

* * *

The Court's decision today leaves unexplained why the mandatory Guidelines were unconstitutional, but the Court-created substantive-review system that contains the same potential for Sixth Amendment violation is not. It is irresponsible to leave this patent inconsistency hanging in the air, threatening in the future yet another major revision of Guidelines practices to which the district courts and courts of appeals will have to adjust. Procedural review would lay the matter to rest, comporting with both parts of the *Booker* opinion and achieving the maximum degree of sentencing uniformity on the basis of judge-found facts that the Constitution permits.

JUSTICE SOUTER, dissenting.

Applying the Sixth Amendment to current sentencing law has gotten complicated, and someone coming cold to this case might wonder how we reached this point. A very general overview of the course of decisions over the past eight years may help to put today's holding in perspective.

Members of a criminal jury are guaranteed to be impartial residents of the State and district of the crime, but the Sixth Amendment right to trial by jury otherwise relies on history for details, and the practical instincts of judges and legisla-

tors for implementation in the courts. Litigation has, for example, worked through issues of size, see *Ballew* v. *Georgia*, 435 U. S. 223 (1978) (prohibiting five-person state juries but allowing juries of six), and unanimity, see *Apodaca* v. *Oregon*, 406 U. S. 404 (1972) (allowing nonunanimous juries in state criminal trials); *Burch* v. *Louisiana*, 441 U. S. 130 (1979) (prohibiting nonunanimous six-person juries). Such decisions go to what William James would have called the "cash-value" of the Constitution's guarantee. See W. James, Pragmatism: A New Name for Some Old Ways of Thinking 200 (1907).

One additional issue of both detail and implementation is the line between judge and jury in determining facts, and in particular the legitimate extent of factfinding by a judge when sentencing a defendant after a guilty plea or a jury's verdict of guilty. Since the very inception of judicial discretion in determining a sentence, judges have acted on what they learn in the course of a trial (and later what they gather from a presentence report or other evidence at time of sentencing), including details a trial jury may not have found to be true when it returned the guilty verdict or answered a special question. But historically, also, the customary judicial use of these extraverdict facts has been in deciding on a sentence within a range set in advance by the statute defining the crime in question. See *Williams* v. *New York*, 337 U. S. 241, 246–247 (1949). Thus, traditionally when a judge imposed a sentence at some point in the range, say, of 0-to-5 years specified by statute for some offense, every fact necessary to go as high as five years had been found by the jury (or admitted), even though the jury had not made particular or implicit findings of the facts the judge might consider in exercising discretion to set the sentence higher or lower within the 5-year range.

It was against this background, in *Jones* v. *United States*, 526 U. S. 227 (1999), that we called attention to a serious threat to the practical value of a criminal defendant's jury

right. Jones had been prosecuted under a statute that exemplified a growing practice of providing a definition and penalty for some basic crime subject to the right of jury trial, but then identifying variants carrying higher ranges of penalties depending on facts that arguably might be found by a judge sitting alone. Thus, Jones was convicted solely of carjacking, but if the further fact of causing " 'serious bodily injury' " was shown, the maximum penalty jumped from 15 years to 25. *Id.*, at 230 (quoting 18 U. S. C. § 2119 (1988 ed., Supp. V)). The Government's position was that the extra fact of serious bodily injury raising the penalty range required no jury finding because it was only a condition for imposing an enhanced sentence, up to a judge, not an element of a more serious crime, subject to the right to a jury's determination. See *Jones*, 526 U. S., at 233.

It was an unsettling argument, because in prosecutions under these statutory schemes the most serious issue in the case might well be not guilt or innocence of the basic offense, but liability to the substantially enhanced penalty. If, for example, the judge found that Jones had caused not just serious bodily injury, but death, such extraverdict factfinding could have made the difference between 15 years and life imprisonment. *Id.*, at 230 (citing § 2119). In a case like that, giving judges the exclusive power to find the facts necessary to sentence in the higher range would make the jury a mere gatekeeper to the more important trial before a judge alone. *Id.*, at 243–244. The Sixth Amendment does not, of course, speak expressly to such a scheme, but that is not a sufficient reason to give it constitutional approval. For if judicial factfinding necessary for an enhanced sentencing range were held to be adequate in the face of a defendant's objection, a defendant's right to have a jury standing between himself and the power of the government to curtail his liberty would take on a previously unsuspected modesty.

Jones accordingly treated this practice as suspect enough to call for applying the doctrine of constitutional avoidance

when the Court interpreted the statute in question. What the Government called a mere condition for imposing a sentencing enhancement was treated as an element of a more serious offense and made subject to a jury's factfinding. This interpretation obviated the constitutional decision whether subjecting an unwilling defendant to a more onerous range of sentence on facts found solely by a judge would violate the Sixth Amendment.

The issue did not go away with *Jones*, and the constitutional challenge was soon presented inescapably, in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). We held that exposing a defendant to an increased penalty beyond the range for a basic crime, based on facts determined exclusively by a judge, violated the Sixth Amendment, in the absence of a jury waiver; a defendant could not be subjected to a penalty more serious than one authorized by the facts found by the jury or admitted by the defendant. *Id.*, at 490.[1] A judge could constitutionally determine facts for exercising discretion in sentencing up to that point, but a fact that raised the range of possible penalties functioned like an element of a more serious offense, even if a statute ostensibly tied that fact to the sentence alone. Hence, in the absence of waiver, a sentence in that weightier range could be imposed by a judge only if the enhancing fact was found beyond a reasonable doubt by the trial jury. *Ibid.* In placing disputed factfinding off judicial limits when, but only when, its effect would be to raise the range of possible sentences, we made a practical judgment that maintained the historical judicial role in finding facts relevant to sentencing within the range set by a jury's verdict, but we recognized that the jury right would be trivialized beyond recognition if that traditional practice could be extended to the point that a judge alone

[1] We recognized a single exception to this rule, permitting reliance on the fact of a prior conviction without a jury determination that the defendant had previously been convicted. See *Apprendi*, 530 U. S., at 489–490; see also *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998).

(over objection) could find a fact necessary to raise the upper limit of a sentencing range.

From the moment *Apprendi* drew that line, however, its holding carried apparent implications for the regime of Guidelines sentencing adopted in 1984, see Sentencing Reform Act of 1984, 98 Stat. 1987, 18 U. S. C. § 3551 *et seq.* (2000 ed. and Supp. IV); 28 U. S. C. § 991 *et seq.* (2000 ed. and Supp. IV). The general object of Guidelines sentencing was the eminently laudable one of promoting substantial consistency in exercising judicial discretion to sentence within the range set by statute for a given crime. Thus, at the elementary level, the Guidelines law limits the sentence that a judge may impose even within the sentencing range provided by the statute creating a particular offense. In effect, it divides a basic sentencing range into subranges and assigns an offender to a subrange based on the particular facts of the case and the offender's criminal history. A judge may depart from the assigned subrange only if the case presents a circumstance "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U. S. C. § 3553(b)(1) (2000 ed., Supp. IV). It follows that a judge must find facts beyond those necessary for the jury's guilty verdict to sentence above (or below, for that matter) the subrange designated for an offender with a comparable criminal history whose case presents no relevant facts beyond the formal elements of the crime itself. The result is a hybrid sentencing practice. One could describe it by emphasizing that the judge's factfinding could never increase the sentence beyond the range set by the law defining the crime, or one could stress that a principal motivation for Guidelines sentencing is eliminating some traditional judicial discretion by forbidding a judge to impose a high sentence except on the basis of some fact beyond those necessary for a guilty verdict (and thus subject to the right to a jury's determination).

In *Blakely* v. *Washington*, 542 U. S. 296 (2004), considering a state sentencing system similar to the federal scheme, we decided that the latter way of looking at it made more sense, if *Apprendi* was going to mean something in preserving the historical significance of the jury. See 542 U. S., at 305–306. We held that the additional factfinding necessary for a judge to sentence within a high subrange was comparable to the finding of additional fact required for a judge to impose an enhanced sentence under the law considered in *Apprendi*. If *Blakely* had come out the other way, the significance of *Apprendi* itself would be in jeopardy: a legislature would be free to bypass *Apprendi* by providing an abnormally spacious sentencing range for any basic crime (theoretically exposing a defendant to the highest sentence just by the jury's guilty verdict), then leaving it to a judge to make supplementary findings not only appropriate but necessary for a sentence in a subrange at the high end. That would spell the end of *Apprendi* and diminish the real significance of jury protection that *Apprendi* had shored up.

In *United States* v. *Booker*, 543 U. S. 220 (2005), a majority of the Court applied *Blakely*'s reasoning and held that the Federal Guidelines, too, subjected defendants to unconstitutional sentences in upper subranges, absent a jury finding or waiver. So far, so good for the Sixth Amendment, but there was the further issue of remedy, and at that step consistency began to falter. If statutory Guidelines were to survive, there were two serious alternatives. One was already in place in courts with the foresight to apply *Apprendi* to the Guidelines: require any additional facts necessary for a possible high subrange sentence to be charged and submitted to the jury. True, the Government would have to think ahead (and could not charge relevant facts that emerged unexpectedly at trial). But the mandatory character of the Guidelines would be preserved, the goal of consistency would continue to be served, and the practical value of the jury right would not face erosion.

The second remedial alternative was a declaration by the Court that the Guidelines were not mandatory but discretionary, so that finding extraverdict facts was not strictly necessary for sentencing in a high subrange under the Guidelines. On this alternative, a judge who found a subsidiary fact specified as a condition for a high subrange sentence might decide to impose a low sentence (independently of the Guidelines' own provisions for downward departure), and a judge who found no such fact might sentence within the high subrange for other reasons that seemed sufficient. If the Guidelines were not mandatory, the subsidiary fact merely provided one reasoned basis for a traditional exercise of discretion to sentence at the high end of the sentencing range provided by the statute defining the crime.

But that second alternative could not be so simple: it raised yet further issues, and the reconfigured majority of the Court that in fact adopted it, see 543 U. S., at 244, guaranteed that we would have the case now before us. If district judges treated the now-discretionary Guidelines simply as worthy of consideration but open to rejection in any given case, the *Booker* remedy would threaten a return to the old sentencing regime and would presumably produce the apparent disuniformity that convinced Congress to adopt Guidelines sentencing in the first place. But if sentencing judges attributed substantial gravitational pull to the now-discretionary Guidelines, if they treated the Guidelines result as persuasive or presumptively appropriate, the *Booker* remedy would in practical terms preserve the very feature of the Guidelines that threatened to trivialize the jury right. For a presumption of Guidelines reasonableness would tend to produce Guidelines sentences almost as regularly as mandatory Guidelines had done, with judges finding the facts needed for a sentence in an upper subrange. This would open the door to undermining *Apprendi* itself, and this is what has happened today.

Without a powerful reason to risk reversal on the sentence, a district judge faced with evidence supporting a high subrange Guidelines sentence will do the appropriate factfinding in disparagement of the jury right and will sentence within the high subrange. This prediction is weakened not a whit by the Court's description of within-Guidelines reasonableness as an "appellate" presumption, *ante*, at 351 (emphasis deleted). What works on appeal determines what works at trial, and if the Sentencing Commission's views are as weighty as the Court says they are, see *ante*, at 348–351, a trial judge will find it far easier to make the appropriate findings and sentence within the appropriate Guideline, than to go through the unorthodox factfinding necessary to justify a sentence outside the Guidelines range, see 18 U. S. C. § 3553(c)(2) (2000 ed., Supp. IV). The upshot is that today's decision moves the threat to the practical value of the Sixth Amendment jury right closer to what it was when this Court flagged it in *Jones*, and it seems fair to ask just what has been accomplished in real terms by all the judicial labor imposed by *Apprendi* and its associated cases.

Taking the *Booker* remedy (of discretionary Guidelines) as a given, however, the way to avoid further risk to *Apprendi* and the jury right is to hold that a discretionary within-Guidelines sentence carries no presumption of reasonableness. Only if sentencing decisions are reviewed according to the same standard of reasonableness whether or not they fall within the Guidelines range will district courts be assured that the entire sentencing range set by statute is available to them. See *Booker*, *supra*, at 263 (calling for a reasonableness standard "across the board"). And only then will they stop replicating the unconstitutional system by imposing appeal-proof sentences within the Guidelines ranges determined by facts found by them alone.

I would therefore reject the presumption of reasonableness adopted in this case, not because it is pernicious in and

of itself, but because I do not think we can recognize such a presumption and still retain the full effect of *Apprendi* in aid of the Sixth Amendment guarantee. But I would not stop at rejecting the presumption. Neither my preferred course nor the choice of today's majority can avoid being at odds to some degree with the intent of Congress; there is no question that Congress meant to impose mandatory Guidelines as the means of bringing greater uniformity to sentencing. So I point out that the congressional objective can still be attained, but that *Booker*'s remedial holding means that only Congress can restore the scheme to what it had in mind, and in a way that gives full measure to the right to a jury trial. If Congress has not had a change of heart about the value of a Guidelines system, it can reenact the Guidelines law to give it the same binding force it originally had, but with provision for jury, not judicial, determination of any fact necessary for a sentence within an upper Guidelines subrange. At this point, only Congress can make good on both its enacted policy of mandatory Guidelines sentencing and the guarantee of a robust right of jury trial.

I respectfully dissent.[2]

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[2] Because I would ask the Court of Appeals to review the sentence for reasonableness without resort to any presumption, I would not reach the other issues in this case.

Syllabus

MORSE ET AL. *v.* FREDERICK

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

No. 06–278. Argued March 19, 2007—Decided June 25, 2007

At a school-sanctioned and school-supervised event, petitioner Morse, the high school principal, saw students unfurl a banner stating "BONG HiTS 4 JESUS," which she regarded as promoting illegal drug use. Consistent with established school policy prohibiting such messages at school events, Morse directed the students to take down the banner. When one of the students who had brought the banner to the event—respondent Frederick—refused, Morse confiscated the banner and later suspended him. The school superintendent upheld the suspension, explaining, *inter alia*, that Frederick was disciplined because his banner appeared to advocate illegal drug use in violation of school policy. Petitioner school board also upheld the suspension. Frederick filed suit under 42 U. S. C. § 1983, alleging that the school board and Morse had violated his First Amendment rights. The District Court granted petitioners summary judgment, ruling that they were entitled to qualified immunity and that they had not infringed Frederick's speech rights. The Ninth Circuit reversed. Accepting that Frederick acted during a school-authorized activity and that the banner expressed a positive sentiment about marijuana use, the court nonetheless found a First Amendment violation because the school punished Frederick without demonstrating that his speech threatened substantial disruption. It also concluded that Morse was not entitled to qualified immunity because Frederick's right to display the banner was so clearly established that a reasonable principal in Morse's position would have understood that her actions were unconstitutional.

Held: Because schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending Frederick. Pp. 400–410.

(a) Frederick's argument that this is not a school speech case is rejected. The event in question occurred during normal school hours and was sanctioned by Morse as an approved social event at which the district's student conduct rules expressly applied. Teachers and administrators were among the students and were charged with supervising them. Frederick stood among other students across the street from

the school and directed his banner toward the school, making it plainly visible to most students. Under these circumstances, Frederick cannot claim he was not at school. Pp. 400–401.

(b) The Court agrees with Morse that those who viewed the banner would interpret it as advocating or promoting illegal drug use, in violation of school policy. At least two interpretations of the banner's words—that they constitute an imperative encouraging viewers to smoke marijuana or, alternatively, that they celebrate drug use—demonstrate that the sign promoted such use. This pro-drug interpretation gains further plausibility from the paucity of alternative meanings the banner might bear. Pp. 401–403.

(c) A principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. In *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, the Court declared, in holding that a policy prohibiting high school students from wearing antiwar armbands violated the First Amendment, *id.*, at 504, that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school," *id.*, at 513. The Court in *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, however, upheld the suspension of a student who delivered a high school assembly speech employing "an elaborate, graphic, and explicit sexual metaphor," *id.*, at 678. Analyzing the case under *Tinker*, the lower courts had found no disruption, and therefore no basis for discipline. 478 U. S., at 679–680. This Court reversed, holding that the school was "within its permissible authority in imposing sanctions . . . in response to [the student's] offensively lewd and indecent speech." *Id.*, at 685. Two basic principles may be distilled from *Fraser*. First, it demonstrates that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Id.*, at 682. Had Fraser delivered the same speech in a public forum outside the school context, he would have been protected. See *id.*, at 682–683. In school, however, his First Amendment rights were circumscribed "in light of the special characteristics of the school environment." *Tinker*, *supra*, at 506. Second, *Fraser* established that *Tinker*'s mode of analysis is not absolute, since the *Fraser* Court did not conduct the "substantial disruption" analysis. Subsequently, the Court has held in the Fourth Amendment context that "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' . . . the nature of those rights is what is appropriate for children in school," *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 655–656, and has recognized that deterring drug use by schoolchildren is an "important—indeed, perhaps compelling"

Syllabus

interest, *id.*, at 661. Drug abuse by the Nation's youth is a serious problem. For example, Congress has declared that part of a school's job is educating students about the dangers of drug abuse, see, *e. g.*, the Safe and Drug-Free Schools and Communities Act of 1994, and petitioners and many other schools have adopted policies aimed at implementing this message. Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, poses a particular challenge for school officials working to protect those entrusted to their care. The "special characteristics of the school environment," *Tinker*, 393 U. S., at 506, and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting such abuse. *Id.*, at 508, 509, distinguished. Pp. 403–410.

439 F. 3d 1114, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 410. ALITO, J., filed a concurring opinion, in which KENNEDY, J., joined, *post*, p. 422. BREYER, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 425. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, *post*, p. 433.

Kenneth W. Starr argued the cause for petitioners. With him on the briefs were *Rick Richmond* and *Eric W. Hagen*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Garre*, *Daryl Joseffer*, *Robert D. Kamenshine*, *Kent D. Talbert*, *Stephen H. Freid*, *Edward H. Jurith*, and *Linda V. Priebe*.

Douglas K. Mertz argued the cause for respondent. With him on the brief were *Jason Brandeis* and *Steven R. Shapiro*.*

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*Briefs of *amici curiae* urging reversal were filed for D. A. R. E. America et al. by *Gene C. Schaerr*, *Steffen N. Johnson*, and *Linda T. Coberly;* and for the National School Boards Association et al. by *Michael E. Smith*, *Francisco M. Negrón, Jr.*, *Naomi E. Gittins*, *Thomas E. M. Hutton*, and *Lisa E. Soronen*.

Briefs of *amici curiae* urging affirmance were filed for the American Center for Law and Justice by *Jay Alan Sekulow*, *Colby M. May*, *Stuart*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

At a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use. Consistent with established school policy prohibiting such messages at school events, the principal directed the students to take down the banner. One student—among those who had brought the banner to the event—refused to do so. The principal confiscated the banner and later suspended the student. The Ninth Circuit held that the principal's actions violated the First Amendment, and that the student could sue the principal for damages.

Our cases make clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 506 (1969). At the same time, we have held that "the constitutional rights of students in public school are not automatically coextensive

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J. Roth, James M. Henderson, Sr., and *Walter M. Weber;* for the Center for Individual Rights by *Michael E. Rosman;* for the Christian Legal Society by *Gregory S. Baylor, Kimberlee Wood Colby*, and *Steven H. Aden;* for the Drug Policy Alliance et al. by *David T. Goldberg* and *Daniel N. Abrahamson;* for the Lambda Legal Defense and Education Fund, Inc., by *Jon W. Davidson, Gregory R. Nevins, F. Brian Chase*, and *James P. Madigan;* for the National Coalition Against Censorship et al. by *Preeta D. Bansal, Joan E. Bertin*, and *Marjorie Heins;* for the Rutherford Institute by *James J. Knicely* and *John W. Whitehead;* for Students for Sensible Drug Policy by *Brooks M. Beard;* and for the Student Press Law Center et al. by *Sonja R. West, Michele L. Earl-Hubbard, S. Mark Goodman*, and *Michael C. Hiestand.*

Briefs of *amici curiae* were filed for the Alliance Defense Fund by *Kevin H. Theriot, Benjamin W. Bull*, and *Jordan W. Lorence;* for Liberty Counsel by *Mathew D. Staver, Anita L. Staver, Erik W. Stanley*, and *Mary E. McAlister;* and for the Liberty Legal Institute by *Kelly J. Shackelford, Douglas Laycock*, and *Robert A. Destro.*

with the rights of adults in other settings," *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 682 (1986), and that the rights of students "must be 'applied in light of the special characteristics of the school environment,'" *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260, 266 (1988) (quoting *Tinker*, *supra*, at 506). Consistent with these principles, we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.

I

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a street in front of Juneau-Douglas High School (JDHS) while school was in session. Petitioner Deborah Morse, the school principal, decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip. App. 22–23. Students were allowed to leave class to observe the relay from either side of the street. Teachers and administrative officials monitored the students' actions.

Respondent Joseph Frederick, a JDHS senior, was late to school that day. When he arrived, he joined his friends (all but one of whom were JDHS students) across the street from the school to watch the event. Not all the students waited patiently. Some became rambunctious, throwing plastic cola bottles and snowballs and scuffling with their classmates. As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: "BONG HiTS 4 JESUS." App. to Pet. for Cert. 70a. The large banner was easily readable by the students on the other side of the street.

Principal Morse immediately crossed the street and demanded that the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days. Morse later explained that she told Frederick to take the banner down because she thought it encouraged illegal drug use, in violation of established school policy. Juneau School Board Policy No. 5520 states: "The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . ." *Id.*, at 53a. In addition, Juneau School Board Policy No. 5850 subjects "[p]upils who participate in approved social events and class trips" to the same student conduct rules that apply during the regular school program. *Id.*, at 58a.

Frederick administratively appealed his suspension, but the Juneau School District Superintendent upheld it, limiting it to time served (eight days). In a memorandum setting forth his reasons, the superintendent determined that Frederick had displayed his banner "in the midst of his fellow students, during school hours, at a school-sanctioned activity." *Id.*, at 63a. He further explained that Frederick "was not disciplined because the principal of the school 'disagreed' with his message, but because his speech appeared to advocate the use of illegal drugs." *Id.*, at 61a.

The superintendent continued:

> "The common-sense understanding of the phrase 'bong hits' is that it is a reference to a means of smoking marijuana. Given [Frederick's] inability or unwillingness to express any other credible meaning for the phrase, I can only agree with the principal and countless others who saw the banner as advocating the use of illegal drugs. [Frederick's] speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst

> of a school activity, for the benefit of television cameras covering the Torch Relay. [Frederick's] speech was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use." *Id.*, at 61a–62a.

Relying on our decision in *Fraser*, *supra*, the superintendent concluded that the principal's actions were permissible because Frederick's banner was "speech or action that intrudes upon the work of the schools." App. to Pet. for Cert. 62a (internal quotation marks omitted). The Juneau School District Board of Education upheld the suspension.

Frederick then filed suit under 42 U. S. C. § 1983, alleging that the school board and Morse had violated his First Amendment rights. He sought declaratory and injunctive relief, unspecified compensatory damages, punitive damages, and attorney's fees. The District Court granted summary judgment for the school board and Morse, ruling that they were entitled to qualified immunity and that they had not infringed Frederick's First Amendment rights. The court found that Morse reasonably interpreted the banner as promoting illegal drug use—a message that "directly contravened the Board's policies relating to drug abuse prevention." App. to Pet. for Cert. 36a–38a. Under the circumstances, the court held that "Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity." *Id.*, at 37a.

The Ninth Circuit reversed. Deciding that Frederick acted during a "school-authorized activit[y]," and "proceed[ing] on the basis that the banner expressed a positive sentiment about marijuana use," the court nonetheless found a violation of Frederick's First Amendment rights because the school punished Frederick without demonstrating that his speech gave rise to a "risk of substantial disruption." 439 F. 3d 1114, 1118, 1121–1123 (2006). The court further concluded that Frederick's right to display his banner was

so "clearly established" that a reasonable principal in Morse's position would have understood that her actions were unconstitutional, and that Morse was therefore not entitled to qualified immunity. *Id.*, at 1123–1125.

We granted certiorari on two questions: whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages. 549 U. S. 1075 (2006). We resolve the first question against Frederick, and therefore have no occasion to reach the second.[1]

II

At the outset, we reject Frederick's argument that this is not a school speech case—as has every other authority to address the question. See App. 22–23 (Principal Morse); App. to Pet. for Cert. 63a (superintendent); *id.*, at 69a (school board); *id.*, at 34a–35a (District Court); 439 F. 3d, at 1117 (Ninth Circuit). The event occurred during normal school hours. It was sanctioned by Principal Morse "as an approved social event or class trip," App. 22–23, and the school district's rules expressly provide that pupils in "approved social events and class trips are subject to district rules for

[1] JUSTICE BREYER would rest decision on qualified immunity without reaching the underlying First Amendment question. The problem with this approach is the rather significant one that it is inadequate to decide the case before us. Qualified immunity shields public officials from money damages only. See *Wood* v. *Strickland*, 420 U. S. 308, 314, n. 6 (1975). In this case, Frederick asked not just for damages, but also for declaratory and injunctive relief. App. 13. JUSTICE BREYER's proposed decision on qualified immunity grounds would dispose of the damages claims, but Frederick's other claims would remain unaddressed. To get around that problem, JUSTICE BREYER hypothesizes that Frederick's suspension—the target of his request for injunctive relief—"may well be justified on non-speech-related grounds." See *post*, at 433 (opinion concurring in judgment in part and dissenting in part). That hypothesis was never considered by the courts below, never raised by any of the parties, and is belied by the record, which nowhere suggests that the suspension would have been justified solely on non-speech-related grounds.

student conduct," App. to Pet. for Cert. 58a. Teachers and administrators were interspersed among the students and charged with supervising them. The high school band and cheerleaders performed. Frederick, standing among other JDHS students across the street from the school, directed his banner toward the school, making it plainly visible to most students. Under these circumstances, we agree with the superintendent that Frederick cannot "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school." *Id.*, at 63a. There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents, see *Porter* v. *Ascension Parish School Bd.*, 393 F. 3d 608, 615, n. 22 (CA5 2004), but not on these facts.

III

The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed "that the words were just nonsense meant to attract television cameras." 439 F. 3d, at 1117–1118. But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.

As Morse later explained in a declaration, when she saw the sign, she thought that "the reference to a 'bong hit' would be widely understood by high school students and others as referring to smoking marijuana." App. 24. She further believed that "display of the banner would be construed by students, District personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use"—in violation of school policy. *Id.*, at 25; see *ibid.* ("I told Frederick and the other members of his group to put the banner down because I felt that it violated the [school] policy against displaying . . . material that advertises or promotes use of illegal drugs").

We agree with Morse. At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: "[Take] bong hits . . . "—a message equivalent, as Morse explained in her declaration, to "smoke marijuana" or "use an illegal drug." Alternatively, the phrase could be viewed as celebrating drug use—"bong hits [are a good thing]," or "[we take] bong hits"—and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion. See *Guiles* v. *Marineau*, 461 F. 3d 320, 328 (CA2 2006) (discussing the present case and describing the sign as "a clearly pro-drug banner").

The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear. The best Frederick can come up with is that the banner is "meaningless and funny." 439 F. 3d, at 1116. The dissent similarly refers to the sign's message as "curious," *post*, at 434 (opinion of STEVENS, J.), "ambiguous," *ibid.*, "nonsense," *post*, at 435, "ridiculous," *post*, at 438, "obscure," *post*, at 439, "silly," *post*, at 444, "quixotic," *post*, at 445, and "stupid," *ibid.* Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.

The dissent mentions Frederick's "credible and uncontradicted explanation for the message—he just wanted to get on television." *Post*, at 444. But that is a description of Frederick's *motive* for displaying the banner; it is not an interpretation of what the banner says. The *way* Frederick was going to fulfill his ambition of appearing on television was by unfurling a pro-drug banner at a school event, in the presence of teachers and fellow students.

Elsewhere in its opinion, the dissent emphasizes the importance of political speech and the need to foster "national debate about a serious issue," *post*, at 448, as if to suggest

that the banner is political speech. But not even Frederick argues that the banner conveys any sort of political or religious message. Contrary to the dissent's suggestion, see *post*, at 446–448, this is plainly not a case about political debate over the criminalization of drug use or possession.

IV

The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.

In *Tinker*, this Court made clear that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." 393 U. S., at 506. *Tinker* involved a group of high school students who decided to wear black armbands to protest the Vietnam War. School officials learned of the plan and then adopted a policy prohibiting students from wearing armbands. When several students nonetheless wore armbands to school, they were suspended. *Id.*, at 504. The students sued, claiming that their First Amendment rights had been violated, and this Court agreed.

Tinker held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." *Id.*, at 513. The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment. The students sought to engage in political speech, using the armbands to express their "disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them." *Id.*, at 514. Political speech, of course, is "at the core of what the First Amendment is designed to protect." *Virginia* v. *Black*, 538 U. S. 343, 365 (2003) (plurality opinion). The only interest the Court discerned underlying the school's actions was the "mere desire to avoid

the discomfort and unpleasantness that always accompany an unpopular viewpoint," or "an urgent wish to avoid the controversy which might result from the expression." *Tinker*, 393 U. S., at 509, 510. That interest was not enough to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Id.*, at 508.

This Court's next student speech case was *Fraser*, 478 U. S. 675. Matthew Fraser was suspended for delivering a speech before a high school assembly in which he employed what this Court called "an elaborate, graphic, and explicit sexual metaphor." *Id.*, at 678. Analyzing the case under *Tinker*, the District Court and Court of Appeals found no disruption, and therefore no basis for disciplining Fraser. 478 U. S., at 679–680. This Court reversed, holding that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech." *Id.*, at 685.

The mode of analysis employed in *Fraser* is not entirely clear. The Court was plainly attuned to the content of Fraser's speech, citing the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Fraser's] speech." *Id.*, at 680. But the Court also reasoned that school boards have the authority to determine "what manner of speech in the classroom or in school assembly is inappropriate." *Id.*, at 683. Cf. *id.*, at 689 (Brennan, J., concurring in judgment) ("In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate [Fraser's] speech because they disagreed with the views he sought to express").

We need not resolve this debate to decide this case. For present purposes, it is enough to distill from *Fraser* two basic principles. First, *Fraser*'s holding demonstrates that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other

settings." *Id.*, at 682. Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. See *Cohen* v. *California*, 403 U. S. 15 (1971); *Fraser*, *supra*, at 682–683. In school, however, Fraser's First Amendment rights were circumscribed "in light of the special characteristics of the school environment." *Tinker*, *supra*, at 506. Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the "substantial disruption" analysis prescribed by *Tinker*, *supra*, at 514. See *Kuhlmeier*, 484 U. S., at 271, n. 4 (disagreeing with the proposition that there is "no difference between the First Amendment analysis applied in *Tinker* and that applied in *Fraser*," and noting that the holding in *Fraser* was not based on any showing of substantial disruption).

Our most recent student speech case, *Kuhlmeier*, concerned "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." 484 U. S., at 271. Staff members of a high school newspaper sued their school when it chose not to publish two of their articles. The Court of Appeals analyzed the case under *Tinker*, ruling in favor of the students because it found no evidence of material disruption to classwork or school discipline. *Kuhlmeier* v. *Hazelwood School Dist.*, 795 F. 2d 1368, 1375 (CA8 1986). This Court reversed, holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Kuhlmeier*, 484 U. S., at 273.

Kuhlmeier does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur. The case is nevertheless instructive because it confirms both principles cited above. *Kuhlmeier* acknowl-

edged that schools may regulate some speech "even though the government could not censor similar speech outside the school." *Id.*, at 266. And, like *Fraser*, it confirms that the rule of *Tinker* is not the only basis for restricting student speech.[2]

Drawing on the principles applied in our student speech cases, we have held in the Fourth Amendment context that "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' . . . the nature of those rights is what is appropriate for children in school." *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 655–656 (1995) (quoting *Tinker*, *supra*, at 506). In particular, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *New Jersey* v. *T. L. O.*, 469 U. S. 325, 340 (1985). See *Vernonia*, *supra*, at 656 ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere . . . "); *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty.* v. *Earls*, 536 U. S. 822, 829–830 (2002) (" 'special needs' inhere in the public school context"; "[w]hile schoolchildren do not shed their constitutional rights when they enter the schoolhouse, Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children" (quoting *Vernonia*, 515 U. S., at 656; citation and some internal quotation marks omitted)).

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[2] The dissent's effort to find inconsistency between our approach here and the opinion in *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, *post*, p. 449, see *post*, at 444–445, overlooks what was made clear in *Tinker*, *Fraser*, and *Kuhlmeier*: Student First Amendment rights are "applied in light of the special characteristics of the school environment." *Tinker*, 393 U. S., at 506. See *Fraser*, 478 U. S., at 682; *Kuhlmeier*, 484 U. S., at 266. And, as discussed above, *supra*, at 402–403, there is no serious argument that Frederick's banner is political speech of the sort at issue in *Wisconsin Right to Life*.

Even more to the point, these cases also recognize that deterring drug use by schoolchildren is an "important—indeed, perhaps compelling" interest. *Id.*, at 661. Drug abuse can cause severe and permanent damage to the health and well-being of young people:

> "School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Id.*, at 661–662 (citations and internal quotation marks omitted).

Just five years ago, we wrote: "The drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse." *Earls, supra*, at 834, and n. 5.

The problem remains serious today. See generally 1 National Institute on Drug Abuse, National Institutes of Health, Monitoring the Future: National Survey Results on Drug Use, 1975–2005, Secondary School Students (2006). About half of American 12th graders have used an illicit drug, as have more than a third of 10th graders and about one-fifth of 8th graders. *Id.*, at 99. Nearly one in four 12th graders has used an illicit drug in the past month. *Id.*, at 101. Some 25% of high schoolers say that they have been offered, sold, or given an illegal drug on school property within the past year. Dept. of Health and Human Services, Centers for Disease Control and Prevention, Youth Risk Behavior Surveillance—United States, 2005, 55 Morbidity and Mortality Weekly Report, Surveillance Summaries, No. SS–5, p. 19 (June 9, 2006).

Congress has declared that part of a school's job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs, Brief for United States as *Amicus Curiae* 1, and required that schools receiving federal funds under the Safe and Drug-Free Schools and Communities Act of 1994 certify that their drug-prevention programs "convey a clear and consistent message that . . . the illegal use of drugs [is] wrong and harmful," 20 U. S. C. § 7114(d)(6) (2000 ed., Supp. IV).

Thousands of school boards throughout the country—including JDHS—have adopted policies aimed at effectuating this message. See Pet. for Cert. 17–21. Those school boards know that peer pressure is perhaps "the single most important factor leading schoolchildren to take drugs," and that students are more likely to use drugs when the norms in school appear to tolerate such behavior. *Earls*, *supra*, at 840 (BREYER, J., concurring). Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.

The "special characteristics of the school environment," *Tinker*, 393 U. S., at 506, and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use. *Tinker* warned that schools may not prohibit student speech because of "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.*, at 508, 509. The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy, App. 92–95; App. to Pet.

for Cert. 53a, extends well beyond an abstract desire to avoid controversy.

Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. See Reply Brief for Petitioners 14–15. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.

Although accusing this decision of doing "serious violence to the First Amendment" by authorizing "viewpoint discrimination," *post*, at 435, 437, the dissent concludes that "it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting," *post*, at 439. Nor do we understand the dissent to take the position that schools are required to tolerate student advocacy of illegal drug use at school events, even if that advocacy falls short of inviting "imminent" lawless action. See *ibid.* ("[I]t is possible that our rigid imminence requirement ought to be relaxed at schools"). And even the dissent recognizes that the issues here are close enough that the principal should not be held liable in damages, but should instead enjoy qualified immunity for her actions. See *post*, at 434. Stripped of rhetorical flourishes, then, the debate between the dissent and this opinion is less about constitutional first principles than about whether Frederick's banner constitutes promotion of illegal drug use. We have explained our view that it does. The dissent's contrary view on that relatively narrow question hardly justifies sounding the First Amendment bugle.

* * *

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly un-

furled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.

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

It is so ordered.

JUSTICE THOMAS, concurring.

The Court today decides that a public school may prohibit speech advocating illegal drug use. I agree and therefore join its opinion in full. I write separately to state my view that the standard set forth in *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969), is without basis in the Constitution.

I

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." As this Court has previously observed, the First Amendment was not originally understood to permit all sorts of speech; instead, "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942); see also *Cox* v. *Louisiana*, 379 U. S. 536, 554 (1965). In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect stu-

dent speech in public schools. Although colonial schools were exclusively private, public education proliferated in the early 1800's. By the time the States ratified the Fourteenth Amendment, public schools had become relatively common. W. Reese, America's Public Schools: From the Common School to "No Child Left Behind" 11–12 (2005) (hereinafter Reese). If students in public schools were originally understood as having free-speech rights, one would have expected 19th-century public schools to have respected those rights and courts to have enforced them.[1] They did not.

A

During the colonial era, private schools and tutors offered the only educational opportunities for children, and teachers managed classrooms with an iron hand. R. Butts & L. Cremin, A History of Education in American Culture 121, 123 (1953) (hereinafter Butts). Public schooling arose, in part, as a way to educate those too poor to afford private schools. See Kaestle & Vinovskis, From Apron Strings to ABCs: Parents, Children, and Schooling in Nineteenth-Century Massachusetts, 84 Am. J. Sociology S39, S49 (Supp. 1978). Because public schools were initially created as substitutes for private schools, when States developed public education systems in the early 1800's, no one doubted the government's ability to educate and discipline children as private schools did. Like their private counterparts, early public schools were not places for freewheeling debates or exploration of competing ideas. Rather, teachers instilled "a core of common values" in students and taught them self-control. Reese 23; A. Potter & G. Emerson, The School and

[1] Although the First Amendment did not apply to the States until at least the ratification of the Fourteenth Amendment, most state constitutions included free-speech guarantees during the period when public education expanded. *E. g.*, Cal. Const., Art. I, § 9 (1849); Conn. Const., Art. I, § 5 (1818); Ind. Const., Art. I, § 9 (1816).

the Schoolmaster: A Manual 125 (1843) ("By its discipline it contributes, insensibly, to generate a spirit of subordination to lawful authority, a power of self-control, and a habit of postponing present indulgence to a greater future good . . . "); D. Parkerson & J. Parkerson, The Emergence of the Common School in the U. S. Countryside 6 (1998) (hereinafter Parkerson) (noting that early education activists, such as Benjamin Rush, believed public schools "help[ed] control the innate selfishness of the individual").

Teachers instilled these values not only by presenting ideas but also through strict discipline. Butts 274–275. Schools punished students for behavior the school considered disrespectful or wrong. Parkerson 65 (noting that children were punished for idleness, talking, profanity, and slovenliness). Rules of etiquette were enforced, and courteous behavior was demanded. Reese 40. To meet their educational objectives, schools required absolute obedience. C. Northend, The Teacher's Assistant or Hints and Methods in School Discipline and Instruction 44, 52 (1865) ("I consider a school judiciously governed, where order prevails; where the strictest sense of propriety is manifested by the pupils towards the teacher, and towards each other . . . " (internal quotation marks omitted)).[2]

In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.

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[2] Even at the college level, strict obedience was required of students: "The English model fostered absolute institutional control of students by faculty both inside and outside the classroom. At all the early American schools, students lived and worked under a vast array of rules and restrictions. This one-sided relationship between the student and the college mirrored the situation at English schools where the emphasis on hierarchical authority stemmed from medieval Christian theology and the unique legal privileges afforded the university corporation." Note, 44 Vand. L. Rev. 1135, 1140 (1991) (footnote omitted).

B

Through the legal doctrine of *in loco parentis*, courts upheld the right of schools to discipline students, to enforce rules, and to maintain order.[3] Rooted in the English common law, *in loco parentis* originally governed the legal rights and obligations of tutors and private schools. 1 W. Blackstone, Commentaries on the Laws of England 441 (1765) ("[A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed"). Chancellor James Kent noted the acceptance of the doctrine as part of American law in the early 19th century. 2 J. Kent, Commentaries on American Law *205, *206–*207 ("So the power allowed by law to the parent over the person of the child may be delegated to a tutor or instructor, the better to accomplish the purpose of education").

As early as 1837, state courts applied the *in loco parentis* principle to public schools:

> "One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and

[3] My discussion is limited to elementary and secondary education. In these settings, courts have applied the doctrine of *in loco parentis* regardless of the student's age. See, *e. g.*, *Stevens* v. *Fassett*, 27 Me. 266, 281 (1847) (holding that a student over the age of 21 is "liab[le] to punishment" on the same terms as other students if he "present[s] himself as a pupil, [and] is received and instructed by the master"); *State* v. *Mizner*, 45 Iowa 248, 250–252 (1876) (same); *Sheehan* v. *Sturges*, 53 Conn. 481, 484, 2 A. 841, 843 (1885) (same). Therefore, the fact that Frederick was 18 and not a minor under Alaska law, 439 F. 3d 1114, 1117, n. 4 (CA9 2006), is inconsequential.

> to reform bad habits . . . . The teacher is the substitute of the parent; . . . and in the exercise of these delegated duties, is invested with his power." *State* v. *Pendergrass*, 19 N. C. 365, 365–366 (1837).

Applying *in loco parentis*, the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order. *Sheehan* v. *Sturges*, 53 Conn. 481, 483–484, 2 A. 841, 842 (1885). Thus, in the early years of public schooling, schools and teachers had considerable discretion in disciplinary matters:

> "To accomplish th[e] desirable ends [of teaching self-restraint, obedience, and other civic virtues], the master of a school is necessarily invested with much discretionary power. . . . He must govern these pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn. He must make rules, give commands, and punish disobedience. What rules, what commands, and what punishments shall be imposed, are necessarily largely within the discretion of the master, where none are defined by the school board." *Patterson* v. *Nutter*, 78 Me. 509, 511, 7 A. 273, 274 (1886).[4]

A review of the case law shows that *in loco parentis* allowed schools to regulate student speech as well. Courts routinely preserved the rights of teachers to punish speech that the school or teacher thought was contrary to the interests of the school and its educational goals. For example, the Vermont Supreme Court upheld the corporal punishment of a student who called his teacher "*Old Jack Seaver*" in

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[4] Even courts that did not favor the broad discretion given to teachers to impose corporal punishment recognized that the law provided it. *Cooper* v. *McJunkin*, 4 Ind. 290, 291 (1853) (stating that "[t]he public seem to cling to a despotism in the government of schools which has been discarded everywhere else").

front of other students. *Lander* v. *Seaver*, 32 Vt. 114, 115 (1859). The court explained its decision as follows:

> "[L]anguage used to other scholars to stir up disorder and subordination, or to heap odium and disgrace upon the master; writings and pictures placed so as to suggest evil and corrupt language, images and thoughts to the youth who must frequent the school; all such or similar acts tend directly to impair the usefulness of the school, the welfare of the scholars and the authority of the master. By common consent and by the universal custom in our New England schools, the master has always been deemed to have the right to punish such offences. Such power is essential to the preservation of order, decency, decorum and good government in schools." *Id.*, at 121.

Similarly, the California Court of Appeal upheld the expulsion of a student who gave a speech before the student body that criticized the administration for having an unsafe building "because of the possibility of fire." *Wooster* v. *Sunderland*, 27 Cal. App. 51, 52, 148 P. 959 (1915). The punishment was appropriate, the court stated, because the speech "was intended to discredit and humiliate the board in the eyes of the students, and tended to impair the discipline of the school." *Id.*, at 55, 148 P., at 960. Likewise, the Missouri Supreme Court explained that a "rule which forbade the use of profane language [and] quarrelling" "was not only reasonable, but necessary to the orderly conduct of the school." *Deskins* v. *Gose*, 85 Mo. 485, 487, 488 (1885). And the Indiana Supreme Court upheld the punishment of a student who made distracting demonstrations in class for "a breach of good deportment." *Vanvactor* v. *State*, 113 Ind. 276, 281, 15 N. E. 341, 343 (1888).[5]

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[5] Courts also upheld punishment when children refused to speak after being requested to do so by their teachers. See *Board of Ed.* v. *Helston*, 32 Ill. App. 300, 305–307 (1890) (upholding the suspension of a boy who refused to provide information about who had defaced the school building);

The doctrine of *in loco parentis* limited the ability of schools to set rules and control their classrooms in almost no way. It merely limited the imposition of excessive physical punishment. In this area, the case law was split. One line of cases specified that punishment was wholly discretionary as long as the teacher did not act with legal malice or cause permanent injury. *E. g., Boyd* v. *State*, 88 Ala. 169, 170–172, 7 So. 268, 269 (1890) (allowing liability where the "punishment inflicted is immoderate, or excessive, and . . . it was induced by legal *malice*, or wickedness of motive"). Another line allowed courts to intervene where the corporal punishment was "*clearly* excessive." *E. g., Lander*, *supra*, at 124. Under both lines of cases, courts struck down only punishments that were excessively harsh; they almost never questioned the substantive restrictions on student conduct set by teachers and schools. *E. g., Sheehan*, *supra*, at 483–484, 2 A., at 842; *Gardner* v. *State*, 4 Ind. 632, 635 (1853); *Anderson* v. *State*, 40 Tenn. 455, 456 (1859); *Hardy* v. *James*, 5 Ky. Op. 36 (1872).[6]

II

Tinker effected a sea change in students' speech rights, extending them well beyond traditional bounds. The case

cf. *Sewell* v. *Board of Ed. of Defiance Union School*, 29 Ohio St. 89, 92 (1876) (upholding the suspension of a student who failed to complete a rhetorical exercise in the allotted time).

[6] At least nominally, this Court has continued to recognize the applicability of the *in loco parentis* doctrine to public schools. See *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 654, 655 (1995) ("Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination . . . . They are subject . . . to the control of their parents or guardians. When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them" (citation omitted)); *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 684 (1986) ("These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech").

arose when a school punished several students for wearing black armbands to school to protest the Vietnam War. 393 U. S., at 504. Determining that the punishment infringed the students' First Amendment rights, this Court created a new standard for students' freedom of speech in public schools:

> "[W]here there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained." *Id.*, at 509 (internal quotation marks omitted).

Accordingly, unless a student's speech would disrupt the educational process, students had a fundamental right to speak their minds (or wear their armbands)—even on matters the school disagreed with or found objectionable. *Ibid.* ("[The school] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").

Justice Black dissented, criticizing the Court for "subject[ing] all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students." *Id.*, at 525. He emphasized the instructive purpose of schools: "[T]axpayers send children to school on the premise that at their age they need to learn, not teach." *Id.*, at 522. In his view, the Court's decision "surrender[ed] control of the American public school system to public school students." *Id.*, at 526.

Of course, *Tinker*'s reasoning conflicted with the traditional understanding of the judiciary's role in relation to public schooling, a role limited by *in loco parentis.* Perhaps for that reason, the Court has since scaled back *Tinker*'s standard, or rather set the standard aside on an ad hoc basis. In *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 677, 678

(1986), a public school suspended a student for delivering a speech that contained "an elaborate, graphic, and explicit sexual metaphor." The Court of Appeals found that the speech caused no disruption under the *Tinker* standard, and this Court did not question that holding. 478 U. S., at 679–680. The Court nonetheless permitted the school to punish the student because of the objectionable content of his speech. *Id.*, at 685 ("A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students"). Signaling at least a partial break with *Tinker*, *Fraser* left the regulation of indecent student speech to local schools.[7] 478 U. S., at 683.

Similarly, in *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260 (1988), the Court made an exception to *Tinker* for school-sponsored activities. The Court characterized newspapers and similar school-sponsored activities "as part of the school curriculum" and held that "[e]ducators are entitled to exercise greater control over" these forms of student expression. 484 U. S., at 271. Accordingly, the Court expressly refused to apply *Tinker*'s standard. 484 U. S., at 272–273. Instead, for school-sponsored activities, the Court created a new standard that permitted school regulations of student speech that are "reasonably related to legitimate pedagogical concerns." *Id.*, at 273.

Today, the Court creates another exception. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not. *Ante*, at 404–409. I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not—a standard continuously developed through litigation against local schools and their administrators. In my view, petitioners could prevail for a much simpler reason: As originally understood, the

[7] Distancing itself from *Tinker*'s approach, the *Fraser* Court quoted Justice Black's dissent in *Tinker*. 478 U. S., at 686.

Constitution does not afford students a right to free speech in public schools.

III

In light of the history of American public education, it cannot seriously be suggested that the First Amendment "freedom of speech" encompasses a student's right to speak in public schools. Early public schools gave total control to teachers, who expected obedience and respect from students. And courts routinely deferred to schools' authority to make rules and to discipline students for violating those rules. Several points are clear: (1) Under *in loco parentis*, speech rules and other school rules were treated identically; (2) the *in loco parentis* doctrine imposed almost no limits on the types of rules that a school could set while students were in school; and (3) schools and teachers had tremendous discretion in imposing punishments for violations of those rules.

It might be suggested that the early school speech cases dealt only with slurs and profanity. But that criticism does not withstand scrutiny. First, state courts repeatedly reasoned that schools had discretion to impose discipline to maintain order. The substance of the student's speech or conduct played no part in the analysis. Second, some cases involved punishment for speech on weightier matters, for instance a speech criticizing school administrators for creating a fire hazard. See *Wooster*, 27 Cal. App., at 52–53, 148 P., at 959. Yet courts refused to find an exception to *in loco parentis* even for this advocacy of public safety.

To be sure, our educational system faces administrative and pedagogical challenges different from those faced by 19th-century schools. And the idea of treating children as though it were still the 19th century would find little support today. But I see no constitutional imperative requiring public schools to allow all student speech. Parents decide whether to send their children to public schools. Cf. *Hamilton* v. *Regents of Univ. of Cal.*, 293 U. S. 245, 262

(1934) ("California has not drafted or called them to attend the university. They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course . . . "); *id.*, at 266 (Cardozo, J., concurring). If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or homeschool them; or they can simply move. Whatever rules apply to student speech in public schools, those rules can be challenged by parents in the political process.

In place of that democratic regime, *Tinker* substituted judicial oversight of the day-to-day affairs of public schools. The *Tinker* Court made little attempt to ground its holding in the history of education or in the original understanding of the First Amendment.[8] Instead, it imposed a new and malleable standard: Schools could not inhibit student speech unless it "substantially interfere[d] with the requirements of appropriate discipline in the operation of the school." 393 U. S., at 509 (internal quotation marks omitted). Inherent

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[8] The *Tinker* Court claimed that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." 393 U. S., at 506. But the cases the Court cited in favor of that bold proposition do not support it. *Tinker* chiefly relies upon *Meyer* v. *Nebraska*, 262 U. S. 390 (1923) (striking down a law prohibiting the teaching of German). However, *Meyer* involved a challenge by a *private* school, *id.*, at 396, and the *Meyer* Court was quick to note that no "challenge [has] been made of the State's power to prescribe a curriculum for institutions which it supports," *id.*, at 402. *Meyer* provides absolutely no support for the proposition that free-speech rights apply within schools operated by the State. And notably, *Meyer* relied as its chief support on the *Lochner* v. *New York*, 198 U. S. 45 (1905), line of cases, 262 U. S., at 399, a line of cases that has long been criticized, *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330 (2007). *Tinker* also relied on *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). *Pierce* has nothing to say on this issue either. *Pierce* simply upheld the right of parents to send their children to private school. *Id.*, at 535.

in the application of that standard are judgment calls about what constitutes interference and what constitutes appropriate discipline. See *id.*, at 517–518 (Black, J., dissenting) (arguing that the armbands in fact caused a disruption). Historically, courts reasoned that only local school districts were entitled to make those calls. The *Tinker* Court usurped that traditional authority for the judiciary.

And because *Tinker* utterly ignored the history of public education, courts (including this one) routinely find it necessary to create ad hoc exceptions to its central premise. This doctrine of exceptions creates confusion without fixing the underlying problem by returning to first principles. Just as I cannot accept *Tinker*'s standard, I cannot subscribe to *Kuhlmeier*'s alternative. Local school boards, not the courts, should determine what pedagogical interests are "legitimate" and what rules "reasonably relat[e]" to those interests. 484 U. S., at 273.

Justice Black may not have been "a prophet or the son of a prophet," but his dissent in *Tinker* has proved prophetic. 393 U. S., at 525. In the name of the First Amendment, *Tinker* has undermined the traditional authority of teachers to maintain order in public schools. "Once a society that generally respected the authority of teachers, deferred to their judgment, and trusted them to act in the best interest of school children, we now accept defiance, disrespect, and disorder as daily occurrences in many of our public schools." Dupre, Should Students Have Constitutional Rights? Keeping Order in the Public Schools, 65 Geo. Wash. L. Rev. 49, 50 (1996). We need look no further than this case for an example: Frederick asserts a constitutional right to utter at a school event what is either "[g]ibberish," *ante,* at 402, or an open call to use illegal drugs. To elevate such impertinence to the status of constitutional protection would be farcical and would indeed be to "surrender control of the American public school system to public school students." *Tinker, supra,* at 526 (Black, J., dissenting).

* * *

I join the Court's opinion because it erodes *Tinker*'s hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so.

JUSTICE ALITO, with whom JUSTICE KENNEDY joins, concurring.

I join the opinion of the Court on the understanding that (1) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use." See *post*, at 445 (STEVENS, J., dissenting).

The opinion of the Court correctly reaffirms the recognition in *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 506 (1969), of the fundamental principle that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court is also correct in noting that *Tinker*, which permits the regulation of student speech that threatens a concrete and "substantial disruption," *id.*, at 514, does not set out the only ground on which in-school student speech may be regulated by state actors in a way that would not be constitutional in other settings.

But I do not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court. In addition to *Tinker*, the decision in the present case allows the restriction of speech advocating illegal drug use; *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675 (1986), permits the regulation of speech that is delivered in a lewd or vulgar manner as

part of a high school program; and *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260 (1988), allows a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ. I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.

The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's "educational mission." See Brief for Petitioners 21; Brief for United States as *Amicus Curiae* 6. This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

During the *Tinker* era, a public school could have defined its educational mission to include solidarity with our soldiers and their families and thus could have attempted to outlaw the wearing of black armbands on the ground that they undermined this mission. Alternatively, a school could have defined its educational mission to include the promotion of world peace and could have sought to ban the wearing of buttons expressing support for the troops on the ground that the buttons signified approval of war. The "educational mission" argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.

The public schools are invaluable and beneficent institutions, but they are, after all, organs of the State. When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing *in loco parentis*.

For these reasons, any argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic that is relevant in this case is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger.

In most settings, the First Amendment strongly limits the government's ability to suppress speech on the ground that it presents a threat of violence. See *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) *(per curiam)*. But due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence. And, in most cases, *Tinker*'s "substantial disruption" standard permits school officials to step in before actual violence erupts. See 393 U. S., at 508–509.

Speech advocating illegal drug use poses a threat to student safety that is just as serious, if not always as immediately obvious. As we have recognized in the past and as the opinion of the Court today details, illegal drug use presents a grave and in many ways unique threat to the physical safety of students. I therefore conclude that the public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension.

JUSTICE BREYER, concurring in the judgment in part and dissenting in part.

This Court need not and should not decide this difficult First Amendment issue on the merits. Rather, I believe that it should simply hold that qualified immunity bars the student's claim for monetary damages and say no more.

I

Resolving the First Amendment question presented in this case is, in my view, unwise and unnecessary. In part that is because the question focuses upon specific content narrowly defined: May a school board punish students for speech that advocates drug use and, if so, when? At the same time, the underlying facts suggest that Principal Morse acted as she did not simply because of the specific content

and viewpoint of Joseph Frederick's speech but also because of the surrounding context and manner in which Frederick expressed his views. To say that school officials might reasonably prohibit students during school-related events from unfurling 14-foot banners (with any kind of irrelevant or inappropriate message) designed to attract attention from television cameras seems unlikely to undermine basic First Amendment principles. But to hold, as the Court does, that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use" (and that "schools" may "restrict student expression that they reasonably regard as promoting illegal drug use") is quite a different matter. *Ante*, at 397, 408. This holding, based as it is on viewpoint restrictions, raises a host of serious concerns.

One concern is that, while the holding is theoretically limited to speech promoting the use of illegal drugs, it could in fact authorize further viewpoint-based restrictions. Illegal drugs, after all, are not the only illegal substances. What about encouraging the underage consumption of alcohol? Moreover, it is unclear how far the Court's rule regarding drug advocacy extends. What about a conversation during the lunch period where one student suggests that glaucoma sufferers should smoke marijuana to relieve the pain? What about deprecating commentary about an antidrug film shown in school? And what about drug messages mixed with other, more expressly political, content? If, for example, Frederick's banner had read "LEGALIZE BONG HiTS," he might be thought to receive protection from the majority's rule, which goes to speech "encouraging *illegal* drug use." *Ante*, at 397 (emphasis added). But speech advocating change in drug laws might also be perceived of as promoting the disregard of existing drug laws.

Legal principles must treat like instances alike. Those principles do not permit treating "drug use" separately without a satisfying explanation of why drug use is *sui generis*.

To say that illegal drug use is harmful to students, while surely true, does not itself constitute a satisfying explanation because there are many such harms. During a real war, one less metaphorical than the war on drugs, the Court declined an opportunity to draw narrow subject-matter-based lines. Cf. *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943) (holding students cannot be compelled to recite the Pledge of Allegiance during World War II). We should decline this opportunity today.

Although the dissent avoids some of the majority's pitfalls, I fear that, if adopted as law, it would risk significant interference with reasonable school efforts to maintain discipline. What is a principal to do when a student unfurls a 14-foot banner (carrying an irrelevant or inappropriate message) during a school-related event in an effort to capture the attention of television cameras? Nothing? In my view, a principal or a teacher might reasonably view Frederick's conduct, in this setting, as simply beyond the pale. And a school official, knowing that adolescents often test the outer boundaries of acceptable behavior, may believe it is important (for the offending student and his classmates) to establish when a student has gone too far.

Neither can I simply say that Morse may have taken the right action (confiscating Frederick's banner) but for the wrong reason ("drug speech"). Teachers are neither lawyers nor police officers; and the law should not demand that they fully understand the intricacies of our First Amendment jurisprudence. As the majority rightly points out, the circumstances here called for a quick decision. See *ante*, at 410 (noting that "Morse had to decide to act—or not act—on the spot"). But this consideration is better understood in terms of qualified immunity than of the First Amendment. See *infra*, at 429–432.

All of this is to say that, regardless of the outcome of the constitutional determination, a decision on the underlying First Amendment issue is both difficult and unusually por-

tentous. And that is a reason for us *not to decide* the issue unless we must.

In some instances, it is appropriate to decide a constitutional issue in order to provide "guidance" for the future. But I cannot find much guidance in today's decision. The Court makes clear that school officials may "restrict" student speech that promotes "illegal drug use" and that they may "take steps" to "safeguard" students from speech that encourages "illegal drug use." *Ante,* at 397, 403. Beyond "steps" that prohibit the unfurling of banners at school outings, the Court does not explain just what those "restrict[ions]" or those "steps" might be.

Nor, if we are to avoid the risk of interpretations that are too broad or too narrow, is it easy to offer practically valuable guidance. Students will test the limits of acceptable behavior in myriad ways better known to schoolteachers than to judges; school officials need a degree of flexible authority to respond to disciplinary challenges; and the law has always considered the relationship between teachers and students special. Under these circumstances, the more detailed the Court's supervision becomes, the more likely its law will engender further disputes among teachers and students. Consequently, larger numbers of those disputes will likely make their way from the schoolhouse to the courthouse. Yet no one wishes to substitute courts for school boards, or to turn the judge's chambers into the principal's office.

In order to avoid resolving the fractious underlying constitutional question, we need only decide a different question that this case presents, the question of "qualified immunity." See Pet. for Cert. 23–28. The principle of qualified immunity fits this case perfectly and, by saying so, we would diminish the risk of bringing about the adverse consequences I have identified. More importantly, we should also adhere to a basic constitutional obligation by avoiding unnecessary decision of constitutional questions. See *Ashwander* v.

TVA, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of").

II

A

The defense of "qualified immunity" requires courts to enter judgment in favor of a government employee unless the employee's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982). The defense is designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U. S. 335, 341 (1986).

Qualified immunity applies here and entitles Principal Morse to judgment on Frederick's monetary damages claim because she did not clearly violate the law during her confrontation with the student. At the time of that confrontation, *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 513 (1969), indicated that school officials could not prohibit students from wearing an armband in protest of the Vietnam War, where the conduct at issue did not "materially and substantially disrupt the work and discipline of the school"; *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675 (1986), indicated that school officials could restrict a student's freedom to give a school assembly speech containing an elaborate sexual metaphor; and *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260 (1988), indicated that school officials could restrict student contributions to a school-sponsored newspaper, even without threat of imminent disruption. None of these cases clearly governs the case at hand.

The Ninth Circuit thought it "clear" that these cases did not permit Morse's actions. See 439 F. 3d 1114, 1124 (2006). That is because, in the Ninth Circuit's view, this case in-

volved neither lewd speech, cf. *Fraser*, *supra*, nor school-sponsored speech, cf. *Kuhlmeier*, *supra*, and hence *Tinker*'s substantial disruption test must guide the inquiry. See 439 F. 3d, at 1123. But unlike the Ninth Circuit, other courts have described the tests these cases suggest as complex and often difficult to apply. See, *e. g.*, *Guiles* v. *Marineau*, 461 F. 3d 320, 326 (CA2 2006) ("It is not entirely clear whether *Tinker's* rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser*, or whether it applies only to political speech or to political viewpoint-based discrimination"); *Baxter* v. *Vigo Cty. School Corp.*, 26 F. 3d 728, 737 (CA7 1994) (pointing out that *Fraser* "cast some doubt on the extent to which students retain free speech rights in the school setting"). Indeed, the fact that this Court divides on the constitutional question (and that the majority reverses the Ninth Circuit's constitutional determination) strongly suggests that the answer as to how to apply prior law to these facts was unclear.

The relative ease with which we could decide this case on the qualified immunity ground, and thereby avoid deciding a far more difficult constitutional question, underscores the need to lift the rigid "order of battle" decisionmaking requirement that this Court imposed upon lower courts in *Saucier* v. *Katz*, 533 U. S. 194, 201–202 (2001). In *Saucier*, the Court wrote that lower courts' "first inquiry must be whether a constitutional right would have been violated on the facts alleged." *Id.*, at 200. Only if there is a constitutional violation can lower courts proceed to consider whether the official is entitled to "qualified immunity." See *ibid.*

I have previously explained why I believe we should abandon *Saucier*'s order-of-battle rule. See *Scott* v. *Harris*, 550 U. S. 372, 387–389 (2007) (concurring opinion); *Brosseau* v. *Haugen*, 543 U. S. 194, 201–202 (2004) (same). Sometimes the rule will require lower courts unnecessarily to answer difficult constitutional questions, thereby wasting judicial resources. Sometimes it will require them to resolve constitu-

tional issues that are poorly presented. Sometimes the rule will immunize an incorrect constitutional holding from further review. And often the rule violates the longstanding principle that courts should "not . . . pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944).

This last point warrants amplification. In resolving the underlying constitutional question, we produce several differing opinions. It is utterly unnecessary to do so. Were we to decide this case on the ground of qualified immunity, our decision would be *unanimous*, for the dissent concedes that Morse should not be held liable in damages for confiscating Frederick's banner. *Post*, at 434 (opinion of STEVENS, J.). And the "cardinal principle of judicial restraint" is that "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs., Inc.* v. *Drug Enforcement Admin.*, 362 F. 3d 786, 799 (CADC 2004) (Roberts, J., concurring in part and concurring in judgment).

If it is *Saucier* that tempts this Court to adhere to the rigid "order of battle" that binds lower courts, it should resist that temptation. *Saucier* does not bind this Court. Regardless, the rule of *Saucier* has generated considerable criticism from both commentators and judges. See Leval, Judging Under the Constitution: Dicta About Dicta, 81 N. Y. U. L. Rev. 1249, 1275 (2006) (calling the requirement "a puzzling misadventure in constitutional dictum"); *Dirrane* v. *Brookline Police Dept.*, 315 F. 3d 65, 69–70 (CA1 2002) (referring to the requirement as "an uncomfortable exercise" when "the answer whether there was a violation may depend on a kaleidoscope of facts not yet fully developed"); *Lyons* v. *Xenia*, 417 F. 3d 565, 580–584 (CA6 2005) (Sutton, J., concurring). While *Saucier* justified its rule by contending that it was necessary to permit constitutional law to develop, see 533 U. S., at 201, this concern is overstated because overruling *Saucier* would not mean that the law *prohibited* judges

from passing on constitutional questions, only that it did not *require* them to do so. Given that *Saucier* is a judge-made procedural rule, *stare decisis* concerns supporting preservation of the rule are weak. See, *e. g.*, *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991) ("Considerations in favor of *stare decisis*" are at their weakest in cases "involving procedural and evidentiary rules").

Finally, several Members of this Court have previously suggested that *always* requiring lower courts first to answer constitutional questions is misguided. See *County of Sacramento* v. *Lewis*, 523 U. S. 833, 859 (1998) (STEVENS, J., concurring in judgment) (resolving the constitutional question first is inappropriate when that "question is both difficult and unresolved"); *Bunting* v. *Mellen*, 541 U. S. 1019, 1025 (2004) (SCALIA, J., dissenting from denial of certiorari) ("We should either make clear that constitutional determinations are *not* insulated from our review . . . or else drop any pretense at requiring the ordering in every case"); *Saucier*, *supra*, at 210 (GINSBURG, J., concurring in judgment) ("The two-part test today's decision imposes holds large potential to confuse"); *Siegert* v. *Gilley*, 500 U. S. 226, 235 (1991) (KENNEDY, J., concurring in judgment) ("If it is plain that a plaintiff's required malice allegations are insufficient but there is some doubt as to the constitutional right asserted, it seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first"). I would end the failed *Saucier* experiment now.

B

There is one remaining objection to deciding this case on the basis of qualified immunity alone. The plaintiff in this case has sought not only damages; he has also sought an injunction requiring the school district to expunge his suspension from its records. A "qualified immunity" defense applies in respect to damages actions, but not to injunctive relief. See, *e. g.*, *Wood* v. *Strickland*, 420 U. S. 308, 314, n. 6

(1975). With respect to that claim, the underlying question of constitutionality, at least conceivably, remains.

I seriously doubt, however, that it does remain. At the plaintiff's request, the school superintendent reviewed Frederick's 10-day suspension. The superintendent, in turn, reduced the suspension to the eight days that Frederick had served before the appeal. But in doing so the superintendent noted that several actions independent of Frederick's speech supported the suspension, including the plaintiff's disregard of a school official's instruction, his failure to report to the principal's office on time, his "defiant [and] disruptive behavior," and the "belligerent attitude" he displayed when he finally reported. App. to Pet. for Cert. 65a. The superintendent wrote that "were" he to "concede" that Frederick's "speech . . . is protected . . . , the remainder of his behavior was not excused." *Id.*, at 66a.

The upshot is that the school board's refusal to erase the suspension from the record may well be justified on non-speech-related grounds. In addition, plaintiff's counsel appeared to agree with the Court's suggestion at oral argument that Frederick "would not pursue" injunctive relief if he prevailed on the damages question. Tr. of Oral Arg. 46–48. And finding that Morse was entitled to qualified immunity would leave only the question of injunctive relief.

Given the high probability that Frederick's request for an injunction will not require a court to resolve the constitutional issue, see *Ashwander*, 297 U. S., at 347 (Brandeis, J., concurring), I would decide only the qualified immunity question and remand the rest of the case for an initial consideration.

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

A significant fact barely mentioned by the Court sheds a revelatory light on the motives of both the students and the principal of Juneau-Douglas High School (JDHS). On Janu-

ary 24, 2002, the Olympic Torch Relay gave those Alaska residents a rare chance to appear on national television. As Joseph Frederick repeatedly explained, he did not address the curious message—"BONG HiTS 4 JESUS"—to his fellow students. He just wanted to get the camera crews' attention. Moreover, concern about a nationwide evaluation of the conduct of the JDHS student body would have justified the principal's decision to remove an attention-grabbing 14-foot banner, even if it had merely proclaimed "Glaciers Melt!"

I agree with the Court that the principal should not be held liable for pulling down Frederick's banner. See *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982). I would hold, however, that the school's interest in protecting its students from exposure to speech "reasonably regarded as promoting illegal drug use," *ante*, at 396, cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more.

The Court holds otherwise only after laboring to establish two uncontroversial propositions: first, that the constitutional rights of students in school settings are not coextensive with the rights of adults, see *ante*, at 403–406; and second, that deterring drug use by schoolchildren is a valid and terribly important interest, see *ante*, at 407–408. As to the first, I take the Court's point that the message on Frederick's banner is not *necessarily* protected speech, even though it unquestionably would have been had the banner been unfurled elsewhere. As to the second, I am willing to assume that the Court is correct that the pressing need to deter drug use supports JDHS' rule prohibiting willful conduct that expressly "advocates the use of substances that are illegal to minors." App. to Pet. for Cert. 53a. But it is a gross non sequitur to draw from these two unremarkable propositions the remarkable conclusion that the school may suppress stu-

dent speech that was never meant to persuade anyone to do anything.

In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students. This nonsense banner does neither, and the Court does serious violence to the First Amendment in upholding—indeed, lauding—a school's decision to punish Frederick for expressing a view with which it disagreed.

I

In December 1965, we were engaged in a controversial war, a war that "divided this country as few other issues ever have." *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 524 (1969) (Black, J., dissenting). Having learned that some students planned to wear black armbands as a symbol of opposition to the country's involvement in Vietnam, officials of the Des Moines public school district adopted a policy calling for the suspension of any student who refused to remove the armband. As we explained when we considered the propriety of that policy, "[t]he school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners." *Id.*, at 508. The district justified its censorship on the ground that it feared that the expression of a controversial and unpopular opinion would generate disturbances. Because the school officials had insufficient reason to believe that those disturbances would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," we found the justification for the rule to lack any foundation and therefore held that the censorship violated the First Amendment. *Id.*, at 509 (internal quotation marks omitted).

Justice Harlan dissented, but not because he thought the school district could censor a message with which it dis-

agreed. Rather, he would have upheld the district's rule only because the students never cast doubt on the district's antidisruption justification by proving that the rule was motivated "by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion." *Id.*, at 526.

Two cardinal First Amendment principles animate both the Court's opinion in *Tinker* and Justice Harlan's dissent. First, censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification:

> "Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828–829 (1995) (citation omitted).

Second, punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid. See *Brandenburg* v. *Ohio*, 395 U. S. 444, 449 (1969) *(per curiam)* (distinguishing "mere advocacy" of illegal conduct from "incitement to imminent lawless action").

However necessary it may be to modify those principles in the school setting, *Tinker* affirmed their continuing vitality. 393 U. S., at 509 ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was

caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained" (internal quotation marks omitted)). As other federal courts have long recognized, under *Tinker*,

> "regulation of student speech is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students. . . . *Tinker* requires a specific and significant fear of disruption, *not just some remote apprehension of disturbance.*" *Saxe* v. *State College Area School Dist.*, 240 F. 3d 200, 211 (CA3 2001) (Alito, J.) (emphasis added).

Yet today the Court fashions a test that trivializes the two cardinal principles upon which *Tinker* rests. See *ante*, at 408 ("[S]chools [may] restrict student expression that they reasonably regard as promoting illegal drug use"). The Court's test invites stark viewpoint discrimination. In this case, for example, the principal has unabashedly acknowledged that she disciplined Frederick because she disagreed with the pro-drug viewpoint she ascribed to the message on the banner, see App. 25—a viewpoint, incidentally, that Frederick has disavowed, see *id.*, at 28. Unlike our recent decision in *Tennessee Secondary School Athletic Assn.* v. *Brentwood Academy*, *ante*, at 296 (plurality opinion), see also *ante*, at 423 (ALITO, J., concurring), the Court's holding in this case strikes at "the heart of the First Amendment" because it upholds a punishment meted out on the basis of a listener's disagreement with her understanding (or, more likely, misunderstanding) of the speaker's viewpoint. "If there is a bedrock principle underlying the First Amend-

ment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U. S. 397, 414 (1989).

It is also perfectly clear that "promoting illegal drug use," *ante*, at 409, comes nowhere close to proscribable "incitement to imminent lawless action." *Brandenburg*, 395 U. S., at 449. Encouraging drug use might well increase the likelihood that a listener will try an illegal drug, but that hardly justifies censorship:

> "Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. . . . Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on." *Whitney* v. *California*, 274 U. S. 357, 376 (1927) (Brandeis, J., concurring) (footnote omitted).

No one seriously maintains that drug advocacy (much less Frederick's ridiculous sign) comes within the vanishingly small category of speech that can be prohibited because of its feared consequences. Such advocacy, to borrow from Justice Holmes, "ha[s] no chance of starting a present conflagration." *Gitlow* v. *New York*, 268 U. S. 652, 673 (1925) (dissenting opinion).

II

The Court rejects outright these twin foundations of *Tinker* because, in its view, the unusual importance of protecting children from the scourge of drugs supports a ban on all speech in the school environment that promotes drug use. Whether or not such a rule is sensible as a matter of policy, carving out pro-drug speech for uniquely harsh treatment

finds no support in our case law and is inimical to the values protected by the First Amendment.[1] See *infra*, at 446–448.

I will nevertheless assume for the sake of argument that the school's concededly powerful interest in protecting its students adequately supports its restriction on "any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . ." App. to Pet. for Cert. 53a. Given that the relationship between schools and students "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults," *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 655 (1995), it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting. And while conventional speech may be restricted only when likely to "incit[e] . . . imminent lawless action," *Brandenburg*, 395 U. S., at 449, it is possible that our rigid imminence requirement ought to be relaxed at schools. See *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 682 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

But it is one thing to restrict speech that *advocates* drug use. It is another thing entirely to prohibit an obscure message with a drug theme that a third party subjectively—and not very reasonably—thinks is tantamount to express advocacy. Cf. *Masses Pub. Co.* v. *Patten*, 244 F. 535, 540, 541 (SDNY 1917) (Hand, J.) (distinguishing sharply between "agitation, legitimate as such," and "the direct advocacy" of unlawful conduct). Even the school recognizes the paramount need to hold the line between, on the one hand, nondisruptive speech that merely expresses a viewpoint that is unpopular or contrary to the school's preferred message, and on the other hand, advocacy of an illegal or unsafe course of

[1] I also seriously question whether such a ban could really be enforced. Consider the difficulty of monitoring student conversations between classes or in the cafeteria.

conduct. The district's prohibition of drug advocacy is a gloss on a more general rule that is otherwise quite tolerant of nondisruptive student speech:

> "Students will not be disturbed in the exercise of their constitutionally guaranteed rights to assemble peaceably and to express ideas and opinions, privately or publicly, provided that their activities do not infringe on the rights of others and do not interfere with the operation of the educational program.
>
> "The Board will not permit the conduct on school premises of any willful activity . . . that interferes with the orderly operation of the educational program or offends the rights of others. The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . ." App. to Pet. for Cert. 53a; see also *ante*, at 398 (opinion of the Court) (quoting rule in part).

There is absolutely no evidence that Frederick's banner's reference to drug paraphernalia "willful[ly]" infringed on anyone's rights or interfered with any of the school's educational programs.[2] On its face, then, the rule gave Frederick wide berth "to express [his] ideas and opinions" so long as they did not amount to "advoca[cy]" of drug use. App. to Pet. for Cert. 53a. If the school's rule is, by hypothesis, a valid one, it is valid only insofar as it scrupulously preserves adequate space for constitutionally protected speech. When First Amendment rights are at stake, a rule that "sweep[s] in a great variety of conduct under a general and indefinite characterization" may not leave "too wide a discretion in its

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[2] It is also relevant that the display did not take place "on school premises," as the rule contemplates. App. to Pet. for Cert. 53a. While a separate district rule does make the policy applicable to "social events and class trips," *id.*, at 58a, Frederick might well have thought that the Olympic Torch Relay was neither a "social event" (for example, prom) nor a "class trip."

application." *Cantwell* v. *Connecticut*, 310 U. S. 296, 308 (1940). Therefore, just as we insisted in *Tinker* that the school establish some likely connection between the armbands and their feared consequences, so too JDHS must show that Frederick's supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana.

But instead of demanding that the school make such a showing, the Court punts. Figuring out just *how* it punts is tricky; "[t]he mode of analysis [it] employ[s] . . . is not entirely clear," see *ante*, at 404. On occasion, the Court suggests it is deferring to the principal's "reasonable" judgment that Frederick's sign qualified as drug advocacy.[3] At other times, the Court seems to say that *it* thinks the banner's message constitutes express advocacy.[4] Either way, its approach is indefensible.

To the extent the Court defers to the principal's ostensibly reasonable judgment, it abdicates its constitutional responsibility. The beliefs of third parties, reasonable or otherwise, have never dictated which messages amount to proscribable advocacy. Indeed, it would be a strange constitutional doctrine that would allow the prohibition of only the narrowest category of speech advocating unlawful conduct, see *Bran-*

[3] See *ante*, at 396 (stating that the principal "reasonably regarded" Frederick's banner as "promoting illegal drug use"); *ante*, at 401 (explaining that "Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one"); *ante*, at 403 (asking whether "a principal may . . . restrict student speech . . . when that speech is reasonably viewed as promoting illegal drug use"); *ante*, at 408 (holding that "schools [may] restrict student expression that they reasonably regard as promoting illegal drug use"); see also *ante*, at 422 (ALITO, J., concurring) ("[A] public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use").

[4] See *ante*, at 402 ("We agree with Morse. At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs"); *ante*, at 409 (observing that "[w]e have explained our view" that "Frederick's banner constitutes promotion of illegal drug use").

denburg, 395 U. S., at 447–448, yet would permit a listener's perceptions to determine which speech deserved constitutional protection.[5]

Such a peculiar doctrine is alien to our case law. In *Abrams* v. *United States,* 250 U. S. 616 (1919), this Court affirmed the conviction of a group of Russian "rebels, revolutionists, [and] anarchists," *id.*, at 617–618 (internal quotation marks omitted), on the ground that the leaflets they distributed were thought to "incite, provoke and encourage resistance to the United States," *id.*, at 617 (internal quotation marks omitted). Yet Justice Holmes' dissent—which has emphatically carried the day—never inquired into the reasonableness of the United States' judgment that the leaflets would likely undermine the war effort. The dissent instead ridiculed that judgment: "[N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so." *Id.*, at 628. In *Thomas* v. *Collins,* 323 U. S. 516 (1945) (opinion for the Court by Rutledge, J.), we overturned the conviction of a union organizer who violated a restraining order prohibiting him from exhorting workers. In so doing, we held that the distinction between advocacy and incitement could not depend on how one of those workers might have understood the organizer's speech. That would "pu[t] the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may

[5] The reasonableness of the view that Frederick's message was unprotected speech is relevant to ascertaining whether qualified immunity should shield the principal from liability, not to whether her actions violated Frederick's constitutional rights. Cf. *Saucier* v. *Katz,* 533 U. S. 194, 202 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted").

be drawn as to his intent and meaning." *Id.*, at 535. In *Cox* v. *Louisiana*, 379 U. S. 536, 543 (1965), we vacated a civil rights leader's conviction for disturbing the peace, even though a Baton Rouge sheriff had "deem[ed]" the leader's "appeal to . . . students to sit in at the lunch counters to be 'inflammatory.'" We never asked if the sheriff's in-person, on-the-spot judgment was "reasonable." Even in *Fraser*, we made no inquiry into whether the school administrators reasonably thought the student's speech was obscene or profane; we rather satisfied ourselves that "[t]he pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person." 478 U. S., at 683. Cf. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 499 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression" (internal quotation marks omitted)).[6]

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[6] This same reasoning applies when the interpreter is not just a listener, but a legislature. We have repeatedly held that "[d]eference to a legislative finding" that certain types of speech are inherently harmful "cannot limit judicial inquiry when First Amendment rights are at stake," reasoning that "the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution." *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 843, 844 (1978); see also *Whitney* v. *California*, 274 U. S. 357, 378–379 (1927) (Brandeis, J., concurring) ("[A legislative declaration] does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature"). When legislatures are entitled to no deference as to

To the extent the Court independently finds that "BONG HiTS 4 JESUS" *objectively* amounts to the advocacy of illegal drug use—in other words, that it can *most* reasonably be interpreted as such—that conclusion practically refutes itself. This is a nonsense message, not advocacy. The Court's feeble effort to divine its hidden meaning is strong evidence of that. *Ante*, at 402 (positing that the banner might mean, alternatively, " '[Take] bong hits,' " " 'bong hits [are a good thing],' " or " '[we take] bong hits' "). Frederick's credible and uncontradicted explanation for the message—he just wanted to get on television—is also relevant because a speaker who does not intend to persuade his audience can hardly be said to be advocating anything.[7] But most importantly, it takes real imagination to read a "cryptic" message (the Court's characterization, not mine, see *ante*, at 401) with a slanting drug reference as an incitement to drug use. Admittedly, some high school students (including those who use drugs) are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible. That the Court believes such a silly message can be proscribed as advocacy underscores the novelty of its position, and suggests that the principle it articulates has no stopping point.

Even if advocacy could somehow be wedged into Frederick's obtuse reference to marijuana, that advocacy was at best subtle and ambiguous. There is abundant precedent, including another opinion THE CHIEF JUSTICE announces

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whether particular speech amounts to a "clear and present danger," *id.*, at 379, it is hard to understand why the Court would so blithely defer to the judgment of a single school principal.

[7] In affirming Frederick's suspension, the district superintendent acknowledged that Frederick displayed his message "for the benefit of television cameras covering the Torch Relay." App. to Pet. for Cert. 62a.

today, for the proposition that when the "First Amendment is implicated, the tie goes to the speaker," *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, *post*, at 474 (principal opinion), and that "when it comes to defining what speech qualifies as the functional equivalent of express advocacy . . . we give the benefit of the doubt to speech, not censorship," *post*, at 482. If this were a close case, the tie would have to go to Frederick's speech, not to the principal's strained reading of his quixotic message.

Among other things, the Court's ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate, even among high school students, about the wisdom of the war on drugs or of legalizing marijuana for medicinal use.[8] See *Tinker*, 393 U. S., at 511 ("[Students] may not be confined to the expression of those sentiments that are officially approved"). If Frederick's stupid reference to marijuana can in the Court's view justify censorship, then high school students everywhere could be forgiven for zipping their mouths about drugs at school lest some "reasonable" observer censor and then punish them for promot-

[8] The Court's opinion ignores the fact that the legalization of marijuana is an issue of considerable public concern in Alaska. The State Supreme Court held in 1975 that Alaska's Constitution protects the right of adults to possess less than four ounces of marijuana for personal use. *Ravin* v. *State*, 537 P. 2d 494. In 1990, the voters of Alaska attempted to undo that decision by voting for a ballot initiative recriminalizing marijuana possession. Initiative Proposal No. 2, §§ 1–2 (effective Mar. 3, 1991), 11 Alaska Stat., p. 872 (2006). At the time Frederick unfurled his banner, the constitutionality of that referendum had yet to be tested. It was subsequently struck down as unconstitutional. See *Noy* v. *State*, 83 P. 3d 538 (App. 2003). In the meantime, Alaska voters had approved a ballot measure decriminalizing the use of marijuana for medicinal purposes, 1998 Ballot Measure No. 8 (approved Nov. 3, 1998), 11 Alaska Stat., p. 883 (codified at Alaska Stat. §§ 11.71.190, 17.37.010–17.37.080), and had rejected a much broader measure that would have decriminalized marijuana possession and granted amnesty to anyone convicted of marijuana-related crimes, see 2000 Ballot Measure No. 5 (failed Nov. 7, 2000), 11 Alaska Stat., p. 886.

ing drugs. See also *ante,* at 426 (BREYER, J., concurring in judgment in part and dissenting in part).

Consider, too, that the school district's rule draws no distinction between alcohol and marijuana, but applies evenhandedly to all "substances that are illegal to minors." App. to Pet. for Cert. 53a; see also App. 83 (expressly defining "'drugs'" to include "all alcoholic beverages"). Given the tragic consequences of teenage alcohol consumption—drinking causes far more fatal accidents than the misuse of marijuana—the school district's interest in deterring teenage alcohol use is at least comparable to its interest in preventing marijuana use. Under the Court's reasoning, must the First Amendment give way whenever a school seeks to punish a student for any speech mentioning beer, or indeed anything else that might be deemed risky to teenagers? While I find it hard to believe the Court would support punishing Frederick for flying a "WINE SiPS 4 JESUS" banner—which could quite reasonably be construed either as a protected religious message or as a pro-alcohol message—the breathtaking sweep of its opinion suggests it would.

III

Although this case began with a silly, nonsensical banner, it ends with the Court inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message. Our First Amendment jurisprudence has identified some categories of expression that are less deserving of protection than others—fighting words, obscenity, and commercial speech, to name a few. Rather than reviewing our opinions discussing such categories, I mention two personal recollections that have no doubt influenced my conclusion that it would be profoundly unwise to create special rules for speech about drug and alcohol use.

The Vietnam War is remembered today as an unpopular war. During its early stages, however, "the dominant opinion" that Justice Harlan mentioned in his *Tinker* dissent regarded opposition to the war as unpatriotic, if not treason. 393 U. S., at 526. That dominant opinion strongly supported the prosecution of several of those who demonstrated in Grant Park during the 1968 Democratic Convention in Chicago, see *United States* v. *Dellinger*, 472 F. 2d 340 (CA7 1972), and the vilification of vocal opponents of the war like Julian Bond, cf. *Bond* v. *Floyd*, 385 U. S. 116 (1966). In 1965, when the Des Moines students wore their armbands, the school district's fear that they might "start an argument or cause a disturbance" was well founded. *Tinker*, 393 U. S., at 508. Given that context, there is special force to the Court's insistence that "our Constitution says we must take th[at] risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Id.*, at 508–509 (citation omitted). As we now know, the then-dominant opinion about the Vietnam War was not etched in stone.

Reaching back still further, the current dominant opinion supporting the war on drugs in general, and our antimarijuana laws in particular, is reminiscent of the opinion that supported the nationwide ban on alcohol consumption when I was a student. While alcoholic beverages are now regarded as ordinary articles of commerce, their use was then condemned with the same moral fervor that now supports the war on drugs. The ensuing change in public opinion occurred much more slowly than the relatively rapid shift in Americans' views on the Vietnam War, and progressed on a state-by-state basis over a period of many years. But just as prohibition in the 1920's and early 1930's was secretly questioned by thousands of otherwise law-abiding patrons of

bootleggers and speakeasies, today the actions of literally millions of otherwise law-abiding users of marijuana,[9] and of the majority of voters in each of the several States that tolerate medicinal uses of the product,[10] lead me to wonder whether the fear of disapproval by those in the majority is silencing opponents of the war on drugs. Surely our national experience with alcohol should make us wary of dampening speech suggesting—however inarticulately—that it would be better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely.

Even in high school, a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing views. *Whitney*, 274 U. S., at 377 (Brandeis, J., concurring); *Abrams*, 250 U. S., at 630 (Holmes, J., dissenting); *Tinker*, 393 U. S., at 512. In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment. Whatever the better policy may be, a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular.

I respectfully dissent.

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[9] See *Gonzales* v. *Raich*, 545 U. S. 1, 21, n. 31 (2005) (citing a Government estimate "that in 2000 American users spent $10.5 *billion* on the purchase of marijuana").

[10] *Id.*, at 5 (noting that "at least nine States . . . authorize the use of marijuana for medicinal purposes").

Syllabus

FEDERAL ELECTION COMMISSION *v.* WISCONSIN RIGHT TO LIFE, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 06–969. Argued April 25, 2007—Decided June 25, 2007*

Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) makes it a federal crime for a corporation to use its general treasury funds to pay for any "electioneering communication," 2 U. S. C. § 441b(b)(2), which BCRA defines as any broadcast that refers to a candidate for federal office and is aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction where that candidate is running, § 434(f)(3)(A). In *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, this Court upheld § 203 against a First Amendment facial challenge even though the section encompassed not only campaign speech, or "express advocacy" promoting a candidate's election or defeat, but also "issue advocacy," or speech about public issues more generally, that also mentions such a candidate. The Court concluded there was no overbreadth concern to the extent the speech in question was the "functional equivalent" of express advocacy. *Id.*, at 204–205, 206.

On July 26, 2004, appellee Wisconsin Right to Life, Inc. (WRTL), began broadcasting advertisements declaring that a group of Senators was filibustering to delay and block federal judicial nominees and telling voters to contact Wisconsin Senators Feingold and Kohl to urge them to oppose the filibuster. WRTL planned to run the ads throughout August 2004 and finance them with its general treasury funds. Recognizing, however, that as of August 15, 30 days before the Wisconsin primary, the ads would be illegal "electioneering communication[s]" under BCRA § 203, but believing that it nonetheless had a First Amendment right to broadcast them, WRTL filed suit against the Federal Election Commission (FEC), seeking declaratory and injunctive relief and alleging that § 203's prohibition was unconstitutional as applied to the three ads in question, as well as any materially similar ads WRTL might run in the future. Just before the BCRA blackout, the three-judge District Court denied a preliminary injunction, concluding that *McConnell*'s reasoning that § 203 was not facially overbroad left no room for such "as-

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*Together with No. 06–970, *McCain, United States Senator, et al.* v. *Wisconsin Right to Life, Inc.*, also on appeal from the same court.

applied" challenges. WRTL did not run its ads during the blackout period, and the court subsequently dismissed the complaint. This Court vacated that judgment, holding that *McConnell* "did not purport to resolve future as-applied challenges" to § 203. *Wisconsin Right to Life, Inc.* v. *Federal Election Comm'n*, 546 U. S. 410, 412 *(WRTL I)*. On remand, the District Court granted WRTL summary judgment, holding § 203 unconstitutional as applied to the three ads. The court first found that adjudication was not barred by mootness because the controversy was capable of repetition, yet evading review. On the merits, it concluded that the ads were genuine issue ads, *not* express advocacy or its "functional equivalent" under *McConnell*, and held that no compelling interest justified BCRA's regulation of such ads.

Held: The judgment is affirmed.

466 F. Supp. 2d 195, affirmed.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I and II, concluding that the Court has jurisdiction to decide these cases. The FEC argues that the cases are moot because the 2004 election has passed and WRTL neither asserts a continuing interest in running its ads nor identifies any reason to believe that a significant dispute over Senate filibusters of judicial nominees will occur in the foreseeable future. These cases, however, fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review. That exception applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again," *Spencer* v. *Kemna*, 523 U. S. 1, 17. Both circumstances are present here. First, it would be unreasonable to expect that WRTL could have obtained complete judicial review of its claims in time to air its ads during the BCRA blackout periods. Indeed, *two* BCRA blackout periods have passed during the pendency of this action. Second, there exists a reasonable expectation that the same "controversy" involving the same party will recur: WRTL has credibly claimed that it plans to run materially similar targeted ads during future blackout periods, and there is no reason to believe that the FEC will refrain from prosecuting future BCRA violations. Pp. 461–464.

THE CHIEF JUSTICE, joined by JUSTICE ALITO, concluded that BCRA § 203 is unconstitutional as applied to the ads at issue in these cases. Pp. 464–482.

1. The speech at issue is not the "functional equivalent" of express campaign speech. Pp. 464–476.

(a) Appellants are wrong in arguing that WRTL has the burden of demonstrating that § 203 is unconstitutional. Because § 203 burdens

political speech, it is subject to strict scrutiny, see, *e. g.*, *McConnell*, *supra*, at 205, under which the *Government* must prove that applying BCRA to WRTL's ads furthers a compelling governmental interest and is narrowly tailored to achieve that interest, see *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786. Given that *McConnell*, *supra*, at 206, already ruled that BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent, the FEC's burden is not onerous insofar as these ads fit this description. Pp. 464–465.

(b) Contrary to the FEC's contention, *McConnell*, 540 U. S., at 205–206, did not establish an intent-and-effect test for determining if a particular ad is the functional equivalent of express advocacy. Indeed, *McConnell* did not adopt any test for future as-applied challenges, but simply grounded its analysis in the evidentiary record, which included two key studies that separated ads based on whether they were intended to, or had the effect of, supporting candidates for federal office. *Id.*, at 308–309. More importantly, *Buckley* v. *Valeo*, 424 U. S. 1, 14, 43–44, rejected an intent-and-effect test for distinguishing between discussions of issues and candidates, and *McConnell* did not purport to overrule *Buckley* on this point—or even address what *Buckley* had to say on the subject. Pp. 465–469.

(c) Because WRTL's ads may reasonably be interpreted as something other than an appeal to vote for or against a specific candidate, they are not the functional equivalent of express advocacy, and therefore fall outside *McConnell*'s scope. To safeguard freedom of speech on public issues, the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the communication's substance rather than on amorphous considerations of intent and effect. See *Buckley*, *supra*, at 43–44. It must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. See *Virginia* v. *Hicks*, 539 U. S. 113, 119. And it must eschew "the open-ended rough-and-tumble of factors," which "invit[es] complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U. S. 527, 547. In short, it must give the benefit of any doubt to protecting rather than stifling speech. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269–270. In light of these considerations, a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. WRTL's three ads are plainly not the functional equivalent of express advocacy under this test. First, their content is consistent with that of a genuine issue ad: They focus and take a position on a legislative issue and exhort the public to adopt that position and to contact public officials with respect to the matter. Second, their content lacks indicia of ex-

press advocacy: They do not mention an election, candidacy, political party, or challenger; and they take no position on a candidate's character, qualifications, or fitness for office. Pp. 469–476.

2. Because WRTL's ads are not express advocacy or its functional equivalent, and because appellants identify no interest sufficiently compelling to justify burdening WRTL's speech, BCRA § 203 is unconstitutional as applied to the ads. The section can be constitutionally applied only if it is narrowly tailored to further a compelling interest. *E. g.*, *McConnell*, *supra*, at 205. None of the interests that might justify regulating WRTL's ads are sufficiently compelling. Although the Court has long recognized "the governmental interest in preventing corruption and the appearance of corruption" in election campaigns, *Buckley*, 424 U. S., at 45, it has invoked this interest as a reason for upholding *contribution* limits, *id.*, at 26–27, and suggested that it might also justify limits on electioneering *expenditures* posing the same dangers as large contributions, *id.*, at 45. *McConnell* arguably applied this interest to ads that were the "functional equivalent" of express advocacy. See 540 U. S., at 204–206. But to justify regulation of WRTL's ads, this interest must be stretched yet another step to ads that are *not* the functional equivalent of express advocacy. Issue ads like WRTL's are not equivalent to contributions, and the corruption interest cannot justify regulating them. A second possible compelling interest lies in addressing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 660. *McConnell* held that this interest justifies regulating the "functional equivalent" of campaign speech, 540 U. S., at 205–206. This interest cannot be extended further to apply to genuine issue ads like WRTL's, see, *e. g.*, *id.*, at 206, n. 88, because doing so would call into question this Court's holdings that the corporate identity of a speaker does not strip corporations of all free speech rights. *WRTL I* reinforced the validity of this point by holding § 203 susceptible to as-applied challenges. 546 U. S., at 412. Pp. 476–481.

3. These cases present no occasion to revisit *McConnell*'s holding that a corporation's express advocacy of a candidate or his opponent shortly before an election may be prohibited, along with the functional equivalent of such express advocacy. But when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban—the question here—the Court should give the benefit of the doubt to speech, not censorship. Pp. 481–482.

JUSTICE SCALIA, joined by JUSTICE KENNEDY and JUSTICE THOMAS, agreed that the Court has jurisdiction in these cases and concurred in

the Court's judgment because he would overrule that part of *McConnell* v. *Federal Election Comm'n,* 540 U. S. 93, upholding § 203(a) of BCRA. Pp. 485–504.

1. The pertinent case law begins with *Buckley* v. *Valeo,* 424 U. S. 1, in which the Court held, *inter alia,* that a federal limitation on campaign expenditures not made in coordination with a candidate's campaign (contained in the Federal Election Campaign Act of 1971 (FECA)) was unconstitutional, *id.,* at 39–51. In light of vagueness concerns, the Court narrowly construed the independent-expenditure provision to cover only express advocacy of the election or defeat of a clearly identified candidate for federal office by use of such magic words "as 'vote for,' 'elect,' . . . 'vote against,' 'defeat,' 'reject.'" *Id.,* at 44, and n. 52. This narrowing construction excluded so-called "issue advocacy" referring to a clearly identified candidate's position on an issue, but not expressly advocating his election or defeat. Even as narrowly construed, however, the Court struck the provision down. *Id.,* at 45–46. Despite *Buckley,* some argued that independent expenditures *by corporations* should be treated differently. A post-*Buckley* case, *First Nat. Bank of Boston* v. *Bellotti,* 435 U. S. 765, 776–777, struck down, on First Amendment grounds, a state statute prohibiting corporations from spending money in connection with a referendum. The Court strayed far from these principles, however, in *Austin* v. *Michigan Chamber of Commerce,* 494 U. S. 652, upholding state restrictions on corporations' independent expenditures in support of, or in opposition to, candidates for state office, *id.,* at 654–655. *Austin* was wrongly decided, but at least it was limited to express advocacy. *Nonexpress* advocacy was presumed to remain protected under *Buckley* and *Bellotti,* even when engaged in by corporations, until *McConnell.* *McConnell* held, *inter alia,* that the compelling governmental interest supporting restrictions on corporate expenditures for express advocacy—*i. e.,* *Austin*'s perceived "corrosive and distorting effects of immense aggregations of [corporate] wealth," 540 U. S., at 205—also justified extending those restrictions to ads run during the BCRA blackout period "to the extent . . . [they] are *the functional equivalent of express advocacy,*" *id.,* at 206 (emphasis added). *McConnell* upheld BCRA § 203(a) against a facial challenge. Subsequently, in *Wisconsin Right to Life, Inc.* v. *Federal Election Comm'n,* 546 U. S. 410, 412, the Court held that *McConnell* did not foreclose as-applied challenges to § 203. Pp. 485–491.

2. *McConnell*'s holding concerning § 203 was wrong. The answer to whether WRTL meets the standard for prevailing in an as-applied challenge requires the Court to articulate the standard. The most obvious standard is *McConnell*'s, which asks whether an ad is the "functional equivalent of express advocacy," 540 U. S., at 206. The fundamental

and inescapable problem with this test, with the principal opinion's susceptible-of-no-other-reasonable-interpretation standard, and with other similar tests is that each is impermissibly vague and thus ineffective to vindicate the fundamental First Amendment rights at issue. *Buckley* itself compelled the conclusion that such tests fall short when it narrowed the statutory language there at issue to cover only advertising that used the magic words of express advocacy. 424 U. S., at 43–44. The only plausible explanation for *Buckley*'s "highly strained" reading of FECA, *McConnell*, *supra*, at 280, is that the Court there eschewed narrowing constructions that would have been more faithful to FECA's text and more effective at capturing campaign speech *because those tests were all too vague.* If *Buckley* foreclosed such vagueness in a statutory test, it also must foreclose such vagueness in an as-applied test. Yet any clear rule that would protect all genuine issue ads would cover such a substantial number of ads prohibited by § 203 that § 203 would be rendered substantially overbroad. Thus, *McConnell* (which presupposed the availability of as-applied challenges) was mistaken. Pp. 491–500.

3. *Stare decisis* would not prevent the Court from overruling *McConnell*'s § 203 holding. This Court's "considered practice" is not to apply that principle "as rigidly in constitutional as in nonconstitutional cases," *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 543, and it has not hesitated to overrule a decision offensive to the First Amendment that was decided just a few years earlier, see *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642. Pp. 500–503.

ROBERTS, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Parts III and IV, in which ALITO, J., joined. ALITO, J., filed a concurring opinion, *post*, p. 482. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 483. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 504.

Solicitor General Clement argued the cause for appellant in No. 06–969. With him on the briefs were *Deputy Solicitor General Garre*, *Malcolm L. Stewart*, *Richard B. Bader*, *David Kolker*, *Harry J. Summers*, and *Kevin Deeley.* *Seth P. Waxman* argued the cause for appellants in No. 06–970. With him on the briefs were *Randolph D. Moss*, *Danielle Spinelli*, *Roger M. Witten*, *Donald J. Simon*, *Scott L. Nelson*, *Trevor Potter*, *J. Gerald Hebert*, *Paul S. Ryan*, *Charles*

G. Curtis, Jr., Fred Wertheimer, Alan B. Morrison, and *Bradley S. Phillips.*

James Bopp, Jr., argued the cause for appellee in both cases. With him on the brief were *Richard E. Coleson, Jeffrey P. Gallant, Raeanna S. Moore,* and *M. Miller Baker.*†

CHIEF JUSTICE ROBERTS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Parts III and IV, in which JUSTICE ALITO joins.

Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 91, 2 U. S. C. § 441b(b)(2) (2000 ed., Supp. IV), makes it a federal crime for any corporation to

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†Briefs of *amici curiae* urging reversal in both cases were filed for the Committee for Economic Development et al. by *H. Christopher Bartolomucci;* for the League of Women Voters of the United States et al. by *Daniel R. Ortiz;* for Richard Briffault et al. by *Richard L. Hasen, Martin S. Lederman, Mr. Briffault,* and *David S. Ettinger;* and for Norman Dorsen et al. by *Burt Neuborne* and *Deborah Goldberg.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the Alliance for Justice by *Michael B. Trister* and *B. Holly Schadler;* for the American Civil Liberties Union by *Steven R. Shapiro, Mark J. Lopez,* and *Joel M. Gora;* for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt* and *Laurence E. Gold;* for the Center for Competitive Politics et al. by *Erik S. Jaffe;* for the Chamber of Commerce of the United States of America by *Jan Witold Baran, Thomas W. Kirby, Caleb P. Burns, Steven J. Law, Robin S. Conrad, Amar D. Sarwal,* and *Judith K. Richmond;* for Citizens United et al. by *Herbert W. Titus, William J. Olson, John S. Miles,* and *Mark B. Weinberg;* for the Family Research Council et al. by *Kathleen M. Sullivan* and *Stephen W. Reed;* for the National Association of Realtors by *David C. Frederick, Brendan J. Crimmins, Laurene K. Janik,* and *Ralph W. Holmen;* for the Republican National Committee by *Thomas J. Josefiak;* and for United States Senator Mitch McConnell by *Theodore B. Olson, Douglas R. Cox,* and *Amir C. Tayrani.*

Briefs of *amici curiae* were filed in both cases for the American Center for Law and Justice et al. by *Jay Alan Sekulow, Stuart J. Roth, James M. Henderson, Sr.,* and *Stephen W. Reed;* for a Coalition of Public Charities by *Robert F. Bauer;* and for the National Rifle Association by *Charles J. Cooper, Brian S. Koukoutchos,* and *David H. Thompson.*

broadcast, shortly before an election, any communication that names a federal candidate for elected office and is targeted to the electorate. In *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93 (2003), this Court considered whether § 203 was facially overbroad under the First Amendment because it captured within its reach not only campaign speech, or "express advocacy," but also speech about public issues more generally, or "issue advocacy," that mentions a candidate for federal office. The Court concluded that there was no overbreadth concern to the extent the speech in question was the "functional equivalent" of express campaign speech. *Id.*, at 204–205, 206. On the other hand, the Court "assume[d]" that the interests it had found to "justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *Id.*, at 206, n. 88. The Court nonetheless determined that § 203 was not facially overbroad. Even assuming § 203 "inhibit[ed] some constitutionally protected corporate and union speech," the Court concluded that those challenging the law on its face had failed to carry their "heavy burden" of establishing that *all* enforcement of the law should therefore be prohibited. *Id.*, at 207.

Last Term, we reversed a lower court ruling, arising in the same litigation before us now, that our decision in *McConnell* left "no room" for as-applied challenges to § 203. App. to Juris. Statement 52a. We held on the contrary that "[i]n upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges." *Wisconsin Right to Life, Inc.* v. *Federal Election Comm'n*, 546 U. S. 410, 412 (2006) (*per curiam*) (*WRTL I*).

We now confront such an as-applied challenge. Resolving it requires us first to determine whether the speech at issue is the "functional equivalent" of speech expressly advocating the election or defeat of a candidate for federal office, or instead a "genuine issue a[d]." *McConnell*, *supra*, at 206, and n. 88. We have long recognized that the distinction between campaign advocacy and issue advocacy "may often dissolve in practical application. Candidates, especially incumbents,

are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley* v. *Valeo*, 424 U. S. 1, 42 (1976) (*per curiam*). Our development of the law in this area requires us, however, to draw such a line, because we have recognized that the interests held to justify the regulation of campaign speech and its "functional equivalent" "might not apply" to the regulation of issue advocacy. *McConnell*, *supra*, at 206, and n. 88.

In drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it. We conclude that the speech at issue in this as-applied challenge is not the "functional equivalent" of express campaign speech. We further conclude that the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy, and accordingly we hold that BCRA § 203 is unconstitutional as applied to the advertisements at issue in these cases.

I

Prior to BCRA, corporations were free under federal law to use independent expenditures to engage in political speech so long as that speech did not expressly advocate the election or defeat of a clearly identified federal candidate. See *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 249 (1986) (*MCFL*); *Buckley*, *supra*, at 44–45; 2 U. S. C. §§ 441b(a), (b)(2) (2000 ed. and Supp. IV).

BCRA significantly cut back on corporations' ability to engage in political speech. BCRA § 203, at issue in these cases, makes it a crime for any labor union or incorporated entity—whether the United Steelworkers, the American Civil Liberties Union, or General Motors—to use its general treasury funds to pay for any "electioneering communication." § 441b(b)(2) (2000 ed., Supp. IV). BCRA's definition of "electioneering communication" is clear and expansive. It encompasses any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is

aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running for office. § 434(f)(3)(A).[1]

Appellee Wisconsin Right to Life, Inc. (WRTL), is a nonprofit, nonstock, ideological advocacy corporation recognized by the Internal Revenue Service as tax exempt under § 501(c)(4) of the Internal Revenue Code. On July 26, 2004, as part of what it calls a "grassroots lobbying campaign," Brief for Appellee 8, WRTL began broadcasting a radio advertisement entitled "Wedding." The transcript of "Wedding" reads as follows:

> "'PASTOR: And who gives this woman to be married to this man?
>
> "'BRIDE'S FATHER: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up . . .
>
> "'VOICE-OVER: Sometimes it's just not fair to delay an important decision.
>
> "'But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal

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[1] Subparagraph (A) provides:

"(i) The term 'electioneering communication' means any broadcast, cable, or satellite communication which—

"(I) refers to a clearly identified candidate for Federal office;

"(II) is made within—

"(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

"(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

"(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate." 2 U. S. C. § 434(f)(3)(A) (2000 ed., Supp. IV).

Subparagraph (B) defines exceptions to "electioneering communication" not relevant to this litigation. Subparagraph (C) defines the term "targeted to the relevant electorate."

judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve.

"'It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

"'Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

"'Visit: BeFair.org

"'Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.'" 466 F. Supp. 2d 195, 198, n. 3 (DC 2006).

On the same day, WRTL aired a similar radio ad entitled "Loan."[2] It had also invested treasury funds in producing a television ad entitled "Waiting,"[3] which is similar in substance and format to "Wedding" and "Loan."

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[2] The radio script for "Loan" differs from "Wedding" only in its lead-in. "Loan" begins:

"'LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and well . . .

"'COUPLE: Yes, yes . . . we're listening.

"'OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River Waupaca . . .

"'VOICE-OVER: Sometimes it's just not fair to delay an important decision.

"'But in Washington it's happening. . . .'" 466 F. Supp. 2d, at 198, n. 4. The remainder of the script is identical to "Wedding."

[3] In "Waiting," the images on the television ad depict a "'middle-aged man being as productive as possible while his professional life is in limbo.'" *Id.*, at 198, n. 5. The man reads the morning paper, polishes his shoes, scans through his Rolodex, and does other similar activities. The television script for this ad reads:

"'VOICE-OVER: There are a lot of judicial nominees out there who can't go to work. Their careers are put on hold because a group of Senators is filibustering—blocking qualified nominees from a simple "yes" or "no" vote.

"'It's politics at work and it's causing gridlock. . . .'" *Ibid.*

The remainder of the script is virtually identical to "Wedding."

WRTL planned on running "Wedding," "Waiting," and "Loan" throughout August 2004 and financing the ads with funds from its general treasury. It recognized, however, that as of August 15, 30 days prior to the Wisconsin primary, the ads would be illegal "electioneering communication[s]" under BCRA § 203.

Believing that it nonetheless possessed a First Amendment right to broadcast these ads, WRTL filed suit against the Federal Election Commission (FEC) on July 28, 2004, seeking declaratory and injunctive relief before a three-judge District Court. See note following 2 U. S. C. § 437h (2000 ed., Supp. IV); 28 U. S. C. § 2284. WRTL alleged that BCRA's prohibition on the use of corporate treasury funds for "electioneering communication[s]" as defined in the Act is unconstitutional as applied to "Wedding," "Loan," and "Waiting," as well as any materially similar ads it might seek to run in the future.

Just before the BCRA blackout period was to begin, the District Court denied a preliminary injunction, concluding that "the reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge WRTL propounds before us." App. to Juris. Statement 52a. In response to this ruling, WRTL did not run its ads during the blackout period. The District Court subsequently dismissed WRTL's complaint. See *id.*, at 47a–48a ("WRTL's 'as-applied' challenge to BCRA [§ 203] is foreclosed by the Supreme Court's decision in *McConnell*"). On appeal, we vacated the District Court's judgment, holding that *McConnell* "did not purport to resolve future as-applied challenges" to BCRA § 203, and remanded "for the District Court to consider the merits of WRTL's as-applied challenge in the first instance." *WRTL I*, 546 U. S., at 412.

On remand, after allowing four Members of Congress to intervene as defendants, the three-judge District Court granted summary judgment for WRTL, holding BCRA § 203 unconstitutional as applied to the three advertisements

WRTL planned to run during the 2004 blackout period. The District Court first found adjudication of the dispute not barred by mootness because the controversy was "'capable of repetition, yet evading review.'" 466 F. Supp. 2d, at 202. Turning to the merits, the court began by noting that under *McConnell,* BCRA could constitutionally proscribe "express advocacy"—defined as ads that expressly advocate the election or defeat of a candidate for federal office—and the "functional equivalent" of such advocacy. 466 F. Supp. 2d, at 204. Stating that it was limiting its inquiry to "language within the four corners" of the ads, *id.*, at 207, the District Court concluded that the ads were *not* express advocacy or its functional equivalent, but instead "genuine issue ads," *id.*, at 205–208. Then, reaching a question "left open in *McConnell,*" the court held that no compelling interest justified BCRA's regulation of genuine issue ads such as those WRTL sought to run. *Id.*, at 208–210.

One judge dissented, contending that the majority's "plain facial analysis of the text in WRTL's 2004 advertisements" ignored "the context in which the text was developed." *Id.*, at 210 (opinion of Roberts, J.). In that judge's view, a contextual analysis of the ads revealed "deep factual rifts between the parties concerning the purpose and intended effects of the ads" such that neither side was entitled to summary judgment. *Id.*, at 210, 211.

The FEC and intervenors filed separate notices of appeal and jurisdictional statements. We consolidated the two appeals and set the matter for briefing and argument, postponing further consideration of jurisdiction to the hearing on the merits. 549 U. S. 1177 (2007).

II

Article III's "case-or-controversy requirement subsists through all stages of federal judicial proceedings . . . . [I]t is not enough that a dispute was very much alive when suit was filed." *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472,

477 (1990). Based on these principles, the FEC argues (though the intervenors do not) that these cases are moot because the 2004 election has passed and WRTL "does not assert any continuing interest in running [its three] advertisements, nor does it identify any reason to believe that a significant dispute over Senate filibusters of judicial nominees will occur in the foreseeable future." Brief for Appellant FEC 21.

As the District Court concluded, however, these cases fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review. See *Los Angeles* v. *Lyons*, 461 U. S. 95, 109 (1983); *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). The exception applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Spencer* v. *Kemna*, 523 U. S. 1, 17 (1998) (internal quotation marks and brackets omitted). Both circumstances are present here.

As the District Court found, it would be "entirely unreasonable . . . to expect that [WRTL] could have obtained complete judicial review of its claims in time for it to air its ads" during the BCRA blackout periods. 466 F. Supp. 2d, at 202. The FEC contends that the 2-year window between elections provides ample time for parties to litigate their rights before each BCRA blackout period. But groups like WRTL cannot predict what issues will be matters of public concern during a future blackout period. In these cases, WRTL had no way of knowing well in advance that it would want to run ads on judicial filibusters during the BCRA blackout period. In any event, despite BCRA's command that the cases be expedited "to the greatest possible extent," § 403(a)(4), 116 Stat. 113, note following 2 U. S. C. § 437h (2000 ed., Supp. IV), *two* BCRA blackout periods have come and gone during the pendency of this action. "[A] decision allowing the desired

expenditures would be an empty gesture unless it afforded appellants sufficient opportunity prior to the election date to communicate their views effectively." *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 774 (1978).

The second prong of the "capable of repetition" exception requires a "'reasonable expectation'" or a "'demonstrated probability'" that "the same controversy will recur involving the same complaining party." *Murphy* v. *Hunt*, 455 U. S. 478, 482 (1982) (*per curiam*). Our cases find the same controversy sufficiently likely to recur when a party has a reasonable expectation that it "will again be subjected to the alleged illegality," *Lyons*, *supra*, at 109, or "will be subject to the threat of prosecution" under the challenged law, *Bellotti*, *supra*, at 774–775 (citing *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975) (*per curiam*)). The FEC argues that in order to prove likely recurrence of the same controversy, WRTL must establish that it will run ads in the future sharing all "the characteristics that the district court deemed legally relevant." Brief for Appellant FEC 23.

The FEC asks for too much. We have recognized that the "'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks." *Storer* v. *Brown*, 415 U. S. 724, 737, n. 8 (1974). Requiring repetition of every "legally relevant" characteristic of an as-applied challenge—down to the last detail—would effectively overrule this statement by making this exception unavailable for virtually all as-applied challenges. History repeats itself, but not at the level of specificity demanded by the FEC. Here, WRTL credibly claimed that it planned on running "'materially similar'" future targeted broadcast ads mentioning a candidate within the blackout period, 466 F. Supp. 2d, at 197, and there is no reason to believe that the FEC will "refrain from prosecuting violations" of BCRA, *Bellotti*, *supra*, at 775. Under the circumstances, particularly where WRTL sought another prelimi-

nary injunction based on an ad it planned to run during the 2006 blackout period, see 466 F. Supp. 2d, at 203, n. 15, we hold that there exists a reasonable expectation that the same controversy involving the same party will recur. We have jurisdiction to decide these cases.

III

WRTL rightly concedes that its ads are prohibited by BCRA § 203. Each ad clearly identifies Senator Feingold, who was running (unopposed) in the Wisconsin Democratic primary on September 14, 2004, and each ad would have been "targeted to the relevant electorate," see 2 U. S. C. § 434(f)(3)(C) (2000 ed., Supp. IV), during the BCRA blackout period. WRTL further concedes that its ads do not fit under any of BCRA's exceptions to the term "electioneering communication." See § 434(f)(3)(B). The only question, then, is whether it is consistent with the First Amendment for BCRA § 203 to prohibit WRTL from running these three ads.

A

Appellants contend that WRTL should be required to demonstrate that BCRA is unconstitutional as applied to the ads. Reply Brief for Appellant Sen. John McCain et al. in No. 06–970, p. 5, n. 4; Brief for Appellant FEC 34. After all, appellants reason, *McConnell* already held that BCRA § 203 was facially valid. These cases, however, present the separate question whether § 203 may constitutionally be applied to these specific ads. Because BCRA § 203 burdens political speech, it is subject to strict scrutiny. See *McConnell*, 540 U. S., at 205; *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 658 (1990); *MCFL*, 479 U. S., at 252 (plurality opinion); *Bellotti*, *supra*, at 786; *Buckley*, 424 U. S., at 44–45. Under strict scrutiny, the *Government* must prove that applying BCRA to WRTL's ads furthers a compelling interest and is narrowly tailored to achieve that interest. See *Bellotti*, *supra*, at 786 ("Especially where, as

here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, . . . 'the burden is on the government to show the existence of [a compelling] interest'" (footnote omitted)).

The strict scrutiny analysis is, of course, informed by our precedents. This Court has already ruled that BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent. *McConnell*, *supra*, at 206. So to the extent the ads in these cases fit this description, the FEC's burden is not onerous; all it need do is point to *McConnell* and explain why it applies here. If, on the other hand, WRTL's ads are *not* express advocacy or its equivalent, the Government's task is more formidable. It must then demonstrate that banning such ads during the blackout periods is narrowly tailored to serve a compelling interest. No precedent of this Court has yet reached that conclusion.

B

The FEC, intervenors, and the dissent below contend that *McConnell* already established the constitutional test for determining if an ad is the functional equivalent of express advocacy: whether the ad is intended to influence elections and has that effect. See, *e. g.*, 466 F. Supp. 2d, at 214 (opinion of Roberts, J.). Here is the relevant portion of our opinion in *McConnell*:

> "[P]laintiffs argue that the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications.
>
> "This argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to

influence the voters' decisions and have that effect." 540 U. S., at 205–206.

WRTL and the District Court majority, on the other hand, claim that *McConnell* did not adopt any test as the standard for future as-applied challenges. We agree. *McConnell*'s analysis was grounded in the evidentiary record before the Court. Two key studies in the *McConnell* record constituted "the central piece of evidence marshaled by defenders of BCRA's electioneering communication provisions in support of their constitutional validity." *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 307, 308 (DC 2003) (opinion of Henderson, J.) (internal quotation marks and brackets omitted). Those studies asked "student coders" to separate ads based on whether the students thought the "purpose" of the ad was "to provide information about or urge action on a bill or issue," or "to generate support or opposition for a particular candidate." *Id.*, at 308–309 (internal quotation marks omitted; emphasis deleted); see Brief for Appellee 38. The studies concluded "'that BCRA's definition of Electioneering Communications accurately captures those ads that *have the purpose or effect of supporting candidates for election to office*." *Ibid.* (emphasis in original).

When the *McConnell* Court considered the possible facial overbreadth of § 203, it looked to the studies in the record analyzing ads broadcast during the blackout periods, and those studies had classified the ads in terms of intent and effect. The Court's assessment was accordingly phrased in the same terms, which the Court regarded as sufficient to conclude, on the record before it, that the plaintiffs had not "carried their heavy burden of proving" that § 203 was facially overbroad and could not be enforced in *any* circumstances. 540 U. S., at 207. The Court did not explain that it was adopting a particular test for determining what constituted the "functional equivalent" of express advocacy. The fact that the student coders who helped develop the evidentiary record before the Court in *McConnell* looked to intent and effect in doing so, and that the Court dealt with the

record on that basis in deciding the facial overbreadth claim, neither compels nor warrants accepting that same standard as the constitutional test for separating, in an as-applied challenge, political speech protected under the First Amendment from that which may be banned.[4]

More importantly, this Court in *Buckley* had already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates. See 424 U. S., at 43–44. After noting the difficulty of distinguishing between discussion of issues on the one hand and advocacy of election or defeat of candidates on the other, the *Buckley* Court explained that analyzing the question in terms "'of intent and of effect'" would afford "'no security for free discussion.'" *Id.*, at 43 (quoting *Thomas* v. *Collins*, 323 U. S. 516, 535 (1945)). It therefore rejected such an approach, and *McConnell* did not purport to overrule *Buckley* on this point—or even address what *Buckley* had to say on the subject.

For the reasons regarded as sufficient in *Buckley*, we decline to adopt a test for as-applied challenges turning on the speaker's intent to affect an election. The test to distinguish constitutionally protected political speech from speech that BCRA may proscribe should provide a safe harbor for those who wish to exercise First Amendment rights. The test should also "reflec[t] our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Buckley*, *supra*, at 14

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[4] This is particularly true given that the methodology, data, and conclusions of the two studies were the subject of serious dispute among the District Court judges. Compare *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 307–312 (DC 2003) (opinion of Henderson, J.) (stating that the studies were flawed and of limited evidentiary value), with *id.*, at 585, 583–588 (opinion of Kollar-Kotelly, J.) (finding the studies generally credible, but stating that "I am troubled by the fact that coders in both studies were asked questions regarding their own perceptions of the advertisements' purposes, and that [some of] these perceptions were later recoded" by study supervisors). Nothing in this Court's opinion in *McConnell* suggests it was resolving the sharp disagreements about the evidentiary record in this respect.

(quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964)). A test turning on the intent of the speaker does not remotely fit the bill.

Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. No reasonable speaker would choose to run an ad covered by BCRA if its only defense to a criminal prosecution would be that its motives were pure. An intent-based standard "blankets with uncertainty whatever may be said," and "offers no security for free discussion." *Buckley*, *supra*, at 43 (internal quotation marks omitted). The FEC does not disagree. In its brief filed in the first appeal in this litigation, it argued that a "constitutional standard that turned on the subjective sincerity of a speaker's message would likely be incapable of workable application; at a minimum, it would invite costly, fact-dependent litigation." Brief for Appellee in *WRTL I*, O. T. 2005, No. 04–1581, p. 39.[5]

A test focused on the speaker's intent could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another. See M. Redish, Money Talks: Speech, Economic Power, and the Values of Democracy 91 (2001) ("[U]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection"). "First Amendment freedoms

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[5] Consider what happened in these cases. The District Court permitted extensive discovery on the assumption that WRTL's intent was relevant. As a result, the defendants deposed WRTL's executive director, its legislative director, its political action committee director, its lead communications consultant, and one of its fundraisers. WRTL also had to turn over many documents related to its operations, plans, and finances. Such litigation constitutes a severe burden on political speech.

need breathing space to survive." *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). An intent test provides none.

Buckley also explains the flaws of a test based on the actual effect speech will have on an election or on a particular segment of the target audience. Such a test "'puts the speaker . . . wholly at the mercy of the varied understanding of his hearers.'" 424 U. S., at 43. It would also typically lead to a burdensome, expert-driven inquiry, with an indeterminate result. Litigation on such a standard may or may not accurately predict electoral effects, but it will unquestionably chill a substantial amount of political speech.

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"The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Bellotti*, 435 U. S., at 776 (internal quotation marks omitted). See *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 534 (1980). To safeguard this liberty, the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect. See *Buckley*, *supra*, at 43–44. It must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. See *Virginia* v. *Hicks*, 539 U. S. 113, 119 (2003). And it must eschew "the open-ended rough-and-tumble of factors," which "invit[es] complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U. S. 527, 547 (1995). In short, it must give the benefit of any doubt to protecting rather than stifling speech. See *New York Times Co.* v. *Sullivan*, *supra*, at 269–270.

In light of these considerations, a court should find that an ad is the functional equivalent of express advocacy only if

the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Despite these characteristics, appellants assert that the content of WRTL's ads alone betrays their electioneering nature. Indeed, the FEC suggests that *any* ad covered by § 203 that includes "an appeal to citizens to contact their elected representative" is the "functional equivalent" of an ad saying defeat or elect that candidate. Brief for Appellant FEC 31; see Brief for Appellant Sen. John McCain et al. in No. 06–970, pp. 21–23 (hereinafter McCain Brief). We do not agree. To take just one example, during a blackout period the House considered the proposed Universal National Service Act. See App. to Brief for American Center for Law and Justice et al. as *Amici Curiae* B–3. There would be no reason to regard an ad supporting or opposing that Act, and urging citizens to contact their Representative about it, as the equivalent of an ad saying vote for or against the Representative. Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions.[6]

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[6] For these reasons, we cannot agree with JUSTICE SOUTER's assertion that "anyone who heard the Feingold ads . . . would know that WRTL's message was to vote against Feingold." *Post*, at 525. The dissent supports this assertion by likening WRTL's ads to the "Jane Doe" example

The FEC and intervenors try to turn this difference to their advantage, citing *McConnell*'s statements "that the most effective campaign ads, like the most effective commercials for products . . . , avoid the [*Buckley*] magic words [expressly advocating the election or defeat of a candidate]," 540 U. S., at 127, and that advertisers "would seldom choose to use such words even if permitted," *id.*, at 193. See McCain Brief 19. An expert for the FEC in these cases relied on those observations to argue that WRTL's ads are especially effective electioneering ads because they are "subtl[e]," focusing on issues rather than simply exhorting the electorate to vote against Senator Feingold. App. 56–57. Rephrased a bit, the argument perversely maintains that the *less* an issue ad resembles express advocacy, the more likely it is to be the functional equivalent of express advocacy. This "heads I win, tails you lose" approach cannot be correct. It would effectively eliminate First Amendment protection for genuine issue ads, contrary to our conclusion in *WRTL I* that as-applied challenges to § 203 are available, and our assumption in *McConnell* that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," 540 U. S., at 206, n. 88. Under appel-

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identified in *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93 (2003). But that ad "condemned Jane Doe's record on a particular issue." *Post*, at 525 (internal quotation marks omitted). WRTL's ads do not do so; they instead take a position on the filibuster issue and exhort constituents to contact Senators Feingold and Kohl to advance that position. Indeed, one would not even know from the ads whether Senator Feingold supported or opposed filibusters. JUSTICE SOUTER is confident Wisconsinites independently knew Senator Feingold's position on filibusters, but we think that confidence misplaced. A prominent study found, for example, that during the 2000 election cycle, 85 percent of respondents to a survey were not even able to name at least one candidate for the House of Representatives in their own district. See Inter-university Consortium for Political and Social Research, American National Election Study, 2000: Pre- and Post-Election Survey 243 (N. Burns et al. eds. 2002), online at http://www.icpsr.umich.edu/cocoon/ICPSR/STUDY/03131.xml (as visited June 22, 2007, and available in Clerk of Court's case file).

lants' view, there can be no such thing as a genuine issue ad during the blackout period—it is simply a very effective electioneering ad.

Looking beyond the content of WRTL's ads, the FEC and intervenors argue that several "contextual" factors prove that the ads are the equivalent of express advocacy. First, appellants cite evidence that during the same election cycle, WRTL and its Political Action Committee (PAC) actively opposed Senator Feingold's reelection and identified filibusters as a campaign issue. This evidence goes to WRTL's subjective intent in running the ads, and we have already explained that WRTL's intent is irrelevant in an as-applied challenge. Evidence of this sort is therefore beside the point, as it should be—WRTL does not forfeit its right to speak on issues simply because in other aspects of its work it also opposes candidates who are involved with those issues.

Next, the FEC and intervenors seize on the timing of WRTL's ads. They observe that the ads were to be aired near elections but not near actual Senate votes on judicial nominees, and that WRTL did not run the ads after the elections. To the extent this evidence goes to WRTL's subjective intent, it is again irrelevant. To the extent it nonetheless suggests that the ads should be interpreted as express advocacy, it falls short. That the ads were run close to an election is unremarkable in a challenge like this. *Every* ad covered by BCRA §203 will by definition air just before a primary or general election. If this were enough to prove that an ad is the functional equivalent of express advocacy, then BCRA would be constitutional in all of its applications. This Court unanimously rejected this contention in *WRTL I*.

That the ads were run shortly after the Senate had recessed is likewise unpersuasive. Members of Congress often return to their districts during recess, precisely to determine the views of their constituents; an ad run at that time may succeed in getting more constituents to contact the Representative while he or she is back home. In any event,

a group can certainly choose to run an issue ad to coincide with public interest rather than a floor vote. Finally, WRTL did not resume running its ads after the BCRA blackout period because, as it explains, the debate had changed. Brief for Appellee 16. The focus of the Senate was on whether a majority would vote to change the Senate rules to eliminate the filibuster—not whether individual Senators would continue filibustering. Given this change, WRTL's decision not to continue running its ads after the blackout period does not support an inference that the ads were the functional equivalent of electioneering.

The last piece of contextual evidence the FEC and intervenors highlight is the ads' "specific and repeated cross-reference" to a Web site. Reply Brief for Appellant FEC 15. In the middle of the Web site's homepage, in large type, were the addresses, phone numbers, fax numbers, and e-mail addresses of Senators Feingold and Kohl. Wisconsinites who viewed "Wedding," "Loan," or "Waiting" and wished to contact their Senators—as the ads requested—would be able to obtain the pertinent contact information immediately upon visiting the Web site. This is fully consistent with viewing WRTL's ads as genuine issue ads. The Web site also stated both Wisconsin Senators' positions on judicial filibusters, and allowed visitors to sign up for "e-alerts," some of which contained exhortations to vote against Senator Feingold. These details lend the electioneering interpretation of the ads more credence, but again, WRTL's participation in express advocacy in other aspects of its work is not a justification for censoring its issue-related speech. Any express advocacy on the Web site, already one step removed from the text of the ads themselves, certainly does not render an interpretation of the ads as genuine issue ads unreasonable.

Given the standard we have adopted for determining whether an ad is the "functional equivalent" of express advocacy, contextual factors of the sort invoked by appellants

should seldom play a significant role in the inquiry. Courts need not ignore basic background information that may be necessary to put an ad in context—such as whether an ad "describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future," 466 F. Supp. 2d, at 207—but the need to consider such background should not become an excuse for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns.

At best, appellants have shown what we have acknowledged at least since *Buckley*: that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." 424 U. S., at 42. Under the test set forth above, that is not enough to establish that the ads can only reasonably be viewed as advocating or opposing a candidate in a federal election. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940). Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor.[7]

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[7] JUSTICE SCALIA thinks our test impermissibly vague. See *post*, at 492–494 (opinion concurring in part and concurring in judgment). As should be evident, we agree with JUSTICE SCALIA on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate. It is why we emphasize that (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of "contextual" factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech. And keep in mind this test is only triggered if the speech meets the bright-line requirements of BCRA § 203 in the first place. JUSTICE

We confronted a similar issue in *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234 (2002), in which the Government argued that virtual images of child pornography were difficult to distinguish from real images. The Government's solution was "to prohibit both kinds of images." *Id.*, at 254–255. We rejected the argument that "protected speech may be banned as a means to ban unprotected speech," concluding that it "turns the First Amendment upside down." *Id.*, at 255. As we explained: "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ibid.*

SCALIA's criticism of our test is all the more confusing because he accepts WRTL's proposed three-prong test as "clear." *Post*, at 498. We do not think our test any vaguer than WRTL's, and it is more protective of political speech.

JUSTICE SCALIA also asserts that our test conflicts with *Buckley* v. *Valeo*, 424 U. S. 1 (1976) (*per curiam*). *Post*, at 495–497. The *Buckley* Court confronted a statute restricting "any expenditure . . . relative to a clearly identified candidate." 424 U. S., at 42 (internal quotation marks omitted). To avoid vagueness concerns, this Court first narrowed the statute to cover only expenditures expressly "advocating the election or defeat of a candidate"—using the so-called "magic words" of express advocacy. *Ibid.* (internal quotation marks omitted). The Court then proceeded to strike down the newly narrowed statute under strict scrutiny on the ground that its reach was not broad enough. *Id.*, at 44. From this, JUSTICE SCALIA concludes that "[i]f a permissible test short of the magic-words test existed, *Buckley* would surely have adopted it." *Post*, at 495. We are not so sure. The question in *Buckley* was how a particular statutory provision could be construed to avoid vagueness concerns, not what the constitutional standard for clarity was in the abstract, divorced from specific statutory language. *Buckley*'s intermediate step of statutory construction on the way to its constitutional holding does not dictate a constitutional test. The *Buckley* Court's "express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law." *McConnell*, 540 U. S., at 190. And despite JUSTICE SCALIA's claim to the contrary, our citation of *Buckley* along with other decisions in rejecting an intent-and-effect test does not force us to adopt (or reject) *Buckley*'s statutory construction as a constitutional test.

Because WRTL's ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, we hold they are not the functional equivalent of express advocacy, and therefore fall outside the scope of *McConnell*'s holding.[8]

IV

BCRA § 203 can be constitutionally applied to WRTL's ads only if it is narrowly tailored to further a compelling interest. *McConnell*, 540 U. S., at 205; *Bellotti*, 435 U. S., at 786; *Buckley*, *supra*, at 44–45. This Court has never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent. The District Court below considered interests that might justify regulating WRTL's ads here, and found none sufficiently

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[8] Nothing in *McConnell*'s statement that the "vast majority" of issue ads broadcast in the periods preceding federal elections had an "electioneering purpose" forecloses this conclusion. 540 U. S., at 206. Courts do not resolve unspecified as-applied challenges in the course of resolving a facial attack, so *McConnell* could not have settled the issue we address today. See *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 803, n. 22 (1984) ("The fact that [a law] is capable of valid applications does not necessarily mean that it is valid as applied to these litigants"). Indeed, *WRTL I*, 546 U. S. 410, 412, confirmed as much. By the same token, in deciding this as-applied challenge, we have no occasion to revisit *McConnell*'s conclusion that the statute is not facially overbroad.

The "vast majority" language, moreover, is beside the point. The *McConnell* Court did not find that a "vast majority" of the issue ads considered were the functional equivalent of direct advocacy. Rather, it found that such ads had an "electioneering purpose." For the reasons we have explained, "purpose" is not the appropriate test for distinguishing between genuine issue ads and the functional equivalent of express campaign advocacy. See *supra*, at 468–469. In addition, the "vast majority" statement was not necessary to the Court's facial holding in *McConnell*. The standard required for a statute to survive an overbreadth challenge is not that the "vast majority" of a statute's applications be legitimate. "[B]road language . . . unnecessary to the Court's decision . . . cannot be considered binding authority." *Kastigar* v. *United States*, 406 U. S. 441, 454–455 (1972).

compelling. 466 F. Supp. 2d, at 208–210. We reach the same conclusion.[9]

At the outset, we reject the contention that issue advocacy may be regulated because express election advocacy may be, and "the speech involved in so-called issue advocacy is [not] any more core political speech than are words of express advocacy." *McConnell*, *supra*, at 205. This greater-includes-the-lesser approach is not how strict scrutiny works. A corporate ad expressing support for the local football team could not be regulated on the ground that such

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[9] The dissent stresses a number of points that, while not central to our decision, nevertheless merit a response. First, the dissent overstates its case when it asserts that the "PAC alternative" gives corporations a constitutionally sufficient outlet to speak. See *post*, at 532. PACs impose well-documented and onerous burdens, particularly on small nonprofits. See *MCFL*, 479 U. S. 238, 253–255 (1986) (plurality opinion). *McConnell* did conclude that segregated funds "provid[e] corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy" and its functional equivalent, 540 U. S., at 203, but that holding did not extend beyond functional equivalents—and if it did, the PAC option would justify regulation of all corporate speech, a proposition we have rejected, see *Bellotti*, 435 U. S., at 777–778. Second, the response that a speaker should just take out a newspaper ad, or use a Web site, rather than complain that it cannot speak through a broadcast communication, see *post*, at 521, 534, is too glib. Even assuming for the sake of argument that the possibility of using a different medium of communication has relevance in determining the permissibility of a limitation on speech, newspaper ads and Web sites are not reasonable alternatives to broadcast speech in terms of impact and effectiveness. See *McConnell* v. *FEC*, 251 F. Supp. 2d, at 569–573, 646 (Kollar-Kotelly, J.). Third, we disagree with the dissent's view that corporations can still speak by changing what they say to avoid mentioning candidates, *post*, at 532–533. That argument is akin to telling Cohen that he cannot wear his jacket because he is free to wear one that says "I disagree with the draft," cf. *Cohen* v. *California*, 403 U. S. 15 (1971), or telling 44 Liquormart that it can advertise so long as it avoids mentioning prices, cf. *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484 (1996). Such notions run afoul of "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 573 (1995).

speech is less "core" than corporate speech about an election, which we have held may be restricted. A court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech. That a compelling interest justifies restrictions on express advocacy tells us little about whether a compelling interest justifies restrictions on issue advocacy; the *McConnell* Court itself made just that point. See 540 U. S., at 206, n. 88. Such a greater-includes-the-lesser argument would dictate that virtually *all* corporate speech can be suppressed, since few kinds of speech can lay claim to being as central to the First Amendment as campaign speech. That conclusion is clearly foreclosed by our precedent. See, *e. g.*, *Bellotti*, *supra*, at 776–777.

This Court has long recognized "the governmental interest in preventing corruption and the appearance of corruption" in election campaigns. *Buckley*, 424 U. S., at 45. This interest has been invoked as a reason for upholding *contribution* limits. As *Buckley* explained, "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.*, at 26–27. We have suggested that this interest might also justify limits on electioneering *expenditures* because it may be that, in some circumstances, "large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions." *Id.*, at 45.

McConnell arguably applied this interest—which this Court had only assumed could justify regulation of express advocacy—to ads that were the "functional equivalent" of express advocacy. See 540 U. S., at 204–206. But to justify regulation of WRTL's ads, this interest must be stretched yet another step to ads that are *not* the functional equivalent of express advocacy. Enough is enough. Issue ads like WRTL's are by no means equivalent to contributions, and

the *quid-pro-quo* corruption interest cannot justify regulating them. To equate WRTL's ads with contributions is to ignore their value as political speech.

Appellants argue that an expansive definition of "functional equivalent" is needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions. Cf. *McConnell*, *supra*, at 205 ("[R]ecent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against circumvention of [valid] contribution limits" (internal quotation marks omitted; brackets in original)). But such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny. "[T]he desire for a bright-line rule . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *MCFL*, 479 U. S., at 263. See *Free Speech Coalition*, 535 U. S., at 255 ("The Government may not suppress lawful speech as the means to suppress unlawful speech"); *Buckley*, *supra*, at 44 (expenditure limitations "cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations").

A second possible compelling interest recognized by this Court lies in addressing a "different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U. S., at 660. *Austin* invoked this interest to uphold a state statute making it a felony for corporations to use treasury funds for independent expenditures on express election advocacy. *Id.*, at 654–655. *McConnell* also relied on this interest in upholding regulation not just of express advocacy, but also its "functional equivalent." 540 U. S., at 205–206.

These cases did not suggest, however, that the interest in combating "a different type of corruption" extended beyond campaign speech. Quite the contrary. Two of the Justices who joined the 6-to-3 majority in *Austin* relied, in upholding the constitutionality of the ban on campaign speech, on the fact that corporations retained freedom to speak on issues as distinct from election campaigns. See 494 U. S., at 675–678 (Brennan, J., concurring) (describing fact that campaign speech ban "does not regulate corporate expenditures in referenda or other corporate expression" as "reflect[ing] the requirements of our decisions"); *id.*, at 678 (STEVENS, J., concurring) ("[T]here is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other"). The *McConnell* Court similarly was willing to "assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." 540 U. S., at 206, n. 88. And our decision in *WRTL I* reinforced the validity of that assumption by holding that BCRA § 203 is susceptible to as-applied challenges. 546 U. S., at 412.

Accepting the notion that a ban on campaign speech could also embrace issue advocacy would call into question our holding in *Bellotti* that the corporate identity of a speaker does not strip corporations of all free speech rights. 435 U. S., at 778. It would be a constitutional "bait and switch" to conclude that corporate campaign speech may be banned in part *because* corporate issue advocacy is not, and then assert that corporate issue advocacy may be banned as well, pursuant to the same asserted compelling interest, through a broad conception of what constitutes the functional equivalent of campaign speech, or by relying on the inability to distinguish campaign speech from issue advocacy.

The FEC and intervenors do not argue that the *Austin* interest justifies regulating genuine issue ads. Instead, they focus on establishing that WRTL's ads are the functional equivalent of express advocacy—a contention we have

already rejected. We hold that the interest recognized in *Austin* as justifying regulation of corporate campaign speech and extended in *McConnell* to the functional equivalent of such speech has no application to issue advocacy of the sort engaged in by WRTL.[10]

Because WRTL's ads are not express advocacy or its functional equivalent, and because appellants identify no interest sufficiently compelling to justify burdening WRTL's speech, we hold that BCRA § 203 is unconstitutional as applied to WRTL's "Wedding," "Loan," and "Waiting" ads.

* * *

These cases are about political speech. The importance of the cases to speech and debate on public policy issues is reflected in the number of diverse organizations that have joined in supporting WRTL before this Court: the American Civil Liberties Union, the National Rifle Association, the American Federation of Labor and Congress of Industrial Organizations, the Chamber of Commerce of the United States of America, Focus on the Family, the Coalition of Public Charities, the Cato Institute, and many others.

Yet, as is often the case in this Court's First Amendment opinions, we have gotten this far in the analysis without

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[10] The interest recognized in *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 (1990), stems from a concern that "'[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas.'" *Id.*, at 659 (alteration in original). Some of WRTL's *amici* contend that this interest is not implicated here because of WRTL's status as a nonprofit advocacy organization. They assert that "[s]peech by nonprofit advocacy groups on behalf of their members does not 'corrupt' candidates or 'distort' the political marketplace," and that "[n]onprofit advocacy groups funded by individuals are readily distinguished from for-profit corporations funded by general treasuries." Brief for Family Research Council et al. as *Amici Curiae* 3, 4. Cf. *MCFL*, 479 U. S., at 264. We do not pass on this argument in this as-applied challenge because WRTL's funds for its ads were not derived solely from individual contributions. See Brief for Appellant FEC 11.

quoting the Amendment itself: "Congress shall make no law . . . abridging the freedom of speech." The Framers' actual words put these cases in proper perspective. Our jurisprudence over the past 216 years has rejected an absolutist interpretation of those words, but when it comes to drawing difficult lines in the area of pure political speech—between what is protected and what the Government may ban—it is worth recalling the language we are applying. *McConnell* held that express advocacy of a candidate or his opponent by a corporation shortly before an election may be prohibited, along with the functional equivalent of such express advocacy. We have no occasion to revisit that determination today. But when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban—the issue we *do* have to decide—we give the benefit of the doubt to speech, not censorship. The First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech" demands at least that.

The judgment of the United States District Court for the District of Columbia is affirmed.

It is so ordered.

JUSTICE ALITO, concurring.

I join the principal opinion because I conclude (1) that § 203 of the Bipartisan Campaign Reform Act of 2002, 2 U. S. C. § 441b(b)(2) (2000 ed., Supp. IV), as applied, cannot constitutionally ban any advertisement that may reasonably be interpreted as anything other than an appeal to vote for or against a candidate, (2) that the ads at issue here may reasonably be interpreted as something other than such an appeal, and (3) that because § 203 is unconstitutional as applied to the advertisements before us, it is unnecessary to go further and decide whether § 203 is unconstitutional on its face. If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech, see *post*, at 496–497 (SCALIA, J., joined by KENNEDY and THOMAS, JJ., concurring in part and concur-

ring in judgment), we will presumably be asked in a future case to reconsider the holding in *McConnell* v. *Federal Election Comm'n,* 540 U. S. 93 (2003), that § 203 is facially constitutional.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in part and concurring in the judgment.

A Moroccan cartoonist once defended his criticism of the Moroccan monarch (*lèse majesté* being a serious crime in Morocco) as follows: "'I'm not a revolutionary, I'm just defending freedom of speech. . . . I never said we had to change the king—no, no, no, no! But I said that some things the king is doing, I do not like. Is that a crime?'"[1] Well, in the United States (making due allowance for the fact that we have elected representatives instead of a king) it *is* a crime, at least if the speaker is a union or a corporation (including not-for-profit public-interest corporations) and if the representative is identified by name within a certain period before a primary or congressional election in which he is running. That is the import of § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), the constitutionality of which we upheld three Terms ago in *McConnell* v. *Federal Election Comm'n,* 540 U. S. 93 (2003). As an element essential to that determination of constitutionality, our opinion left open the possibility that a corporation or union could establish that, in the particular circumstances of its case, the ban was unconstitutional because it was (to pursue the analogy) *only* the king's policies and not his tenure in office that was criticized. Today's cases present the question of what sort of showing is necessary for that purpose. For the reasons I set forth below, it is my view that no test for such a showing can both (1) comport with the requirement of clarity that unchilled freedom of political speech demands, and (2) be compatible with the facial validity of § 203 (as pronounced in

[1] Whitlock, Satirist Continues to Prove Himself a Royal Pain, Washington Post, Apr. 26, 2005, pp. C1, C8.

McConnell). I would therefore reconsider the decision that sets us the unsavory task of separating issue-speech from election-speech with no clear criterion.

I

Today's cases originated in the efforts of Wisconsin Right to Life, Inc. (WRTL), a Wisconsin nonprofit, nonstock ideological advocacy corporation, to lobby Wisconsin voters concerning the filibustering of the President's judicial nominees. The problem for WRTL was that, under § 203 of BCRA, it would have been unlawful to air its television and radio ads within 30 days before the September 14, 2004, primary or within 60 days before the November 2, 2004, general election because the ads named Senator Feingold, who was then seeking reelection. Section 203(a) of BCRA amended § 316(b)(2) of the Federal Election Campaign Act Amendments of 1974, which prohibited corporations and unions from "mak[ing] a contribution or expenditure in connection with any election to any political office, or in connection with any primary election . . . for any political office." 2 U. S. C. § 441b(a). Prior to BCRA, that section covered only expenditures for communications that expressly advocated the election or defeat of a candidate (in campaign-finance speak, so-called "express advocacy"). *McConnell*, *supra*, at 204. As amended, however, that section was broadened to cover "electioneering communication[s]," § 441b(b)(2) (2000 ed., Supp. IV), which include "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and that is aired within 60 days before a general election, or 30 days before a primary election, in the jurisdiction in which the candidate is running. § 434(f)(3) (2000 ed., Supp. IV).[2] Under the new law, a corporation or union

[2] BCRA also includes a backup definition of "electioneering communication" that will take effect in the event the primary definition is "held to be constitutionally insufficient . . . to support the regulation provided herein." 2 U. S. C. § 434(f)(3)(A)(ii) (2000 ed., Supp. IV). This defines

wishing to air advertisements covered by the definition of "electioneering communication" is prohibited by § 203 from doing so unless it first creates a separate segregated fund run by a "political action committee," commonly known as a "PAC." § 441b(b)(2)(C) (2000 ed., Supp. IV). Three Terms ago, in *McConnell*, *supra*, this Court upheld most of BCRA's provisions against constitutional challenge, including § 203. The Court found that the "vast majority" of ads aired during the 30-day and 60-day periods before elections were "the functional equivalent of express advocacy," *id.*, at 206, but suggested that "pure issue ads," *id.*, at 207, or "genuine issue ads," *id.*, at 206, would be protected.

The question in these cases is whether § 203 can be applied to WRTL's ads consistently with the First Amendment. Last Term, this Court unanimously held, in *Wisconsin Right to Life, Inc.* v. *Federal Election Comm'n*, 546 U. S. 410, 412 (2006) *(per curiam) (WRTL I)*, that as-applied challenges to § 203 are available. The District Court in these cases subsequently held that § 203 is unconstitutional as applied to the three ads at issue. The Court today affirms the judgment of the District Court. While I agree with that result, I disagree with the principal opinion's reasons.

II

A proper explanation of my views in these cases requires some discussion of the case law leading up to *McConnell*. I begin with the seminal case of *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, wherein this Court considered the constitutionality of various political contribution and expenditure limitations contained in the Federal Election Campaign

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"electioneering communication" as "any broadcast, cable, or satellite communication which promotes or supports a candidate for [a federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." *Ibid.*

Act of 1971 (FECA), 86 Stat. 3, as amended, 88 Stat. 1263. *Buckley* set forth a now-familiar framework for evaluating the constitutionality of campaign-finance regulations. The Court began with the recognition that contributing money to, and spending money on behalf of, political candidates implicates core First Amendment protections, and that restrictions on such contributions and expenditures "operate in an area of the most fundamental First Amendment activities." 424 U. S., at 14. The Court also recognized, however, that the Government has a compelling interest in "prevention of corruption and the appearance of corruption." *Id.*, at 25. The "corruption" to which the Court repeatedly referred was of the "*quid pro quo*" variety, whereby an individual or entity makes a contribution or expenditure in exchange for some action by an official. *Id.*, at 26, 27, 45, 47.

The Court then held that FECA's *contribution* limitations passed constitutional muster because they represented a "marginal restriction upon the contributor's ability to engage in free communication," *id.*, at 20–21, and were thus subject to a lower level of scrutiny, *id.*, at 25. The Court invalidated, however, FECA's limitation on independent expenditures (*i. e.*, expenditures made to express one's own positions and not in coordination with a campaign). *Id.*, at 39–51. In the Court's view, expenditure limitations restrict speech that is "'at the core of our electoral process and of the First Amendment freedoms,'" *id.*, at 39, and require the highest scrutiny, *id.*, at 44–45.

The independent-expenditure restriction at issue in *Buckley* limited the amount of money that could be spent "'relative to a clearly identified candidate.'" *Id.*, at 41 (quoting 18 U. S. C. § 608(e)(1) (1970 ed., Supp. IV) (repealed 1976)). Before striking down the expenditure limitation, the Court narrowly construed § 608(e)(1), in light of vagueness concerns, to cover only express advocacy—that is, advertising that "in express terms advocate[s] the election or defeat of a clearly identified candidate for federal office" by use of such

words of advocacy "as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" 424 U. S., at 44, and n. 52. This narrowing construction excluded so-called "issue advocacy"—for example, an ad that refers to a clearly identified candidate's position on an issue, but does not expressly advocate his election or defeat. Even as narrowly construed to cover only express advocacy, however, § 608(e)(1) was held to be unconstitutional because the narrowed prohibition was too narrow to be effective and (quite apart from that shortcoming) independent expenditures did not pose a serious enough threat of corruption. *Id.*, at 45–46. Notably, the Court also found the Government's interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections" insufficient to support limitations on independent expenditures. *Id.*, at 48.

Buckley might well have been the last word on limitations on independent expenditures. Some argued, however, that independent expenditures *by corporations* should be treated differently. That argument should have been foreclosed by *Buckley* for several reasons: (1) The particular provision at issue in *Buckley*, § 608(e)(1) of FECA, was directed to expenditures not just by "individuals," but by "persons," with "'persons'" specifically defined to include "'corporation[s],'" *id.*, at 23, 39, n. 45; (2) the plaintiffs in *Buckley* included corporations, *id.*, at 8; and (3) *Buckley*, *id.*, at 50–51, cited a case that involved limitations on corporations in support of its striking down the restriction at issue, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974). Moreover, pre-*Buckley* cases had accorded corporations full First Amendment protection. See, *e. g.*, *NAACP* v. *Button*, 371 U. S. 415, 428–429, 431 (1963) (holding that the corporation's activities were "modes of expression and association protected by the First and Fourteenth Amendments"); *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244 (1936) (holding that corporations are guaranteed the "freedom of speech and of the

press . . . safeguarded by the due process of law clause of the Fourteenth Amendment"). See also *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 8 (1986) (plurality opinion) ("The identity of the speaker is not decisive in determining whether speech is protected"; "[c]orporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster").

Indeed, one would have thought the *coup de grâce* to the argument that corporations can be treated differently for these purposes was dealt by *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), decided just two years after *Buckley*. In that case, the Court struck down a Massachusetts statute that prohibited corporations from spending money in connection with a referendum unless the referendum materially affected the corporation's property, business, or assets. As the Court explained: The principle that such advocacy is "at the heart of the First Amendment's protection" and is "indispensable to decisionmaking in a democracy" is "no less true because the speech comes from a corporation rather than an individual." 435 U. S., at 776–777. And the Court rejected the arguments that corporate participation "would exert an undue influence on the outcome of a referendum vote"; that corporations would "drown out other points of view" and "destroy the confidence of the people in the democratic process," *id.*, at 789; and that the prohibition was needed to protect corporate shareholders "by preventing the use of corporate resources in furtherance of views with which some shareholders may disagree," *id.*, at 792–793.[3]

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[3] In *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 248 (1986) *(MCFL)*, we addressed the pre-BCRA version of 2 U. S. C. § 441b, which was interpreted to ban corporate treasury expenditures for *express advocacy* in connection with federal elections. We held that, "[r]egardless of whether th[e] concern [for unfair advantage to organizations that amass great wealth] is adequate to support application of

The Court strayed far from these principles, however, in one post-*Buckley* case: *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 (1990). This was the only pre-*McConnell* case in which this Court had ever permitted the government to restrict political speech based on the corporate identity of the speaker. *Austin* upheld state restrictions on corporate independent expenditures in support of, or in opposition to, any candidate in elections for state office. 494 U. S., at 654–655. The statute had been modeled after the federal statute that BCRA § 203 amended, which had been construed to reach only express advocacy, *id.*, at 655, n. 1. And the ad at issue in *Austin* used the magical and forbidden words of express advocacy: "Elect Richard Bandstra." *Id.*, at 714 (Appendix to opinion of KENNEDY, J., dissenting). How did the Court manage to reach this result without overruling *Bellotti?* It purported to recognize a different class of corruption: "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, *supra*, at 660.

Among the many problems with this "new" theory of corruption was that it actually constituted "the same 'corrosive and distorting effects of immense aggregations of wealth,' found insufficient to sustain a similar prohibition just a decade earlier," in *Bellotti*. *McConnell*, 540 U. S., at 325 (opinion of KENNEDY, J.) (quoting *Austin*, *supra*, at 660; citation omitted). Indeed, *Buckley* itself had cautioned that "[t]he First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." 424 U. S., at 49. However, two Members of *Austin*'s 6-to-3

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§ 441b to commercial enterprises, *a question not before us*, that justification" did not support application of the statute to the nonprofit organization that brought the challenge in *MCFL*. 479 U. S., at 263 (emphasis added).

majority appear to have thought it significant that *Austin* involved express advocacy whereas *Bellotti* involved issue advocacy. 494 U. S., at 675–676 (Brennan, J., concurring); *id.*, at 678 (STEVENS, J., concurring).[4]

Austin was a significant departure from ancient First Amendment principles. In my view, it was wrongly decided. The flawed rationale upon which it is based is examined at length elsewhere, including in a dissenting opinion in *Austin* that a Member of the 5-to-4 *McConnell* majority had joined, see *Austin*, 494 U. S., at 695–713 (opinion of KENNEDY, J., joined by O'Connor, J.). See also *id.*, at 679–695 (SCALIA, J., dissenting); *McConnell*, 540 U. S., at 257–259 (opinion of SCALIA, J.); *id.*, at 325–330 (opinion of KENNEDY, J.); *id.*, at 273–275 (opinion of THOMAS, J.). But at least *Austin* was limited to express advocacy, and *nonexpress* advocacy was presumed to remain protected under *Buckley* and *Bellotti*, even when engaged in by corporations.

Three Terms ago the Court extended *Austin*'s flawed rationale to cover an even broader class of speech. In *McConnell*, the Court rejected a facial overbreadth challenge to BCRA §203's restrictions on corporate and union advertising, which were not limited to express advocacy but covered vast amounts of nonexpress advocacy (embraced within the term "electioneering communications"). 540 U. S., at 203–209. The Court held that, at least in light of the availability of the political action committee (PAC) option, the compelling governmental interest that supported restrictions on corporate expenditures for express advocacy also justified

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[4] The dissent asserts that *Austin* was faithful to *Bellotti*'s principles, to prove which it quotes a footnote in *Bellotti* leaving open the possibility that independent expenditures by corporations might someday be demonstrated to beget *quid-pro-quo* corruption. *Post*, at 514–515, n. 7 (opinion of SOUTER, J.) (quoting *Bellotti*, 435 U. S., at 788, n. 26). That someday has never come. No one seriously believes that *independent* expenditures could possibly give rise to *quid-pro-quo* corruption without being subject to regulation as *coordinated* expenditures.

the extension of those restrictions to "electioneering communications," the "vast majority" of which were intended to influence elections. *Id.*, at 206. Of course, the compelling interest to which the Court referred was " 'the corrosive and distorting effects of immense aggregations of [corporate] wealth,' " *id.*, at 205 (quoting *Austin*, *supra*, at 660). "The justifications for the regulation of express advocacy," the Court explained, "apply equally" to ads run during the BCRA blackout period "to the extent . . . [those ads] are *the functional equivalent of express advocacy.*" 540 U. S., at 206 (emphasis added). The Court found that the "vast majority" of ads aired during the 30- and 60-day periods before elections fit that description. Finally, the Court concluded that, "[e]ven . . . assum[ing] that BCRA will inhibit some constitutionally protected corporate and union speech" (*i. e.*, "pure issue ads," *id.*, at 207, or "genuine issue ads," *id.*, at 206, and n. 88), its application to such ads was insubstantial, and thus the statute was not overbroad, *id.*, at 207. But *McConnell* did not foreclose as-applied challenges to § 203, *WRTL I*, 546 U. S., at 412, which brings me back to the present cases.

III

The question is whether WRTL meets the standard for prevailing in an as-applied challenge to BCRA § 203. Answering that question obviously requires the Court to articulate the standard. The most obvious one, and the one suggested by the Federal Election Commission (FEC) and intervenors, is the standard set forth in *McConnell* itself: whether the advertisement is the "functional equivalent of express advocacy." 540 U. S., at 206. See also Brief for Appellant FEC 18 (arguing that WRTL's "advertisements are the functional equivalent of the sort of express advocacy that this Court has long recognized may be constitutionally regulated"); Reply Brief for Appellant Sen. John McCain et al. in No. 06–970, p. 14 ("[C]ourts should apply the standard articulated in *McConnell*: Congress may constitutionally

restrict corporate funding of ads that are the 'functional equivalent of express advocacy' for or against a candidate"). Intervenors flesh out the standard somewhat further: "[C]ourts should ask whether the ad's audience would reasonably understand the ad, in the context of the campaign, to promote or attack the candidate." *Id.*, at 15. The District Court instead articulated a five-factor test that looks to whether the ad under review "(1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described issue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate." 466 F. Supp. 2d 195, 207 (DC 2006). The backup definition of "electioneering communications" contained in BCRA itself, see n. 2, *supra*, offers another possibility. It covers any communication that "promotes or supports a candidate for that office . . . (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." And the principal opinion in these cases offers a variation of its own (one bearing a strong likeness to BCRA's backup definition): whether "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Ante*, at 470.

There is a fundamental and inescapable problem with all of these various tests. Each of them (and every other test that is tied to the public perception, or a court's perception, of the import, the intent, or the effect of the ad) is impermissibly vague and thus ineffective to vindicate the fundamental First Amendment rights of the large segment of society to which § 203 applies. Consider the application of these tests

to WRTL's ads: There is not the slightest doubt that these ads had an issue-advocacy component. They explicitly urged lobbying on the pending legislative issue of appellate-judge filibusters. The question before us is whether something about them caused them to be the "functional equivalent" of express advocacy, and thus constitutionally subject to BCRA's criminal penalty. Do any of the tests suggested above answer this question with the degree of clarity necessary to avoid the chilling of fundamental political discourse? I think not.

The "functional equivalent" test does nothing more than restate the question (and make clear that the electoral advocacy need not be express). The test which asks how the ad's audience "would reasonably understand the ad" provides ample room for debate and uncertainty. The District Court's five-factor test does not (and could not possibly) specify how much weight is to be given to each factor—and includes the inherently vague factor of whether the ad "promotes, attacks, supports, or opposes the named candidate." (Does attacking the king's position attack the king?) The tests which look to whether the ad is "susceptible of no plausible meaning" or "susceptible of no reasonable interpretation" other than an exhortation to vote for or against a specific candidate seem tighter. They ultimately depend, however, upon a judicial judgment (or is it—worse still—a jury judgment?) concerning "reasonable" or "plausible" import that is far from certain, that rests upon consideration of innumerable surrounding circumstances which the speaker may not even be aware of, and that lends itself to distortion by reason of the decisionmaker's subjective evaluation of the importance or unimportance of the challenged speech. In this critical area of political discourse, the speaker cannot be compelled to risk felony prosecution with no more assurance of impunity than his prediction that what he says will be found susceptible of some "reasonable interpretation other than as an appeal to vote for or against a specific candidate."

Under these circumstances, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia* v. *Hicks*, 539 U. S. 113, 119 (2003) (citation omitted).

It will not do to say that this burden must be accepted—that WRTL's antifilibustering, constitutionally protected speech can be constrained—in the necessary pursuit of electoral "corruption." We have rejected the "can't-make-an-omelet-without-breaking-eggs" approach to the First Amendment, even for the infinitely less important (and less protected) speech category of virtual child pornography. In *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234 (2002), the Government argued:

> "[T]he possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children. Experts . . . may have difficulty in saying whether the pictures were made by using real children or by using computer imaging. The necessary solution . . . is to prohibit both kinds of images." *Id.*, at 254–255.

The Court rejected the principle that protected speech may be banned because it is difficult to distinguish from unprotected speech. *Ibid.* "[T]hat protected speech may be banned as a means to ban unprotected speech," it said, "turns the First Amendment upside down." *Id.*, at 255. The same principle must be applied here. Indeed, it must be applied *a fortiori*, since laws targeting political speech are the principal object of the First Amendment guarantee. The fact that the line between electoral advocacy and issue advocacy dissolves in practice is an indictment of the statute, not a justification of it.

Buckley itself compels the conclusion that these tests fall short of the clarity that the First Amendment demands. Recall that *Buckley* narrowed the ambiguous phrase "any expenditure . . . relative to a clearly identified candidate" to mean any expenditure "advocating the election or defeat of a candidate." 424 U. S., at 42 (internal quotation marks omitted). But that construction alone did not eliminate the vagueness problem because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Ibid.* Any effort to distinguish between the two based on intent of the speaker or effect of the speech on the listener would "'pu[t] the speaker . . . wholly at the mercy of the varied understanding of his hearers,'" would "'offe[r] no security for free discussion,'" and would "'compe[l] the speaker to hedge and trim.'" *Id.*, at 43 (quoting *Thomas* v. *Collins*, 323 U. S. 516, 535 (1945)). In order to avoid these "constitutional deficiencies," the Court was compelled to narrow the statutory language even further to cover only advertising that used the magic words of express advocacy. 424 U. S., at 43–44.

If a permissible test short of the magic-words test existed, *Buckley* would surely have adopted it. Especially since a consequence of the express-advocacy interpretation was the invalidation of the entire limitation on independent expenditures, in part because the statute (as thus narrowed) could not be an effective limitation on expenditures for electoral advocacy. (It would be "naiv[e]," *Buckley* said, to pretend that persons and groups would have difficulty "devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Id.*, at 45.) Why did *Buckley* employ such a "highly strained" reading of the statute, *McConnell*, 540 U. S., at 280 (opinion of THOMAS, J.), when broader readings, more faithful to the text, were available that might not

have resulted in such underinclusiveness? In particular, after going to the trouble of narrowing the statute to cover "advocacy of [the] election or defeat of a candidat[e]," why not do what the principal opinion in these cases does, which is essentially to preface that phrase with the phrase "susceptible of no reasonable interpretation other than as"? *Ante*, at 470. There is only one plausible explanation: The Court eschewed narrowing constructions that would have been more faithful to the text and more effective at capturing campaign speech *because those tests were all too vague.* We cannot now adopt a standard held to be facially vague on the theory that it is somehow clear enough for constitutional as-applied challenges. If *Buckley* foreclosed such vagueness in a statutory test, it also must foreclose such vagueness in an as-applied test.

Though the principal opinion purports to recognize the "imperative for clarity" in this area of First Amendment law, its attempt to distinguish its test from the test found to be vague in *Buckley* falls far short. It claims to be "not so sure" that *Buckley* rejected its test because *Buckley*'s holding did not concern "what the constitutional standard for clarity was in the abstract, divorced from specific statutory language." *Ante*, at 474–475, n. 7. Forget about abstractions: The specific statutory language at issue in *Buckley* was interpreted to mean " 'advocating the election or defeat of a candidate,' " and that is materially identical to the operative language in the principal opinion's test. The principal opinion's protestation that *Buckley*'s vagueness holding "d[id] not dictate a constitutional test," *ante*, at 475, n. 7, is utterly compromised by the fact that the principal opinion itself relies on the very same vagueness holding to reject an intent-and-effect test in these cases. See *ante*, at 467 (citing *Buckley*, *supra*, at 43–44). It is the *same* vagueness holding, and the principal opinion cannot invoke it on page 467 of its opinion and disclaim it on page 476. Finally, the princi-

pal opinion quotes *McConnell* for the proposition that "[t]he *Buckley* Court's 'express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law.'" *Ante*, at 475, n. 7 (quoting *McConnell*, *supra*, at 190). I am not sure why this cryptic statement is at all relevant, since we are discussing here the principle of constitutional law that *underlay Buckley*'s express-advocacy restriction. In any case, the statement is assuredly not a repudiation of *Buckley*'s vagueness holding, since overbreadth and not vagueness was the issue in *McConnell*.[5]

What, then, is to be done? We could adopt WRTL's proposed test, under which § 203 may not be applied to any ad (1) that "focuses on a current legislative branch matter, takes a position on the matter, and urges the public to ask a legislator to take a particular position or action with respect to the matter," and (2) that "does not mention any election, candidacy, political party, or challenger, or the official's character, qualifications, or fitness for office," (3) whether or not it "say[s] that the public official is wrong or right on the issue," so long as it does not expressly say he is "wrong for [the]

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[5] JUSTICE ALITO's concurrence at least hints that the principal opinion's test *may* impermissibly chill speech, and offers to reconsider *McConnell*'s holding "*[i]f* it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech." *Ante*, at 482 (emphasis added). The wait-and-see approach makes no sense and finds no support in our cases. How will we know that would-be speakers have been chilled and have not spoken? If a tree *does not* fall in the forest, can we hear the sound it would have made had it fallen? Our normal practice is to assess *ex ante* the risk that a standard will have an impermissible chilling effect on First Amendment protected speech. JUSTICE ALITO seemed to recognize that as recently as, well, today. In another opinion released this morning, he finds that a proposed test for censoring student speech "can easily be manipulated in dangerous ways," wherefore he "would reject it *before such abuse occurs.*" *Morse* v. *Frederick*, *ante*, at 423 (concurring opinion) (emphasis added). I would accord the core First Amendment speech at issue here at least the same respect he accords speech in the classroom.

office." Brief for Appellee 56–57 (footnote omitted).[6] Or we could of course adopt the *Buckley* test of express advocacy. The problem is that, although these tests are clear, they are incompatible with *McConnell*'s holding that § 203 is facially constitutional, which was premised on the finding that a vast majority of ads proscribed by § 203 are "sham issue ads," 540 U. S., at 185, that fall outside the First Amendment's protection. Indeed, *any* clear rule that would protect all genuine issue ads would cover such a substantial number of ads prohibited by § 203 that § 203 would be rendered substantially overbroad. The Government claims that even the amorphous test adopted by the District Court "call[s] into question a substantial percentage of the statute's applications," Tr. of Oral Arg. 4,[7] and that *any* test providing

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[6] The principal opinion claims that its test is no more vague than WRTL's test. See *ante*, at 474–475, n. 7. I disagree. WRTL's test requires yes or no answers to a series of precise and focused questions: Does the ad take a position on a legislative matter? Does it mention the election? Does it expressly say the candidate is wrong for the office? A group of children—indeed, even a group of college students—could answer these questions with great consistency. The principal opinion's test, by contrast, hinges on assessment of the reasonableness of a determination that something does not constitute advocacy of the election or defeat of a candidate.

[7] The same must be said, I think, of the test proposed by the principal opinion. While its coverage is not entirely clear, it would apparently protect even *McConnell*'s paradigmatic example of the functional equivalent of express advocacy—the so-called "Jane Doe ad," which "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think,'" 540 U. S., at 126–127. Indeed, it at least arguably protects the most "striking" example of a so-called sham issue ad in the *McConnell* record, the notorious "Yellowtail ad," which accused Bill Yellowtail of striking his wife and then urged listeners to call him and "[t]ell him to support family values." *Id.*, at 193–194, n. 78 (internal quotation marks omitted). The claim that § 203 on its face does not reach a substantial amount of speech protected under the principal opinion's test—and that the test is therefore compatible with *McConnell*—seems to me indefensible. Indeed, the principal opinion's attempt at dis-

relief to WRTL is incompatible with *McConnell*'s facial holding because WRTL's ads are in the "heartland" of what Congress meant to prohibit, Brief for Appellant FEC 18, 28, 36, n. 9. If that is so, then *McConnell* cannot be sustained.

Like the *Buckley* Court and the parties to these cases, I recognize the practical reality that corporations can evade the express-advocacy standard. I share the instinct that "[w]hat separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." See *McConnell*, *supra*, at 126, n. 16 (internal quotation marks omitted); Brief for Appellant FEC 30; Brief for Appellant Sen. John McCain et al. in No. 06–970, p. 35. But the way to indulge that instinct consistently with the First Amendment is either to eliminate restrictions on independent expenditures altogether or to *confine* them to one side of the *traditional* line—the express-advocacy line, set in concrete on a calm day by *Buckley*, several decades ago. Section 203's line is bright, but it bans vast amounts of political advocacy indistinguishable from hitherto protected speech.

The foregoing analysis shows that *McConnell* was mistaken in its belief that as-applied challenges could eliminate the unconstitutional applications of § 203. They can do so only if a test is adopted which contradicts the holding of *McConnell*—that § 203 is facially valid because the vast majority of pre-election issue ads can constitutionally be proscribed. In light of the weakness in *Austin*'s rationale, and in light of the longstanding acceptance of the clarity of *Buckley*'s express-advocacy line, it was adventurous for *McConnell* to extend *Austin* beyond corporate speech constituting

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tinguishing *McConnell* is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so. See *post*, at 526–527 (SOUTER, J., dissenting). This faux judicial restraint is judicial obfuscation.

express advocacy. Today's cases make it apparent that the adventure is a flop, and that *McConnell*'s holding concerning § 203 was wrong.[8]

IV

Which brings me to the question of *stare decisis*. "*Stare decisis* is not an inexorable command" or "'a mechanical formula of adherence to the latest decision.'" *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991) (quoting *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940)). It is instead "'a principle of policy,'" *Payne*, *supra*, at 828, and this Court has a "considered practice" not to apply that principle of policy "as rigidly in constitutional as in nonconstitutional cases." *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 543 (1962). This Court has not hesitated to overrule decisions offensive to the First Amendment (a "fixed star in our constitutional constellation," if there is one, *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943))—and to do so promptly where fundamental error was apparent. Just three years after our erroneous decision in *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586 (1940), the

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[8] JUSTICE KENNEDY's opinion in *McConnell* explained why the possibility of corporations' funding speech out of a PAC does not save the statute from constitutional infirmity. See 540 U. S., at 330–333. *McConnell*'s rejection of those arguments rested, of course, upon the assumption that for non-PAC genuine issue ads as-applied challenges would be available. See *id.*, at 207; *WRTL I*, 546 U. S. 410, 412 (2006) *(per curiam)*. The discussion today shows that to be mistaken.

The dissent asserts, *post*, at 533, that there is no reason "why substituting the phrase 'Contact your Senators' for the phrase 'Contact Senators Feingold and Kohl' would have denied WRTL a constitutionally sufficient . . . alternative." Surely that is not so. The purpose of the ad was to put political pressure upon Senator Feingold to change his position on the filibuster—not only through the constituents who accepted the invitation to contact him, but also through the very existence of an ad bringing to the public's attention that he, Senator Feingold, stood athwart the allowance of a vote on judicial nominees. (Unlike the principal opinion, I think that the fair import of the ad in context.)

Court corrected the error in *Barnette*. Overruling a constitutional case decided just a few years earlier is far from unprecedented.[9]

Of particular relevance to the *stare decisis* question in these cases is the impracticability of the regime created by *McConnell*. *Stare decisis* considerations carry little weight when an erroneous "governing decisio[n]" has created an "unworkable" legal regime. *Payne*, *supra*, at 827. As described above, the *McConnell* regime is unworkable because of the inability of any acceptable as-applied test to validate the facial constitutionality of § 203—that is, its inability to sustain proscription of the vast majority of issue ads. We could render the regime workable only by effectively overruling *McConnell* without saying so—adopting a clear as-applied rule protective of speech in the "heartland" of what Congress prohibited. The promise of an administrable as-

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[9] See, *e. g.*, *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996) (overruling *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1 (1989)); *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200 (1995) (overruling in part *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547 (1990)); *United States* v. *Dixon*, 509 U. S. 688 (1993) (overruling *Grady* v. *Corbin*, 495 U. S. 508 (1990)); *Payne* v. *Tennessee*, 501 U. S. 808 (1991) (overruling *South Carolina* v. *Gathers*, 490 U. S. 805 (1989), and *Booth* v. *Maryland*, 482 U. S. 496 (1987)); *Daniels* v. *Williams*, 474 U. S. 327 (1986) (overruling in part *Parratt* v. *Taylor*, 451 U. S. 527 (1981)); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985) (overruling *National League of Cities* v. *Usery*, 426 U. S. 833 (1976)); *United States* v. *Scott*, 437 U. S. 82 (1978) (overruling *United States* v. *Jenkins*, 420 U. S. 358 (1975)); *National League of Cities*, *supra* (overruling *Maryland* v. *Wirtz*, 392 U. S. 183 (1968)); *Edelman* v. *Jordan*, 415 U. S. 651 (1974) (overruling in part *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *State Dept. of Health and Rehabilitative Servs. of Fla.* v. *Zarate*, 407 U. S. 918 (1972); and *Sterrett* v. *Mothers' & Children's Rights Org.*, 409 U. S. 809 (1972)); *Miller* v. *California*, 413 U. S. 15 (1973) (overruling *Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Mass.*, 383 U. S. 413 (1966)); *Perez* v. *Campbell*, 402 U. S. 637 (1971) (overruling *Kesler* v. *Department of Public Safety of Utah*, 369 U. S. 153 (1962)).

applied rule that is both effective in the vindication of First Amendment rights and consistent with *McConnell*'s holding is illusory.

It is not as though *McConnell* produced a settled body of law. Indeed, it is far more accurate to say that *McConnell unsettled* a body of law. Not until 1947, with the enactment of the Taft-Hartley amendments to the Federal Corrupt Practices Act, 1925, did Congress even purport to regulate campaign-related expenditures of corporations and unions. See *United States* v. *CIO*, 335 U. S. 106, 107, 113–115 (1948). In the three decades following, this Court expressly declined to pronounce upon the constitutionality of such restrictions on independent expenditures. See *Pipefitters* v. *United States*, 407 U. S. 385, 400 (1972); *United States* v. *Automobile Workers*, 352 U. S. 567, 591–592 (1957); *CIO*, *supra*, at 110, 124. When the Court finally did turn to that question, it struck them down. See *Buckley*, 424 U. S. 1. Our subsequent pre-*McConnell* decisions, with the lone exception of *Austin*, disapproved limits on independent expenditures. The modest medicine of restoring First Amendment protection to nonexpress advocacy—speech that was protected until three Terms ago—does not unsettle an established body of law.

Neither do any of the other considerations relevant to *stare decisis* suggest adherence to *McConnell*. These cases do not involve property or contract rights, where reliance interests are involved. *Payne*, *supra*, at 828. And *McConnell*'s § 203 holding has assuredly not become "embedded" in our "national culture." *Dickerson* v. *United States*, 530 U. S. 428, 443–444 (2000) (declining to overrule *Miranda* v. *Arizona*, 384 U. S. 436 (1966), in part because it had become embedded in our national culture). If § 203 has had any cultural impact, it has been to undermine the traditional and important role of grassroots advocacy in American politics by burdening the "budget-strapped nonprofit entities upon which many of our citizens rely for political commentary and

advocacy." *McConnell,* 540 U. S., at 340 (opinion of KENNEDY, J.).

Perhaps overruling this one part of *McConnell* with respect to one part of BCRA would not "ai[d] the legislative effort to combat real or apparent corruption." *Id.*, at 194. But the First Amendment was not designed to facilitate legislation, even wise legislation. Indeed, the assessment of former House Minority Leader Richard Gephardt, a proponent of campaign-finance reform, may well be correct. He said that "'[w]hat we have is two important values in direct conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy,'" and "'[y]ou can't have both.'" Gibbs, The Wake-Up Call, Time, Feb. 3, 1997, pp. 22, 25. (He was referring, presumably, to incumbents' notions of healthy campaigns.) If he was wrong, however, and the two values can coexist, it is pretty clear which side of the equation *this institution* is primarily responsible for. It is perhaps our most important constitutional task to ensure freedom of political speech. And when a statute creates a regime as unworkable and unconstitutional as today's effort at as-applied review proves § 203 to be, it is our responsibility to decline enforcement.

* * *

There is wondrous irony to be found in both the genesis and the consequences of BCRA. In the fact that the institutions it was designed to muzzle—unions and nearly all manner of corporations—for all the "corrosive and distorting effects" of their "immense aggregations of wealth," were utterly impotent to prevent the passage of this legislation that forbids them to criticize candidates (including incumbents). In the fact that the effect of BCRA has been to concentrate more political power in the hands of the country's wealthiest individuals and their so-called 527 organizations, unregulated by § 203. (In the 2004 election cycle, a mere 24 individuals contributed an astounding total of $142

million to 527s. S. Weissman & R. Hassan, BCRA and the 527 Groups, in The Election After Reform 79, 92–96 (M. Malbin ed. 2006).) And in the fact that while these wealthy individuals dominate political discourse, it is this small, grassroots organization of Wisconsin Right to Life that is muzzled.

I would overrule that part of the Court's decision in *McConnell* upholding §203(a) of BCRA. Accordingly, I join Parts I and II of today's principal opinion and otherwise concur only in the judgment.

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

The significance and effect of today's judgment, from which I respectfully dissent, turn on three things: the demand for campaign money in huge amounts from large contributors, whose power has produced a cynical electorate; the congressional recognition of the ensuing threat to democratic integrity as reflected in a century of legislation restricting the electoral leverage of concentrations of money in corporate and union treasuries; and *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93 (2003), declaring the facial validity of the most recent Act of Congress in that tradition, a decision that is effectively, and unjustifiably, overruled today.[1]

I

The indispensable ingredient of a political candidacy is money for advertising. In the 2004 campaign, more than half of the combined expenditures by the two principal Presidential candidates (excluding fundraising) went for media time and space. See The Costliest Campaign, Washington Post, Dec. 30, 2004, p. A7.[2] And in the 2005–2006 election

[1] Substantially for the reasons stated by the Court, *ante*, at 461–464, I believe these cases are justiciable.

[2] Between candidates, political action committees, interest groups, and national, state, and local parties, spending on the 2004 state and federal elections exceeded $4 billion. K. Patterson, Spending in the 2004 Elec-

cycle, the expenditure of more than $2 billion on television shattered the previous record, even without a Presidential contest. See Inside Media, MediaWeek, Nov. 20, 2006, p. 18. The portent is for still greater spending. By the end of March 2007, almost a year before the first primary and more than 18 months before the general election, Presidential can-

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tion, in Financing the 2004 Election 68, 71, tbl. 3–1 (D. Magleby, A. Corrado, & K. Patterson eds. 2006). Congressional campaigns spent over $1 billion in 2004, *id.*, at 75, tbl. 3–4, state legislative candidates raised three-quarters of a billion dollars in the 2003–2004 election cycle, The Institute on Money in State Politics, State Elections Overview 2004, p. 2 (2005), online at http://www.followthemoney.org/press/Reports/200601041.pdf (all Internet materials as visited June 20, 2007, and available in Clerk of Court's case file), and gubernatorial candidates raised over $200 million, *id.*, at 6. State judicial campaigns have become flush with cash as well, with state supreme court candidates raising over $30 million in the 2005–2006 cycle. J. Sample, L. Jones, & R. Weiss, The New Politics of Judicial Elections 2006, p. 16 (J. Rutledge ed. 2007), online at http://www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf. In a single 2004 judicial election in Illinois, the candidates raised a breathtaking $9.3 million, an amount the winner called "'obscene.'" The Justice-elect wondered, "'How can people have faith in the system?'" Moyer & Brandenburg, Big Money and Special Interests are Warping Judicial Elections, Legal Times, Oct. 9, 2006, p. 50 (quoting Justice Lloyd Karmeier of the Illinois Supreme Court). According to polling data, the fear that people will lose trust in the system is well founded. With respect to judicial elections, a context in which the influence of campaign contributions is most troubling, a recent poll of business leaders revealed that about four in five thought that campaign contributions have at least "some influence" on judges' decisions, while 90 percent are at least "somewhat concerned" that "[c]ampaign contributions and political pressure will make judges accountable to politicians and special interest groups instead of the law and the Constitution." Zogby International, Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges 4–5 (May 2007), online at http://www.ced.org/docs/report/report_2007judicial_survey.pdf. People have similar feelings about other elected officials. See M. Mellman & R. Wirthlin, Public Views of Party Soft Money, in Inside the Campaign Finance Battle 266–269 (A. Corrado, T. Mann, & T. Potter eds. 2003) (hereinafter Mellman & Wirthlin); see also *infra*, at 507.

didates had already raised over $150 million. See Balz, Fundraising Totals Challenge Early Campaign Assumptions, Washington Post, Apr. 17, 2007, p. A1 (citing figures and noting that "[t]he campaign is living up to its reputation as the most expensive in U. S. history"). To reach this total, the leading fundraisers collected over $250,000 per day in the first quarter of 2007, Mullins, Clinton Leads the Money Race, Wall Street Journal, Apr. 16, 2007, p. A8, and the eventual nominees are expected to raise $500 million apiece (about $680,000 per day over a 2-year election cycle), Kirkpatrick & Pilhofer, McCain Lags in Income But Excels in Spending, Report Shows, N. Y. Times, Apr. 15, 2007, p. 20.

The indispensability of these huge sums has two significant consequences for American government that are particularly on point here. The enormous demands, first, assign power to deep pockets. See Balz, *supra*, at A6 ("For all the interest in Internet fundraising, big donors still ruled in the first quarter, with roughly 80 percent of donations coming in amounts of $1,000 or more"). Candidates occasionally boast about the number of contributors they have, but the headlines speaking in dollars reflect political reality. See, *e. g.*, Mullins, *supra*, at A8 (headlined "Clinton Leads the Money Race").

Some major contributors get satisfaction from pitching in for their candidates, but political preference fails to account for the frequency of giving "substantial sums to *both* major national parties," *McConnell*, *supra*, at 148, a practice driven "by stark political pragmatism, not by ideological support for either party or their candidates," Brief for Committee for Economic Development et al. as *Amici Curiae* in *McConnell*, O. T. 2003, No. 02–1674, p. 3 (hereinafter CED Brief). What the high-dollar pragmatists of either variety get is special access to the officials they help elect, and with it a disproportionate influence on those in power. See *McConnell*, *supra*, at 130–131. As the erstwhile officer of a large American corporation put it, "'[b]usiness leaders believe—based on

experience and with good reason—that . . . access gives them an opportunity to shape and affect governmental decisions and that their ability to do so derives from the fact that they have given large sums of money to the parties.'" CED Brief 9. At a critical level, contributions that underwrite elections are leverage for enormous political influence.

Voters know this. Hence, the second important consequence of the demand for big money to finance publicity: pervasive public cynicism. A 2002 poll found that 71 percent of Americans think Members of Congress cast votes based on the views of their big contributors, even when those views differ from the Member's own beliefs about what is best for the country. Mellman & Wirthlin 267; see also *id.*, at 266 ("In public opinion research it is uncommon to have 70 percent or more of the public see an issue the same way. When they do, it indicates an unusually strong agreement on that issue"). The same percentage believes that the will of contributors tempts Members to vote against the majority view of their constituents. *Id.*, at 267. Almost half of Americans believe that Members often decide how to vote based on what big contributors to their party want, while only a quarter think Members often base their votes on perceptions of what is best for the country or their constituents. *Ibid.*

Devoting concentrations of money in self-interested hands to the support of political campaigning therefore threatens the capacity of this democracy to represent its constituents and the confidence of its citizens in their capacity to govern themselves. These are the elements summed up in the notion of political integrity, giving it a value second to none in a free society.

II

If the threat to this value flowing from concentrations of money in politics has reached an unprecedented enormity, it has been gathering force for generations. Before the turn of the last century, as now, it was obvious that the purchase of influence and the cynicism of voters threaten the integrity

and stability of democratic government, each derived from the responsiveness of its law to the interests of citizens and their confidence in that focus. The danger has traditionally seemed at its apex when no reasonable limits constrain the campaign activities of organizations whose "unique legal and economic characteristics" are tailored to "facilitat[e] the amassing of large treasuries," *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 658, 660 (1990). Corporations were the earliest subjects of concern; the same characteristics that have made them engines of the Nation's extraordinary prosperity have given them the financial muscle to gain "advantage in the political marketplace" when they turn from core corporate activity to electioneering, *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 257–258 (1986) *(MCFL)*, and in "Congress' judgment" the same concern extends to labor unions as to corporations, *Federal Election Comm'n* v. *National Right to Work Comm.*, 459 U. S. 197, 210 (1982); see also *Austin*, *supra*, at 661.

A

In the wake of the industrial expansion after the Civil War there developed a momentum for civic reform that led to the enactment of the Pendleton Civil Service Act of 1883, ch. 27, 22 Stat. 403, which stopped political parties from raising money through compulsory assessments on federal employees. Not unnaturally, corporations filled the vacuum, see R. Mutch, Campaigns, Congress, and Courts xvi–xvii (1988) (hereinafter Mutch), and in due course demonstrated what concentrated capital could do. The resulting political leverage disturbed "the confidence of the plain people of small means in our political institutions," E. Root, The Political Use of Money (delivered Sept. 3, 1894), in Addresses on Government and Citizenship 141, 143–144 (R. Bacon & J. Scott eds. 1916) (cited in *United States* v. *Automobile Workers*, 352 U. S. 567, 571 (1957)), and the 1904 Presidential campaign

eventually "crystallized popular sentiment" on the subject of money and politics, *id.*, at 572. In his next message to Congress, President Theodore Roosevelt invoked the power "to protect the integrity of the elections of its own officials [as] inherent" in government, and called for "vigorous measures to eradicate" perceived political corruption, for he found "no enemy of free government more dangerous and none so insidious."[3] 39 Cong. Rec. 17 (1904).

The following year, the President urged that "[a]ll contributions by corporations to any political committee or for any political purpose should be forbidden by law." 40 Cong. Rec. 96 (1905). His call was seconded by the Senate sponsor of the eventual legislation, whose "sad thought [was] that the Senate is discredited by the people of the United States as being a body more or less corruptible or corrupted." *Id.*, at 229. The President persisted in his 1906 message to Congress with another call for "a law prohibiting all corporations from contributing to the campaign expenses of any party," 41 Cong. Rec. 22, and the next year Congress passed the Tillman Act of 1907:

> "it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any

[3] Perhaps the President's call was inspired by the accusations from his own 1904 Democratic opponent, Judge Alton B. Parker, that the Republican camp accepted corporate campaign contributions intended to buy influence. See A. Corrado, Money and Politics: A History of Federal Campaign Finance Law, in A. Corrado, T. Mann, D. Ortiz, & T. Potter, The New Campaign Finance Sourcebook 7, 10–11 (2005) (hereinafter Campaign Finance Sourcebook).

State legislature of a United States Senator." Ch. 420, 34 Stat. 864–865.[4]

The aim was "not merely to prevent the subversion of the integrity of the electoral process," but "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *Automobile Workers*, *supra*, at 575.

B

Thirty years later, new questions about the electoral influence of accumulated wealth surfaced as organized labor expanded during the New Deal. In the 1936 election, labor unions contributed "unprecedented" sums, S. Rep. No. 151, 75th Cong., 1st Sess., 127 (1937), the greater part of them by the United Mine Workers, see Campaign Finance Sourcebook 17. And in due course reaction began to build: "[w]artime strikes gave rise to fears of the new concentration of power represented by the gains of trade unionism. And so the belief grew that, just as the great corporations had made huge political contributions to influence governmental action . . . , the powerful unions were pursuing a similar course, and with the same untoward consequences for the democratic process." *Automobile Workers*, *supra*, at 578. Congress responded with the War Labor Disputes Act of 1943, which extended the ban on corporate donations to labor organizations, ch. 144, § 9, 57 Stat. 167–168, an extension that was made permanent in the Labor Management Relations Act, 1947, better known as Taft-Hartley, § 304, 61 Stat. 159–160.

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[4] A bill along similar lines had been unsuccessfully introduced years earlier by Senator William Chandler, a New Hampshire Republican whom the railroad interests helped defeat in 1900. See Mutch 4–6 (discussing the unlikely alliance between Chandler, a radical Republican, and Senator Benjamin Tillman, a South Carolina Democrat who ultimately succeeded in enacting the law that carries his name).

C

At the same time, Congress had another worry that foreshadows our cases today. It was concerned that the statutory prohibition on corporate "contribution[s]" was being so narrowly construed as to open a "loophole whereby corporations, national banks, and labor organizations are enabled to avoid the obviously intended restrictive policy of the statute by garbing their financial assistance in the form of an 'expenditure' rather than a contribution." S. Rep. No. 1, 80th Cong., 1st Sess., 38–39 (1947); see also H. R. Rep. No. 2739, 79th Cong., 2d Sess., 40 (1947) ("The intent and purpose of the provision of the act prohibiting any corporation or labor organization making any contribution in connection with any election would be wholly defeated if it were assumed that the term 'making any contribution' related only to the donating of money directly to a candidate, and excluded the vast expenditures of money in the activities herein shown to be engaged in extensively. Of what avail would a law be to prohibit the contributing direct to a candidate and yet permit the expenditure of large sums in his behalf?"). Taft-Hartley therefore extended the prohibition to any "contribution or expenditure" by a corporation or a union "in connection with" a federal election. §304, 61 Stat. 159.[5]

D

The new law left open, however, the right of a union to spend money on electioneering from a segregated fund raised specifically for that purpose from members, but not drawn from the general treasury. Segregated funding enti-

[5] Taft-Hartley also specified that the prohibition extends to primary elections, 61 Stat. 159, an extension that had been thought likely to exceed the authority of Congress under Art. I, §4, of the Constitution until our decision in *United States* v. *Classic*, 313 U. S. 299, 317 (1941). See H. R. Rep. No. 2093, 78th Cong., 2d Sess., 8–9 (1945) (discussing the significance of *Classic*).

ties, the now-familiar political action committees or PACs, had been established prior to Taft-Hartley, and we concluded in *Pipefitters* v. *United States*, 407 U. S. 385, 409 (1972), that Taft-Hartley did not prohibit "union contributions and expenditures from political funds financed in some sense by the voluntary donations of employees."

This balance of authorized and restricted financing methods for corporate and union electioneering was made explicit in the Federal Election Campaign Act of 1971 (FECA). See §205, 86 Stat. 10 ("[T]he phrase 'contribution or expenditure' . . . shall not include . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization"). "[T]he underlying theory [of the statute was] that substantial general purpose treasuries should not be diverted to political purposes, both because of the effect on the political process of such aggregated wealth and out of concern for the dissenting member or stockholder." 117 Cong. Rec. 43381 (1971) (statement of Rep. Hansen). But the PAC exception maintained "'the proper balance in regulating corporate and union political activity required by sound policy and the Constitution.'" *Pipefitters*, *supra*, at 431 (quoting 117 Cong. Rec. 43381 (statement of Rep. Hansen)).[6]

[6] FECA also validated corporate and union spending on internal communications and nonpartisan activities designed to promote voting. See §205, 86 Stat. 10 ("[T]he phrase 'contribution or expenditure' . . . shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject [or] nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families"). "'If an organization . . . believes that certain candidates pose a threat to its well-being or the well-being of its members or stockholders, it should be able to get its views to those members or stockholders. . . . Both union members and stockholders have the right to expect this expert guidance.'" *Pipefitters*, 407 U. S., at 431, n. 42 (quoting 117 Cong. Rec. 43380 (statement of Rep. Hansen)).

E

In 1986, in *MCFL,* we reexamined the longstanding ban on spending corporate and union treasury funds "in connection with" federal elections, 2 U. S. C. § 441b, and drew two conclusions implicated in the present cases. First, we construed the "in connection with" phrase in much the same way we had interpreted comparable FECA language challenged in *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*. We held that to avoid vagueness, the product of prohibited corporate and union expenditures "must constitute 'express advocacy' in order to be subject to the prohibition." *MCFL*, 479 U. S., at 249.

We thus held that the prohibition applied "only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U. S., at 44. "[E]xpress terms," in turn, meant what had already become known as "magic words," such as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.*, at 44, n. 52. The consequence of this construction was obvious: it pulled the teeth out of the statute, as we had understood when we announced it in its earlier application in *Buckley:*

> "The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness . . . undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or officeholder. It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Id.*, at 45.

Nor was the statute, even as thus narrowed, enforceable against the particular advocacy corporation challenging the

limit in *MCFL*. This was the second holding of *MCFL* relevant here; we explained that the congressional effort to limit the political influence of corporate money "has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes," 479 U. S., at 259. We held that this "legitima[te]" concern could not reasonably extend to electioneering expenditures by the corporation at issue in *MCFL*, which neither "engage[d] in business activities" nor accepted donations from business corporations and unions (and thus could not serve as a "condui[t]" for political spending by those entities). *Id.*, at 263–264.[7]

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[7] Cf. *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 664 (1990) (First Amendment does not protect a nonprofit corporation from expenditure limits if the corporation accepts corporate and union contributions, lest corporations and unions readily "circumvent" restrictions on their own election spending "by funneling money through" nonprofits). JUSTICE SCALIA asserts that *Austin* "strayed far from" the principles we announced in *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978). *Ante*, at 489 (opinion concurring in part and concurring in judgment). *Bellotti*, however, concerned corporate spending in connection with a referendum, and we went out of our way in that case to avoid casting any doubt upon the constitutionality of limiting corporate expenditures during candidate elections. We said:

"The overriding concern behind the enactment of [the federal restrictions on corporate contributions and expenditures] was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." 435 U. S., at 788, n. 26 (citations omitted).

Eight years before *Austin*, we unanimously reaffirmed that *Bellotti* "specifically pointed out that in elections of candidates to public office,

F

As was expectable, narrowing the corporate-union electioneering limitation to magic words soon reduced it to futility. "[P]olitical money . . . is a moving target," Issacharoff & Karlan, The Hydraulics of Campaign Finance Reform, 77 Texas L. Rev. 1705, 1707 (1999), and the "ingenuity and resourcefulness" of political financiers revealed the massive regulatory gap left by the "magic words" test, *Buckley*, *supra*, at 45. It proved to be the door through which so-called "issue ads" of current practice entered American politics.

An issue ad is an advertisement on a political subject urging the reader or listener to let a politician know what he thinks, but containing no magic words telling the recipient to vote for or against anyone. By the 1996 election cycle, between $135 and $150 million was being devoted to these ads, see *McConnell*, 540 U. S., at 127, n. 20, and because they had no magic words, they failed to trigger the limitation on union or corporate expenditures for electioneering. Experience showed, however, just what we foresaw in *Buckley*, that the line between "issue" broadcasts and outright electioneering was a patent fiction, as in the example of a television "issue ad" that ran during a Montana congressional race between Republican Rick Hill and Democrat Bill Yellowtail in 1996:

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unlike in referenda on issues of general public interest, there may well be a threat of real or apparent corruption." *Federal Election Comm'n* v. *National Right to Work Comm.*, 459 U. S. 197, 210, n. 7 (1982). Then, four years later, in *MCFL*, we also noted that an expenditure limit offering corporations a PAC alternative is "distinguishable from the complete foreclosure of any opportunity for political speech" that we addressed in *Bellotti*. 479 U. S., at 259, n. 12. So *Austin* did not "stra[y]" from *Bellotti*, *ante*, at 489 (opinion of SCALIA, J.); the reasons *Bellotti* was not controlling in *Austin* had been clearly foreshadowed in *Bellotti* itself and confirmed repeatedly in our decisions leading up to *Austin*.

> "'"Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values."'" *McConnell*, *supra*, at 193–194, n. 78.[8]

There are no "magic words" of "express advocacy" in that statement, but no one could deny with a straight face that the message called for defeating Yellowtail.

There was nothing unusual about the Yellowtail issue ad in 1996, and an enquiry into campaign practices by the Senate Committee on Governmental Affairs found as a general matter that "the distinction between issue and express advocacy . . . appeared to be meaningless in the 1996 elections." S. Rep. No. 105–167, p. 3994 (1998). "'"What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day."'" *McConnell*, *supra*, at 126, n. 16 [9] (quoting the former director of an advocacy organization's PAC). Indeed, the president of the AFL–CIO stated that

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[8] Or this example from a Texas district where Democrat Nick Lampson challenged incumbent Republican Steve Stockman, and where the AFL–CIO ran the following advertisement in September and October of 1996:

"'[Narrator] What's important to America's families? [Middle-aged man] "My pension is very important because it will provide a significant amount of my income when I retire." [Narrator] And where do the candidates stand? Congressman Steve Stockman voted to make it easier for corporations to raid employee pension funds. Nick Lampson opposes that plan. He supports new safeguards to protect employee pension funds. When it comes to your pension, there is a difference. Call and find out.'" *McConnell* v. *Federal Election Comm'n*, 251 F. Supp. 2d 176, 201 (DC 2003) *(per curiam)* (emphasis deleted; brackets in original).

[9] Quoting *id.*, at 536, 537 (Kollar-Kotelly, J.) (in turn quoting T. Metaksa, Opening Remarks at the American Assn. of Political Consultants Fifth General Session on "Issue Advocacy," Jan. 17, 1997, p. 2).

"'the bulk of'" its ads were targeted for broadcast in districts represented by "'first-term, freshmen Republicans who . . . may be defeatable,'" S. Rep. No. 105–167, at 3997, 3998, and n. 23, and the Senate Committee found that the union used a "$.15 per member, per month assessment" to finance "issue ads that were clearly designed to influence the outcome of the election," *id.*, at 3999, 4000. Not surprisingly, "ostensibly independent" ads "were often actually coordinated with, and controlled by, the campaigns." *McConnell*, *supra*, at 131.

Nor was it surprising that the Senate Committee heard testimony that "'[w]ithout taming'" the vast sums flowing into issue ads, "'campaign finance reform—no matter how thoroughly it addresses . . . perceived problems—will come to naught.'" S. Rep. No. 105–167, at 4480 (quoting testimony of Professor Daniel R. Ortiz). The Committee predicted that "if the course of non-action is followed, . . . Congress would be encouraging further growth of union, corporate nonprofit and individual independent expenditures." *Id.*, at 4481.[10] The next two elections validated the

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[10] The Senate Committee was not alone in its concerns. In Wisconsin, for example, the Governor's Blue-Ribbon Commission on Campaign Finance Reform reported:

"Especially beginning in 1996, issue advocacy during the campaign season dramatically expanded in Wisconsin.

. . . . . .

"The Commission concludes that, in each of these cases, the expenditures were clearly campaign-oriented activities. They were quite clearly designed to influence the electoral process. They were focused either on electing or defeating a candidate. The Commission bases this conclusion on the following points:

"Although those paying for the activities claimed they were aimed solely at educating voters on the issues, they each mentioned the names of candidates for office.

"They occurred only when election races were in progress that involved a contest between an incumbent and a challenger. When the election was over, the activities ended.

[Footnote 10 is continued on p. 518]

prediction: during the 1998 cycle, spending on issue ads doubled to between $270 and $340 million, and the figure climbed to $500 million in the 2000 cycle. *McConnell*, 540 U. S., at 127, n. 20. A report from the Annenberg Public Policy Center concluded that "[t]he type of issue ad that dominated depended greatly on how close we were to the general election. . . . Though candidate-centered issue ads always made up a majority of issue ads, as the election approached the percent [of] candidate-centered spots increased . . . such that by the last two months before the election almost all televised issue spots made a case for or against a candidate." Issue Advertising in the 1999–2000 Election Cycle 14 (2001).

They were worth the money of those who ultimately paid for them. According to one former Senator, "'Members will . . . be favorably disposed to those who finance'" interest groups that run "'issue ads'" when those financiers "'later seek access to discuss pending legislation.'" *McConnell* v. *Federal Election Comm'n*, 251 F. Supp. 2d 176, 556 (DC 2003) (Kollar-Kotelly, J.) (quoting the declaration of Dale Bumpers).

"The activity has occurred after legislative sessions when the issues about which advocacy was occurring were not being deliberated by the legislature.

"The activity occurred in campaign season, between the candidate's filing for candidacy and election time. Advertisements of this sort have tended to occur at virtually no other time.

"The activity involved the electronic media, mass mailings, or centrally located telephone banks.

. . . . . .

"The explosive growth of campaign-based advocacy, without even disclosure of its activities and funding sources, poses a grave risk to the integrity of elections. It has created a two-tiered campaign process: one, based in candidates and political parties, which is tightly regulated and controlled; the other, based in interest group activity under the guise of 'issue advocacy' but actually quite clearly election-focused, which lies beyond accountability." 1 Governor's Blue-Ribbon Commission on Campaign Finance Reform, State of Wisconsin: Report of the Commission, online at http://www.lafollette.wisc.edu/campaign_reform/final.htm.

The congressional response was § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 91, which redefined prohibited "expenditure" so as to restrict corporations and unions from funding "electioneering communication[s]" out of their general treasuries. 2 U. S. C. § 441b(b)(2) (2000 ed., Supp. IV). The new phrase "electioneering communication" was narrowly defined in BCRA's § 201 as "any broadcast, cable, or satellite communication" that

> "(I) refers to a clearly identified candidate for Federal office;
>
> "(II) is made within—
>
> "(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> "(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> "(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate." § 434(f)(3)(A)(i).

III

In *McConnell*, we found this definition to be "easily understood and objectiv[e]," raising "none of the vagueness concerns that drove our analysis" of the statutory language at issue in *Buckley* and *MCFL*, 540 U. S., at 194, and we held that the resulting line separating regulated election speech from general political discourse does not, on its face, violate the First Amendment. We rejected any suggestion "that *Buckley* drew a constitutionally mandated line between express advocacy [with magic words] and so-called issue advocacy [without them], and that speakers possess an inviolable First Amendment right to engage in the latter category of speech." *Id.*, at 190. To the contrary, we held that "our

decisions in *Buckley* and *MCFL* were specific to the statutory language before us; they in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech." *Id.*, at 192–193. "[T]he presence or absence of magic words cannot meaningfully distinguish electioneering speech," which is prohibitable, "from a true issue ad," we said, since ads that "esche[w] the use of magic words . . . are no less clearly intended to influence the election." *Id.*, at 193. We thus found "[l]ittle difference . . . between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id.*, at 126–127.

We understood that Congress had a compelling interest in limiting this sort of electioneering by corporations and unions, for § 203 exemplified a tradition of "repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *Id.*, at 205 (quoting *Austin*, 494 U. S., at 660). Nor did we see any plausible claim of substantial overbreadth from incidentally prohibiting ads genuinely focused on issues rather than elections, given the limitation of "electioneering communication" by time, geographical coverage, and clear reference to candidate. "Far from establishing that BCRA's application to pure issue ads is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion." 540 U. S., at 207. Finally, we underscored the reasonableness of the § 203 line by emphasizing that it defined a category of limited, but not prohibited, corporate and union speech: "Because corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view [§ 203] as a 'complete ban' on expression rather than a regulation." *Id.*, at 204 (quoting *Federal Election Comm'n* v. *Beaumont*, 539 U. S. 146, 162 (2003)).

Thus "corporations and unions may finance genuine issue ads [in the runup period] by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated [PAC] fund." 540 U. S., at 206.

We may add that a nonprofit corporation, no matter what its source of funding, is free to pelt a federal candidate like Jane Doe with criticism or shower her with praise, by name and within days of an election, if it speaks through a newspaper ad or on a Web site, rather than a "broadcast, cable, or satellite communication," 2 U. S. C. § 434(f)(3)(A)(i) (2000 ed., Supp. IV). And a nonprofit may use its general treasury to pay for clearly "electioneering communication[s]" so long as it declines to serve as a conduit for money from business corporations and unions (and thus qualifies for the *MCFL* exception).[11]

* * *

In sum, Congress in 1907 prohibited corporate contributions to candidates and in 1943 applied the same ban to unions. In 1947, Congress extended the complete ban from contributions to expenditures "in connection with" an election, a phrase so vague that in 1986 we held it must be confined to instances of express advocacy using magic words. Congress determined, in 2002, that corporate and union expenditures for fake issue ads devoid of magic words should be regulated using a narrow definition of "electioneering communication" to reach only broadcast ads that were the practical equivalents of express advocacy. In 2003, this Court found the provision free from vagueness and justified by the concern that drove its enactment.

This century-long tradition of legislation and judicial precedent rests on facing undeniable facts and testifies to an

[11] Campaign finance laws also continue to provide several specific exemptions from the general prohibition on corporate election-related spending, including communications "on any subject" with stockholders and certain personnel, as well as "nonpartisan registration and get-out-the-vote campaigns" similarly aimed at shareholders and personnel. § 441b(b)(2); see also n. 6, *supra*.

equally undeniable value. Campaign finance reform has been a series of reactions to documented threats to electoral integrity obvious to any voter, posed by large sums of money from corporate or union treasuries, with no redolence of "grassroots" about them. Neither Congress's decisions nor our own have understood the corrupting influence of money in politics as being limited to outright bribery or discrete *quid pro quo;* campaign finance reform has instead consistently focused on the more pervasive distortion of electoral institutions by concentrated wealth, on the special access and guaranteed favor that sap the representative integrity of American government and defy public confidence in its institutions. From early in the 20th century through the decision in *McConnell*, we have acknowledged that the value of democratic integrity justifies a realistic response when corporations and labor organizations commit the concentrated moneys in their treasuries to electioneering.

IV

The corporate appellee in these cases, Wisconsin Right to Life (WRTL), is a nonprofit corporation funded to a significant extent by contributions from other corporations.[12] In 2004, WRTL accepted over $315,000 in corporate donations, App. 40, and of its six general fund contributions of $50,000 or more between 2002 and 2005, three, including the largest (for $140,000), came from corporate donors, *id.*, at 118–121.

WRTL also runs a PAC, funded by individual donations, which has been active over the years in making independent campaign expenditures, as in the previous two elections involving Senator Feingold. *Id.*, at 15. During the 1998 campaign, for example, WRTL's PAC spent $60,000 to oppose

[12] To the extent these facts are disputed, we must view them in the light most favorable to the Federal Election Commission and the intervenor-defendants, since the District Court granted WRTL's motion for summary judgment. See *Pennsylvania State Police* v. *Suders*, 542 U. S. 129, 134 (2004).

him. *Ibid.* In 2004, however, despite a sharp nationwide increase in PAC receipts, WRTL focused its fundraising on its corporate treasury, not the PAC, *id.*, at 41–43, and took in only $17,000 in PAC contributions, as against over $150,000 during 2000, *id.*, at 41–42.

Throughout the 2004 senatorial campaign, WRTL made no secret of its views about who should win the election and explicitly tied its position to the filibuster issue. Its PAC issued at least two press releases saying that its "Top Election Priorities" were to "Re-elect George W. Bush" and "Send Feingold Packing!" *Id.*, at 78–80, 82–84. In one of these, the Chair of WRTL's PAC was quoted as saying, " 'We do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees.' " *Id.*, at 82–83. The Spring 2004 issue of the WRTL PAC's quarterly magazine ran an article headlined "Radically Pro-Abortion Feingold Must Go!," which reported that "Feingold has been active in his opposition to Bush's judicial nominees" and said that "the defeat of Feingold must be uppermost in the minds of Wisconsin's pro-life community in the 2004 elections." *Id.*, at 101–103.

It was under these circumstances that WRTL ran the three television and radio ads in question. The bills for them were not paid by WRTL's PAC, but out of the general treasury with its substantial proportion of corporate contributions; in fact, corporations earmarked more than $50,000 specifically to pay for the ads, *id.*, at 41. Each one criticized an unnamed "group of Senators" for "using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' vote," and described the Senators' actions as "politics at work, causing gridlock and backing up some of our courts to a state of emergency."[13] They exhorted viewers and listeners to "[c]ontact Senators Feingold and Kohl

[13] These quotations are taken from the "Wedding" ad, although the relevant language in all of the ads is virtually identical. See *ante*, at 458–459, and nn. 2–3 (principal opinion) (internal quotation marks omitted).

and tell them to oppose the filibuster," but instead of providing a phone number or e-mail address, they told the audience to go to BeFair.org, a Web site set up by WRTL. A visit to this Web site would erase any doubt a listener or viewer might have as to whether Senators Feingold and Kohl were part of the "group" condemned in the ads: it displayed a document that criticized the two Senators for voting to filibuster "16 out of 16 times" and accused them of "putting politics into the court system, creating gridlock, and costing taxpayers money." *Id.*, at 86.

WRTL's planned airing of the ads had no apparent relation to any Senate filibuster vote but was keyed to the timing of the senatorial election. WRTL began broadcasting the ads on July 26, 2004, four days after the Senate recessed for the summer, and although the filibuster controversy raged on through 2005, WRTL did not resume running the ads after the election. *Id.*, at 29, 32. During the campaign period that the ads did cover, Senator Feingold's support of the filibusters was a prominent issue. His position was well known,[14] and his Republican opponents, who vocally opposed the filibusters, made the issue a major talking point in their campaigns against him.[15]

In sum, any Wisconsin voter who paid attention would have known that Democratic Senator Feingold supported filibusters against Republican presidential judicial nominees, that the propriety of the filibusters was a major issue in the senatorial campaign, and that WRTL along with the Senator's Republican challengers opposed his reelection because

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[14] See, *e. g.*, Hearing before the Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary, 108th Cong., 1st Sess., 5–7 (2003) (statement of Sen. Feingold).

[15] See Gilbert, 3 Seeking Feingold Seat Attack Him on Judges Issue, Milwaukee Journal Sentinel, Nov. 18, 2003, App. 70–76 ("In Wisconsin, the three Republicans vying to take on Senate Democrat Russ Feingold are attacking him on judges and assert the controversy resonates with voters").

of his position on filibusters. Any alert voters who heard or saw WRTL's ads would have understood that WRTL was telling them that the Senator's position on the filibusters should be grounds to vote against him.

Given these facts, it is beyond all reasonable debate that the ads are constitutionally subject to regulation under *McConnell*. There, we noted that BCRA was meant to remedy the problem of "[s]o-called issue ads" being used "to advocate the election or defeat of clearly identified federal candidates." 540 U. S., at 126. We then gave a paradigmatic example of these electioneering ads subject to regulation, saying that "[l]ittle difference existed . . . between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id.*, at 126–127.

The WRTL ads were indistinguishable from the Jane Doe ad; they "condemned [Senator Feingold's] record on a particular issue" and exhorted the public to contact him and "tell [him] what you think."[16] And just as anyone who heard the Jane Doe ad would understand that the point was to defeat Doe, anyone who heard the Feingold ads (let alone anyone who went to the Web site they named) would know that WRTL's message was to vote against Feingold. If it is now unconstitutional to restrict WRTL's Feingold ads, then it follows that § 203 can no longer be applied constitutionally to *McConnell*'s Jane Doe paradigm.

McConnell's holding that § 203 is facially constitutional is overruled. By what steps does the principal opinion reach this unacknowledged result less than four years after *McConnell* was decided?

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[16] That the ads purported to target Senator Kohl as well as Senator Feingold is of little import; since the ads would have run during the peak of the 2004 campaign, the audience's focus would naturally fall more heavily on Senator Feingold (who was up for reelection) rather than Senator Kohl (who was not).

A

First, it lays down a new test to identify a severely limited class of ads that may constitutionally be regulated as electioneering communications, a test that is flatly contrary to *McConnell*. An ad is the equivalent of express advocacy and subject to regulation, the opinion says, only if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Ante*, at 470. Since the Feingold ads could, in isolation, be read as at least including calls to communicate views on filibusters to the two Senators, those ads cannot be treated as the functional equivalent of express advocacy to elect or defeat anyone, and therefore may not constitutionally be regulated at all.

But the same could have been said of the hypothetical Jane Doe ad. Its spoken message ended with the instruction to tell Doe what the voter thinks. The same could also have been said of the actual Yellowtail ad. Yet in *McConnell*, we gave the Jane Doe ad as the paradigm of a broadcast message that could be constitutionally regulated as election conduct, and we explicitly described the Yellowtail ad as a "striking example" of one that was "clearly intended to influence the election," 540 U. S., at 193, and n. 78.

The principal opinion, in other words, simply inverts what we said in *McConnell*. While we left open the possibility of a "genuine" or "pure" issue ad that might not be open to regulation under §203, *id.*, at 206–207, and n. 88, we meant that an issue ad without campaign advocacy could escape the restriction. The implication of the adjectives "genuine" and "pure" is unmistakable: if an ad is reasonably understood as going beyond a discussion of issues (that is, if it can be understood as electoral advocacy), then by definition it is not "genuine" or "pure." But the principal opinion inexplicably wrings the opposite conclusion from those words: if an ad is susceptible to any "reasonable interpretation other than as an appeal to vote for or against a specific candidate," then it must be a "pure" or "genuine" issue ad. *Ante*, at 470. This

stands *McConnell* on its head, and on this reasoning it is possible that even some ads with magic words could not be regulated.

B

Second, the principal opinion seems to defend this inversion of *McConnell* as a necessary alternative to an unadministrable subjective test for the equivalence of express (and regulable) electioneering advocacy. The principal opinion acknowledges, of course, that in *McConnell* we said that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during [the period shortly before an election] if the ads are intended to influence the voters' decisions and have that effect." 540 U. S., at 206. But THE CHIEF JUSTICE says that statement in *McConnell* cannot be accepted at face value because we could not, consistent with precedent, have focused our First Amendment enquiry on whether "the speaker actually intended to affect an election." *Ante*, at 468.[17] THE CHIEF JUSTICE suggests it is

[17] THE CHIEF JUSTICE says that *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, "already rejected" any test that calls for an assessment of the intent and effect of corporate electioneering. *Ante*, at 467. The "reject[ion]" to which THE CHIEF JUSTICE presumably refers is *Buckley*'s quotation of *Thomas* v. *Collins*, 323 U. S. 516 (1945), where we found impermissibly vague a statute that permitted a union leader to "'laud unionism'" but forbade him to "imply an invitation" to join a union. *Id.*, at 534. The problem with this predicament, we reasoned, was the lack of a clearly permissible opportunity for expression: Whether words "designed to fall short of invitation would miss that mark is a question both of intent and of effect," and no speaker "safely could assume that anything he might say . . . would not be understood by some as an invitation." *Id.*, at 535. We then specified that the speaker in *Thomas* was left with an impermissibly limited universe of "three choices: (1) to stand on his right and speak freely; (2) to quit, refusing entirely to speak; (3) to trim, and even thus to risk the penalty." *Id.*, at 536.

THE CHIEF JUSTICE implies that considering the intent and effect of corporate advertising during as-applied challenges to § 203 would put corporations in precisely the same bind; thus, he wonders how *McConnell* could use the language of intent and effect without "even address[ing]

more likely that the *McConnell* opinion inadvertently borrowed the language of "intended . . . effect[s]," 540 U. S., at 206, from academic studies in the record of viewers' perceptions of the ads' purposes, *ante*, at 466–467.[18]

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what *Buckley*" (and by extension, *Thomas*) "had to say on the subject." *Ante*, at 467. But one need not look far in our *McConnell* opinion to understand why we thought that corporations have more than the constrained set of options available to the union leader in *Thomas*. Just a few sentences after holding that ads with electioneering intent and effect are regulable, we gave this explanation: "in the future corporations and unions may finance genuine issue ads [shortly before an election] by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." 540 U. S., at 206. In other words, corporations can find refuge in constitutionally sufficient and clearly delineated safe harbors by modifying the content of their ads (by omitting a candidate's name) or by altering the sources of their ads' financing (from general treasuries to PACs). THE CHIEF JUSTICE thus wrongly jettisons our conclusions about the constitutionality of regulating ads with electioneering purpose; we meant what we said in *McConnell*, and we did not overlook First Amendment jurisprudence when we said it. Whereas THE CHIEF JUSTICE says that BCRA "should provide a safe harbor for those who wish to exercise First Amendment rights," *ante*, at 467, we already held in *McConnell* that the campaign finance law accomplishes precisely that.

[18] THE CHIEF JUSTICE speculates that *McConnell* derived its test for functional equivalence from "[t]wo key studies," *ante*, at 466, but not a shred of language in *McConnell* supports that theory. In stating the legal standard, *McConnell* made no mention of any study. What is the authority, then, for asserting that the studies were pivotal to the standard we announced in *McConnell?* See *ante*, at 466. Other than WRTL's brief, THE CHIEF JUSTICE cites only Judge Henderson's separate District Court opinion in *McConnell*. *Ante*, at 466. But THE CHIEF JUSTICE quotes one part of Judge Henderson's analysis and neglects to mention that she in turn was quoting the lead author of one of the studies in question: "According to the Brennan Center, the *Buying Time* reports were 'the central piece of evidence marshaled by defenders of' BCRA's electioneering communication provisions 'in support of their constitutional validity.'" *McConnell*, 251 F. Supp. 2d, at 307–308 (quoting deposition of Craig B. Holman, principal co-author of Buying Time 2000: Television Advertising in the 2000 Federal Elections (Brennan Center 2001); italics in original; brackets omitted).

If THE CHIEF JUSTICE were correct that *McConnell* made the constitutional application of § 203 contingent on whether a corporation's "motives were pure," or its issue advocacy "subjective[ly] sincer[e]," *ante*, at 468 (internal quotation marks omitted), then I, too, might be inclined to reconsider *McConnell*'s language. But *McConnell* did not do that. It did not purport to draw constitutional lines based on the subjective motivations of corporations (or their principals) sponsoring political ads, but merely described our test for equivalence to express advocacy as resting on the ads' "electioneering purpose," which will be objectively apparent from those ads' content and context (as these cases and the examples cited in *McConnell* readily show). We therefore held that § 203 was not substantially overbroad because "the vast majority of ads clearly had such a purpose," and consequently could be regulated consistent with the First Amendment. 540 U. S., at 206.

For that matter, if the studies to which THE CHIEF JUSTICE refers were now to inform our reading of *McConnell*, they would merely underscore the objective character of the proper way to determine whether § 203 is constitutional as applied to a given ad. The authors of those studies did not conduct discovery of the "actua[l] inten[tions]," *ante*, at 468, behind any ads; nor, to my knowledge, were the sponsors of campaign ads summoned before researchers to explain their motivations. The studies merely confirmed that "reasonable people are . . . able to discern between ads whose primary purpose is to support a candidate and those intended to provide information about a policy issue." J. Krasno & D. Seltz, Buying Time: Television Advertising in the 1998 Congressional Elections 9 (2000). To be clear, I am not endorsing the precise methodology of those studies (and THE CHIEF JUSTICE is correct that we did not do so in *McConnell*, *ante*, at 467, n. 4); the point is only that the studies relied on a "reasonable" person's understanding of the ads' apparent

purpose, and thus were no less objective than THE CHIEF JUSTICE's own approach.

A similarly mistaken fear of an unadministrable and speech-chilling subjective regime seems to underlie THE CHIEF JUSTICE's unwillingness to acknowledge the part that consideration of an ad's context necessarily plays in any realistic assessment of its meaning. A reasonable Wisconsinite watching or listening to WRTL's ads would likely ask and answer some obvious questions about their circumstances. Is the group that sponsors these ads the same one publicly campaigning against Senator Feingold's reelection? THE CHIEF JUSTICE says that this information is "beside the point," because WRTL's history of overt electioneering only "goes to [its] subjective intent." *Ante*, at 472. Did these "issue" ads begin appearing on the air during the election season, rather than at the time the filibuster "issue" was in fact being debated in the Senate? This, too, is said to be irrelevant. *Ibid.* And does the Web site to which WRTL's ads direct viewers contain material expressly advocating Senator Feingold's defeat? This enquiry is dismissed as being "one step removed from the text of the ads themselves." *Ante*, at 473. But these questions are central to the meaning of the ads, and any reasonable person would take account of circumstances in coming to understand the object of WRTL's ad. And why not? Each of the contextual facts here can be established by an objective look at a public record; none requires a voter (or a litigant) to engage in discovery of evidence about WRTL's operations or internal communications, and none goes to a hidden state of mind.

This refusal to see and hear what any listener to WRTL's ads would actually consider produces a rule no different in practice from the one adopted by the District Court, which declined to look beyond the "four corners" of the ads themselves. 466 F. Supp. 2d 195, 207 (DC 2006). Although THE CHIEF JUSTICE ostensibly stops short of categorically fore-

closing consideration of context, see *ante*, at 473–474, the application of his test here makes it difficult to see how relevant contextual evidence could ever be taken into account the way it was in *McConnell*,[19] and it is hard to imagine THE CHIEF JUSTICE would ever find an ad to be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *ante*, at 470, unless it contained words of express advocacy. THE CHIEF JUSTICE thus effectively reinstates the same toothless "magic words" criterion of regulable electioneering that led Congress to enact BCRA in the first place.

C

Third, it may be that the principal opinion rejects *McConnell* on the erroneous assumption that §203 flatly bans independent electioneering communications by a corporation. THE CHIEF JUSTICE argues that corporations must receive "the benefit of any doubt," *ante*, at 469, whenever we undertake the task of "separating . . . political speech protected under the First Amendment from that which may be banned," *ante*, at 467. But this is a fundamental misconception of the task at hand: we have already held that it is "'simply wrong' to view [§203] as a 'complete ban' on expression," because PAC financing provides corporations "with a consti-

[19] Like the District Court, the only bit of context THE CHIEF JUSTICE would allow the reasonable listener is the congressional agenda: whether the "'issue'" addressed in an ad currently is, or soon will be, "'the subject of legislative scrutiny.'" *Ante*, at 474 (quoting 466 F. Supp. 2d, at 207). For example, THE CHIEF JUSTICE says, there would have been "no reason" to think that WRTL's ad constituted anything but a pure issue ad if it addressed a bill pending during Senator Feingold's reelection campaign, such as the Universal National Service Act. *Ante*, at 470. It is revealing, of course, that THE CHIEF JUSTICE does not invoke the filibuster issue, the subject of WRTL's ads, as the legislative matter with particular salience during the 2004 election. But why the reasonable listener can look to Congress but not the calendar on the wall or a WRTL Web site is difficult to fathom.

tutionally sufficient opportunity to engage in express advocacy."[20] *McConnell*, 540 U. S., at 203–204 (quoting *Beaumont*, 539 U. S., at 162). Thus, a successful as-applied challenger to § 203 should necessarily show, at the least, that it could not constitutionally be subjected to the administrative rules that govern a PAC's formation and operation. See *id.*, at 163. This would be an uphill fight, after our repeated affirmations that the PAC structure does not impose excessive burdens, *ibid.* (citing *National Right to Work Comm.*, 459 U. S., at 201–202), and WRTL has a particularly weak position on this point: it set up its own PAC long before the 2004 election, used it to campaign openly against Senator Feingold in the past, and could have raised noncorporate donations to it in the 2004 election cycle. Any argument that establishing and maintaining a PAC is unconstitutionally burdensome for WRTL would thus likely be futile, and certainly should not prevail on WRTL's summary judgment motion.

For that matter, even without the PAC alternative, it would be untrue that § 203 "banned" WRTL from saying anything a genuine issue ad would say, for WRTL could have availed itself of either or both of the following additional options. It is undisputed that WRTL's ads could have been broadcast lawfully in the runup to the election (and bankrolled from WRTL's general treasury) if Senator Feingold's name had been omitted and the Senator not otherwise singled out. Since members of today's majority apparently view WRTL's broadcasts either as "genuine issue ad[s]," *ante*, at 470 (opinion of THE CHIEF JUSTICE), or as "lobby-[ing] Wisconsin voters concerning the filibustering of the President's judicial nominees," *ante*, at 484 (SCALIA, J., concurring in part and concurring in judgment), a claim that

[20] JUSTICE SCALIA also adopts the same misconception that § 203 is a "ban" on speech. See *ante*, at 499 ("Section 203's line is bright, but it bans vast amounts of political advocacy indistinguishable from hitherto protected speech").

omitting Senator Feingold's name would "ban" WRTL's message is specious. Yet one searches my Brothers' opinions in vain for any persuasive reason why substituting the phrase "Contact your Senators" for the phrase "Contact Senators Feingold and Kohl" would have denied WRTL a constitutionally sufficient (and clearly lawful) alternative way to send its message. If WRTL is to be believed when it claims that the issue was the point of the ads, it would have lost nothing by referring simply to the "Senators."

Finally, the suggestion that § 203 is a ban on political speech is belied by *MCFL*'s safe harbor for nonprofit advocacy corporations: under that rule, WRTL would have been free to attack Senator Feingold by name at any time with ads funded from its corporate treasury, if it had not also chosen to serve as a funnel for hundreds of thousands of dollars from other corporations. Thus, what is called a "ban" on speech is a limit on the financing of electioneering broadcasts by entities that refuse to take advantage of the PAC structure but insist on acting as conduits from the campaign war chests of business corporations.

D

In sum, *McConnell* does not graft a subjective standard onto campaign regulation, the context of campaign advertising cannot sensibly be ignored, and § 203 is not a ban on speech. What cannot be gainsaid, in any event, is that in treating these subjects as it does, the operative opinion produces the result of overruling *McConnell*'s holding on § 203, less than four years in the Reports. Anyone who doubts that need merely ask what the law would have been if, back in 2003, this Court had held § 203 facially unconstitutional.

BCRA's definition of "electioneering communication," which identifies the communications regulable under § 203, includes a backup to be used if the primary definition "is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein." 2 U. S. C.

§ 434(f)(3)(A)(ii) (2000 ed., Supp. IV). If this should occur, "electioneering communication" is to be defined as

> "any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." *Ibid.*

This backup sounds familiar because it is essentially identical to THE CHIEF JUSTICE's test for evaluating an as-applied challenge to the original definition of "electioneering communication": regulation is permissible only if the communication is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *ante*, at 470. Thus does the principal opinion institute the very standard that would have prevailed if the Court formally overruled *McConnell*. There is neither a theoretical nor a practical basis to claim that *McConnell*'s treatment of § 203 survives.

E

The price of *McConnell*'s demise as authority on § 203 seems to me to be a high one. The Court (and, I think, the country) loses when important precedent is overruled without good reason, and there is no justification for departing from our usual rule of *stare decisis* here. The same combination of alternatives that was available to corporations affected by *McConnell* in 2003 is available today: WRTL could have run a newspaper ad, could have paid for the broadcast ads through its PAC, could have established itself as an *MCFL* organization free of corporate money, and could have said "call your Senators" instead of naming Senator Feingold in its ads broadcasted just before the election. Nothing in the related law surrounding § 203 has changed in any way, let alone in any way that undermines *McConnell*'s rationale.

See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854–855 (1992).

Nor can any serious argument be made that *McConnell*'s holding has been "unworkable in practice." *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U. S. 768, 783 (1992) (internal quotation marks omitted). *McConnell* validated a clear rule resting on mostly bright-line conditions, and there is no indication that the statute has been difficult to apply.[21] Although WRTL contends that the as-applied remedy has proven to be "[i]nadequate" because such challenges cannot be litigated quickly enough to avoid being mooted, Brief for Appellee 65–66, nothing prevents an advertiser from obtaining a preliminary injunction if it can qualify for one, and WRTL does not point to any evidence that district courts have been unable to rule on any such matters in a timely way.

Finally, it goes without saying that nothing has changed about the facts. In Justice Frankfurter's words, they demonstrate a threat to "the integrity of our electoral process," *Automobile Workers*, 352 U. S., at 570, which for a century now Congress has repeatedly found to be imperiled by corporate, and later union, money: witness the Tillman Act, Taft-Hartley, FECA, and BCRA. See Part II, *supra*. *McConnell* was our latest decision vindicating clear and reasonable boundaries that Congress has drawn to limit "'the corrosive and distorting effects of immense aggregations of wealth,'" 540 U. S., at 205 (quoting *Austin*, 494 U. S., at 660), and the

[21] These as-applied challenges provide no reason to second-guess our conclusion in *McConnell* that the rule for differentiating between electioneering ads and genuine issue ads is administrable. WRTL's ads clearly have an electioneering purpose and, as explained above, fall comfortably within the heartland of electioneering communications that §203 may validly regulate. Thus, although JUSTICE SCALIA claims that "[t]oday's cases make it apparent" that *McConnell* must be overruled, *ante*, at 500, there is nothing about today's cases that suggests that *McConnell* is unworkable. We therefore have no occasion to reconsider *McConnell* from first principles.

decision could claim the justification of ongoing fact as well as decisional history in recognizing Congress's authority to protect the integrity of elections from the distortion of corporate and union funds.

After today, the ban on contributions by corporations and unions and the limitation on their corrosive spending when they enter the political arena are open to easy circumvention, and the possibilities for regulating corporate and union campaign money are unclear. The ban on contributions will mean nothing much, now that companies and unions can save candidates the expense of advertising directly, simply by running "issue ads" without express advocacy, or by funneling the money through an independent corporation like WRTL.

But the understanding of the voters and the Congress that this kind of corporate and union spending seriously jeopardizes the integrity of democratic government will remain. The facts are too powerful to be ignored, and further efforts at campaign finance reform will come. It is only the legal landscape that now is altered, and it may be that today's departure from precedent will drive further reexamination of the constitutional analysis: of the distinction between contributions and expenditures, or the relation between spending and speech, which have given structure to our thinking since *Buckley* itself was decided.

I cannot tell what the future will force upon us, but I respectfully dissent from this judgment today.

Syllabus

WILKIE ET AL. *v.* ROBBINS

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

No. 06–219. Argued March 19, 2007—Decided June 25, 2007

Plaintiff-respondent Robbins's Wyoming guest ranch is a patchwork of land parcels intermingled with tracts belonging to other private owners, the State of Wyoming, and the National Government. The previous owner granted the United States an easement to use and maintain a road running through the ranch to federal land in return for a right-of-way to maintain a section of road running across federal land to otherwise isolated parts of the ranch. When Robbins bought the ranch, he took title free of the easement, which the Bureau of Land Management had not recorded. Robbins continued to graze cattle and run guest cattle drives under grazing permits and a Special Recreation Use Permit (SRUP) issued by the Bureau. Upon learning that the easement was never recorded, a Bureau official demanded that Robbins regrant it, but Robbins declined. Robbins claims that after negotiations broke down, defendant-petitioners (defendants) began a campaign of harassment and intimidation to force him to regrant the lost easement.

Robbins's suit for damages and declaratory and injunctive relief now includes a Racketeer Influenced and Corrupt Organizations Act (RICO) claim that defendants repeatedly tried to extort an easement from him and a similarly grounded *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, claim that defendants violated his Fourth and Fifth Amendment rights. Ultimately, the District Court denied defendants' motion to dismiss the RICO claim based on qualified immunity. As to the *Bivens* claims, it dismissed what Robbins called his Fourth Amendment malicious prosecution claim and his Fifth Amendment due process claims, but declined to dismiss a Fifth Amendment claim of retaliation for the exercise of Robbins's rights to exclude the Government from his property and to refuse to grant a property interest without compensation. It adhered to this denial on summary judgment. The Tenth Circuit affirmed.

Held:

1. Robbins does not have a private action for damages of the sort recognized in *Bivens*. Pp. 549–562.

(a) In deciding whether to devise a *Bivens* remedy for retaliation against the exercise of ownership rights, the Court's first step is to ask whether any alternative, existing process for protecting the interest

amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding damages remedy. *Bush* v. *Lucas*, 462 U. S. 367, 378. But even absent an alternative, a *Bivens* remedy is a subject of judgment: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed . . . to any special factors counselling hesitation before authorizing a new kind of federal litigation." 462 U. S., at 378. Pp. 549–550.

(b) For purposes of step one, Robbins's difficulties with the Bureau can be divided into four categories. The first, torts or tort-like injuries, includes an unauthorized survey of the desired easement's terrain and an illegal entry into Robbins's lodge. In each instance, he had a civil damages remedy for trespass, which he did not pursue. The second category, charges brought against Robbins, includes administrative claims for trespass and other land-use violations, a fine for an unauthorized road repair, and two criminal charges. Robbins had the opportunity to contest all of the administrative charges; he fought some of the land-use and trespass citations, and challenged the road repair fine as far as the Interior Board of Land Appeals (IBLA), but did not seek judicial review after losing there. He exercised his right to jury trial on the criminal complaints. The fact that the jury took 30 minutes to acquit him tends to support his baseless-prosecution charge; but the federal trial judge did not find the Government's case thin enough to justify attorney's fees, and Robbins appealed that ruling late. The third category, unfavorable agency actions, involved a 1995 cancellation of the right-of-way given to Robbins's predecessor in return for the Government's unrecorded easement, a 1995 decision to reduce the SRUP from five years to one, and in 1999, the SRUP's termination and a grazing permit's revocation. Administrative review was available for each claim, subject to ultimate judicial review under the Administrative Procedure Act. Robbins did not appeal the 1995 decisions, stopped after an IBLA appeal of the SRUP denial, and obtained an IBLA stay of the grazing permit revocation. The fourth category includes three events that elude classification. An altercation between Robbins and his neighbor did not implicate the Bureau, and no criminal charges were filed. Bureau employees' videotaping of ranch guests during a cattle drive, though annoying and possibly bad for business, may not have been unlawful, depending, *e. g.*, on whether the guests were on public or private land. Also, the guests might be the proper plaintiffs in any tort action, and any tort might be chargeable against the Government, not its employees. Likewise up in the air is the significance of an attempt to pressure a Bureau of Indian Affairs employee to impound Robbins's cattle. An impoundment's legitimacy would have depended on whether the cattle were on private or public land, and no impoundment actually

occurred. Thus, Robbins has an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints. This state of law gives him no intuitively meritorious case for a new constitutional cause of action, but neither does it plainly answer no to the question whether he should have it. Pp. 551–554.

(c) This, then, is a case for *Bivens* step two, for weighing reasons for and against creating a new cause of action, as common law judges have always done. Robbins concedes that any single action might have been brushed aside as a small imposition, but says that in the aggregate the campaign against him amounted to coercion to extract the easement and should be redressed collectively. On the other side of the ledger is the difficulty in defining a workable cause of action. Robbins's claim of retaliation for exercising his property right to exclude the Government does not fit this Court's retaliation cases, which involve an allegation of impermissible purpose and motivation—*e. g.*, an employee is fired after speaking out on matters of public concern, *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 675—and whose outcome turns on "what for" questions—what was the Government's purpose in firing the employee and would he have been fired anyway. Such questions have definite answers, and this Court has established methods to identify the presence of an illicit reason. Robbins alleges not that the Government's means were illegitimate but that the defendants simply demanded too much and went too far. However, a "too much" kind of liability standard can never be as reliable as a "what for" one. Most of the offending actions are legitimate tactics designed to improve the Government's negotiating position. Although the Government is no ordinary landowner, in many ways it deals with its neighbors as one owner among the rest. So long as defendants had authority to withhold or withdraw Robbins's permission to use Government land and to enforce the trespass and land-use rules, they were within their rights to make it plain that Robbins's willingness to give an easement would determine how complaisant they would be about his trespasses on public land. As for Robbins's more abstract claim, recognizing a *Bivens* action for retaliation against those who resist Government impositions on their property rights would invite claims in every sphere of legitimate governmental action affecting property interests, from negotiating tax claim settlements to enforcing Occupational Safety and Health Administration regulations. Pp. 554–562.

2. RICO does not give Robbins a claim against defendants in their individual capacities. Robbins argues that the predicate act for his RICO claim is a violation of the Hobbs Act, which criminalizes interference with interstate commerce by extortion, along with attempts or conspiracies, 18 U. S. C. § 1951(a), and defines extortion as "the obtaining

Syllabus

of property from another, with his consent . . . under color of official right," § 1951(b)(2). Robbins's claim fails because the Hobbs Act does not apply when the National Government is the intended beneficiary of allegedly extortionate acts. That Act does not speak explicitly to efforts to obtain property for the Government rather than a private party, so the question turns on the common law conception of "extortion," which Congress is presumed to have incorporated into the Act in 1946, see, *e. g., Scheidler* v. *National Organization for Women, Inc.*, 537 U. S. 393, 402. At common law, extortion "by the public official was the rough equivalent of what [is] now describe[d] as 'taking a bribe.'" *Evans* v. *United States*, 504 U. S. 255, 260. While public officials were not immune from extortion charges at common law, that crime focused on the harm of public corruption, by selling public favors for private gain, not on the harm caused by overzealous efforts to obtain property on the Government's behalf. The importance of the line between public and private beneficiaries is confirmed by this Court's case law, which is completely barren of an example of extortion under color of official right undertaken for the sole benefit of the Government. More tellingly, Robbins cites no decision by any court, much less this one, in the Hobbs Act's entire 60-year history finding extortion in Government employees' efforts to get property for the Government's exclusive benefit. *United States* v. *Green*, 350 U. S. 415, 420, which held that "extortion as defined in the [Hobbs Act] in no way depends upon having a direct benefit conferred on the person who obtains the property," does not support Robbins's claim that Congress could not have meant to prohibit extortionate acts in the interest of private entities like unions, but ignore them when the intended beneficiary is the Government. Without some other indication from Congress, it is not reasonable to assume that the Hobbs Act (let alone RICO) was intended to expose all federal employees to extortion charges whenever they stretch in trying to enforce Government property claims. Because defendants' conduct does not fit the traditional definition of extortion, it also does not survive as a RICO predicate offense on the theory that it is "chargeable under [Wyoming] law and punishable by imprisonment for more than one year," 18 U. S. C. § 1961(1)(A). Pp. 563–568.

433 F. 3d 755, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined, and in which STEVENS and GINSBURG, JJ., joined as to Part III. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 568. GINSBURG, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined, *post*, p. 568.

Deputy Solicitor General Garre argued the cause for petitioners. With him on the briefs were *Solicitor General Clement*, *Assistant Attorney General Keisler*, *David B. Salmons*, *Barbara L. Herwig*, and *Edward Himmelfarb*.

Laurence H. Tribe argued the cause for respondent. With him on the brief were *Karen Budd-Falen*, *Marc Stimpert*, *Amy Howe*, *Kevin K. Russell*, *Pamela S. Karlan*, and *Thomas C. Goldstein*.*

JUSTICE SOUTER delivered the opinion of the Court.

Officials of the Bureau of Land Management stand accused of harassment and intimidation aimed at extracting an easement across private property. The questions here are whether the landowner has either a private action for damages of the sort recognized in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), or a claim against the officials in their individual capacities under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§ 1961–1968 (2000 ed. and Supp. IV). We hold that neither action is available.

I

A

Plaintiff-respondent Frank Robbins owns and operates the High Island Ranch, a commercial guest resort in Hot Springs County, Wyoming, stretching across some 40 miles of territory. The ranch is a patchwork of mostly contiguous land

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**Amber H. Rovner* and *Larry D. Thompson, Jr.*, filed a brief for the National Wildlife Federation et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for Brooks Realty et al. by *Nancie G. Marzulla* and *Roger J. Marzulla;* for the Mountain States Legal Foundation by *Steven J. Lechner* and *William Perry Pendley;* for the New Mexico Cattle Growers' Association et al. by *Lee E. Peters;* for the Oregon Cattlemen's Association et al. by *Paul A. Turcke;* for the Pacific Legal Foundation et al. by *R. S. Radford;* for the Paragon Foundation, Inc., by *Paul M. Kienzle III;* and for the Public Lands Council et al. by *Mark B. Wiletsky*.

parcels intermingled with tracts belonging to other private owners, the State of Wyoming, and the National Government. Its natural resources include wildlife and mineral deposits, and its mountainous western portion, called the upper Rock Creek area, is a place of great natural beauty. In response to persistent requests by environmentalists and outdoor enthusiasts, the Bureau tried to induce the ranch's previous owner, George Nelson, to grant an easement for public use over South Fork Owl Creek Road, which runs through the ranch and serves as a main route to the upper Rock Creek area. For a while, Nelson refused from fear that the public would disrupt his guests' activities, but shortly after agreeing to sell the property to Robbins, in March 1994, Nelson signed a nonexclusive deed of easement giving the United States the right to use and maintain the road along a stretch of his property. In return, the Bureau agreed to rent Nelson a right-of-way to maintain a different section of the road as it runs across federal property and connects otherwise isolated parts of Robbins's holdings.

In May 1994, Nelson conveyed the ranch to Robbins, who continued to graze cattle and run guest cattle drives in reliance on grazing permits and a Special Recreation Use Permit (SRUP) issued by the Bureau. But Robbins knew nothing about Nelson's grant of the easement across South Fork Owl Creek Road, which the Bureau had failed to record, and upon recording his warranty deed in Hot Springs County, Robbins took title to the ranch free of the easement, by operation of Wyoming law. See Wyo. Stat. Ann. § 34–1–120 (2005).

When the Bureau's employee Joseph Vessels[1] discovered, in June 1994, that the Bureau's inaction had cost it the easement, he telephoned Robbins and demanded an easement to replace Nelson's. Robbins refused but indicated he would

[1] Vessels was named as a defendant when the complaint was filed, but he has since died.

consider granting one in return for something. In a later meeting, Vessels allegedly told Robbins that "'the Federal Government does not negotiate,'" and talks broke down. Brief for Respondent 5. Robbins says that over the next several years the defendant-petitioners (hereinafter defendants), who are current and former employees of the Bureau, carried on a campaign of harassment and intimidation aimed at forcing him to regrant the lost easement.

B

Robbins concedes that any single one of the offensive and sometimes illegal actions by the Bureau's officials might have been brushed aside as a small imposition, but says that in the aggregate the campaign against him amounted to coercion to extract the easement and should be redressed collectively. The substance of Robbins's claim, and the degree to which existing remedies available to him were adequate, can be understood and assessed only by getting down to the details, which add up to a long recitation.[2]

In the summer of 1994, after the fruitless telephone conversation in June, Vessels wrote to Robbins for permission to survey his land in the area of the desired easement. Robbins said no, that it would be a waste of time for the Bureau to do a survey without first reaching agreement with him. Vessels went ahead with a survey anyway, trespassed on Robbins's land, and later boasted about it to Robbins. Not surprisingly, given the lack of damage to his property, Robbins did not file a trespass complaint in response.

Mutual animosity grew, however, and one Bureau employee, Edward Parodi, was told by his superiors to "look closer" and "investigate harder" for possible trespasses and other permit violations by Robbins. App. 128–129. Parodi

[2] Because this case arises on interlocutory appeal from denial of defendants' motion for summary judgment, we recite the facts in the light most favorable to Robbins.

also heard colleagues make certain disparaging remarks about Robbins, such as referring to him as "the rich SOB from Alabama [who] got [the Ranch]." *Id.*, at 121. Parodi became convinced that the Bureau had mistreated Robbins and described its conduct as "the volcanic point" in his decision to retire. *Id.*, at 133.

Vessels and his supervisor, defendant Charles Wilkie, continued to demand the easement, under threat to cancel the reciprocal maintenance right-of-way that Nelson had negotiated. When Robbins would not budge, the Bureau canceled the right-of-way, citing Robbins's refusal to grant the desired easement and failure even to pay the rental fee. Robbins did not appeal the cancellation to the Interior Board of Land Appeals (IBLA) or seek judicial review under the Administrative Procedure Act (APA), 5 U. S. C. § 702.

In August 1995, Robbins brought his cattle to a water source on property belonging to his neighbor, LaVonne Pennoyer. An altercation ensued, and Pennoyer struck Robbins with her truck while he was riding a horse. Plaintiff-Appellee's Supp. App. in No. 04–8016 (CA10), pp. 676–681 (hereinafter CA10 App.); 9 Record, Pl. Exh. 2, pp. 164–166; 10 *id.*, Pl. Exh. 35a, at 102–108. Defendant Gene Leone fielded a call from Pennoyer regarding the incident, encouraged her to contact the sheriff, and himself placed calls to the sheriff suggesting that Robbins be charged with trespass. After the incident, Parodi claims that Leone told him: "'I think I finally got a way to get [Robbins's] permits and get him out of business.'" App. 125, 126.

In October 1995, the Bureau claimed various permit violations and changed the High Island Ranch's 5-year SRUP to a SRUP subject to annual renewal. According to Robbins, losing the 5-year SRUP disrupted his guest ranching business, owing to the resulting uncertainty about permission to conduct cattle drives. Robbins declined to seek administrative review, however, in part because Bureau officials told

him that the process would be lengthy and that his permit would be suspended until the IBLA reached a decision.[3]

Beginning in 1996, defendants brought administrative charges against Robbins for trespass and other land-use violations. Robbins claimed some charges were false, and others unfairly selective enforcement, and he took all of them to be an effort to retaliate for refusing the Bureau's continuing demands for the easement. He contested a number of these charges, but not all of them, administratively.

In the spring of 1997, the South Fork Owl Creek Road, the only way to reach the portions of the ranch in the Rock Creek area, became impassable. When the Bureau refused to repair the section of road across federal land, Robbins took matters into his own hands and fixed the public road himself, even though the Bureau had refused permission. The Bureau fined Robbins for trespass, but offered to settle the charge and entertain an application to renew the old maintenance right-of-way. Instead, Robbins appealed to the IBLA, which found that Robbins had admitted the unauthorized repairs when he sent the Bureau a bill for reimbursement. The Board upheld the fine, *In re Robbins*, 146 I. B. L. A. 213 (1998), and rejected Robbins's claim that the Bureau was trying to "'blackmail'" him into providing the easement; it said that "[t]he record effectively shows . . . intransigence was the tactic of Robbins, not [the] BLM." *Id.*, at 219. Robbins did not seek judicial review of the IBLA's decision.

In July 1997, defendant Teryl Shryack and a colleague entered Robbins's property, claiming the terms of a fence easement as authority. Robbins accused Shryack of unlawful

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[3] According to Robbins, Bureau officials neglected to mention his right to seek a stay of the Bureau's adverse action pending the IBLA's resolution of his appeal. See 43 CFR §4.21 (2006). Such a stay, if granted, would have permitted Robbins to continue to operate under the 5-year SRUP.

entry, tore up the written instrument, and ordered her off his property. Later that month, after a meeting about trespass issues with Bureau officials, Michael Miller, a Bureau law enforcement officer, questioned Robbins without advance notice and without counsel about the incident with Shryack. The upshot was a charge with two counts of knowingly and forcibly impeding and interfering with a federal employee, in violation of 18 U. S. C. § 111 (2000 ed. and Supp. IV), a crime with a penalty of up to one year in prison. A jury acquitted Robbins in December, after deliberating less than 30 minutes. *United States* v. *Robbins*, 179 F. 3d 1268, 1269 (CA10 1999). According to a news story, the jurors "were appalled at the actions of the government" and one said that "Robbins could not have been railroaded any worse . . . if he worked for the Union Pacific." CA10 App. 852. Robbins then moved for attorney's fees under the Hyde Amendment, § 617, 111 Stat. 2519, note following 18 U. S. C. § 3006A, arguing that the position of the United States was vexatious, frivolous, or in bad faith. The trial judge denied the motion, and Robbins appealed too late. See 179 F. 3d, at 1269–1270.

In 1998, Robbins brought the lawsuit now before us, though there was further vexation to come. In June 1999, the Bureau denied Robbins's application to renew his annual SRUP, based on an accumulation of land-use penalties levied against him. Robbins appealed, the IBLA affirmed, *In re Robbins*, 154 I. B. L. A. 93 (2000), and Robbins did not seek judicial review. Then, in August, the Bureau revoked the grazing permit for High Island Ranch, claiming that Robbins had violated its terms when he kept Bureau officials from passing over his property to reach public lands. Robbins appealed to the IBLA, which stayed the revocation pending resolution of the appeal. Order in *Robbins* v. *Bureau of Land Management*, IBLA 2000–12 (Nov. 10, 1999), CA10 App. 1020.

The stay held for several years, despite periodic friction. Without a SRUP, Robbins was forced to redirect his guest

cattle drives away from federal land and through a mountain pass with unmarked property boundaries. In August 2000, Vessels and defendants Darrell Barnes and Miller tried to catch Robbins trespassing in driving cattle over a corner of land administered by the Bureau. From a nearby hilltop, they videotaped ranch guests during the drive, even while the guests sought privacy to relieve themselves. That afternoon, Robbins alleges, Barnes and Miller broke into his guest lodge, left trash inside, and departed without closing the lodge gates.

The next summer, defendant David Wallace spoke with Preston Smith, an employee of the Bureau of Indian Affairs who manages lands along the High Island Ranch's southern border, and pressured him to impound Robbins's cattle. Smith told Robbins, but did nothing more.

Finally, in January 2003, tension actually cooled to the point that Robbins and the Bureau entered into a settlement agreement that, among other things, established a procedure for informal resolution of future grazing disputes and stayed 16 pending administrative appeals with a view to their ultimate dismissal, provided that Robbins did not violate certain Bureau regulations for a 2-year period. The settlement came apart, however, in January 2004, when the Bureau began formal trespass proceedings against Robbins and unilaterally voided the settlement agreement. Robbins tried to enforce the agreement in federal court, but a District Court denied relief in a decision affirmed by the Court of Appeals in February 2006. *Robbins* v. *Bureau of Land Management*, 438 F. 3d 1074 (CA10).

C

In this lawsuit (brought, as we said, in 1998), Robbins asks for compensatory and punitive damages as well as declaratory and injunctive relief. Although he originally included the United States as a defendant, he voluntarily dismissed the Government, and pressed forward with a RICO claim

charging defendants with repeatedly trying to extort an easement from him, as well as a similarly grounded *Bivens* claim that defendants violated his Fourth and Fifth Amendment rights. Defendants filed a motion to dismiss on qualified immunity and failure to state a claim, which the District Court granted, holding that Robbins inadequately pleaded damages under RICO and that the APA and the Federal Tort Claims Act (FTCA), 28 U. S. C. § 1346, were effective alternative remedies that precluded *Bivens* relief. The Court of Appeals for the Tenth Circuit reversed on both grounds, 300 F. 3d 1208, 1211 (2002), although it specified that *Bivens* relief was available only for those "constitutional violations committed by individual federal employees unrelated to final agency action," 300 F. 3d, at 1212.

On remand, defendants again moved to dismiss on qualified immunity. As to the RICO claim, the District Court denied the motion; as to *Bivens*, it dismissed what Robbins called the Fourth Amendment claim for malicious prosecution and those under the Fifth Amendment for due process violations, but it declined to dismiss the Fifth Amendment claim of retaliation for the exercise of Robbins's right to exclude the Government from his property and to refuse any grant of a property interest without compensation. After limited discovery, defendants again moved for summary judgment on qualified immunity. The District Court adhered to its earlier denial.

This time, the Court of Appeals affirmed, after dealing with collateral order jurisdiction to consider an interlocutory appeal of the denial of qualified immunity, 433 F. 3d 755, 761 (2006) (citing *Mitchell* v. *Forsyth*, 472 U. S. 511, 530 (1985)). It held that Robbins had a clearly established right to be free from retaliation for exercising his Fifth Amendment right to exclude the Government from his private property, 433 F. 3d, at 765–767, and it explained that Robbins could go forward with the RICO claim because Government employees who

"engag[e] in lawful actions with an intent to extort a right-of-way from [a landowner] rather than with an intent to merely carry out their regulatory duties" commit extortion under Wyoming law and within the meaning of the Hobbs Act, 18 U. S. C. § 1951, 433 F. 3d, at 768. The Court of Appeals rejected the defense based on a claim of the Government's legal entitlement to demand the disputed easement: "if an official obtains property that he has lawful authority to obtain, but does so in a wrongful manner, his conduct constitutes extortion under the Hobbs Act." *Id.*, at 769. Finally, the Court of Appeals said again that "Robbins'[s] allegations involving individual action unrelated to final agency action are permitted under *Bivens*." *Id.*, at 772. The appeals court declined defendants' request "to determine which allegations remain and which are precluded," however, because defendants had not asked the District Court to sort them out. *Ibid.*

We granted certiorari, 549 U. S. 1075 (2006), and now reverse.

II

The first question is whether to devise a new *Bivens* damages action for retaliating against the exercise of ownership rights, in addition to the discrete administrative and judicial remedies available to a landowner like Robbins in dealing with the Government's employees.[4] *Bivens*, 403 U. S. 388, held that the victim of a Fourth Amendment violation by federal officers had a claim for damages, and in the years following we have recognized two more nonstatutory damages remedies, the first for employment discrimination in vi-

[4] We recognized just last Term that the definition of an element of the asserted cause of action was "directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal." *Hartman* v. *Moore*, 547 U. S. 250, 257, n. 5 (2006). Because the same reasoning applies to the recognition of the entire cause of action, the Court of Appeals had jurisdiction over this issue, as do we.

olation of the Due Process Clause, *Davis* v. *Passman*, 442 U. S. 228 (1979), and the second for an Eighth Amendment violation by prison officials, *Carlson* v. *Green*, 446 U. S. 14 (1980). But we have also held that any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified. We have accordingly held against applying the *Bivens* model to claims of First Amendment violations by federal employers, *Bush* v. *Lucas*, 462 U. S. 367 (1983), harm to military personnel through activity incident to service, *United States* v. *Stanley*, 483 U. S. 669 (1987); *Chappell* v. *Wallace*, 462 U. S. 296 (1983), and wrongful denials of Social Security disability benefits, *Schweiker* v. *Chilicky*, 487 U. S. 412 (1988). We have seen no case for extending *Bivens* to claims against federal agencies, *FDIC* v. *Meyer*, 510 U. S. 471 (1994), or against private prisons, *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61 (2001).

Whatever the ultimate conclusion, however, our consideration of a *Bivens* request follows a familiar sequence, and on the assumption that a constitutionally recognized interest is adversely affected by the actions of federal employees, the decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. *Bush*, *supra*, at 378. But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Bush*, *supra*, at 378.

A

In this factually plentiful case, assessing the significance of any alternative remedies at step one has to begin by categorizing the difficulties Robbins experienced in dealing with the Bureau. We think they can be separated into four main groups: torts or tort-like injuries inflicted on him, charges brought against him, unfavorable agency actions, and offensive behavior by Bureau employees falling outside those three categories.

Tortious harm inflicted on him includes Vessels's unauthorized survey of the terrain of the desired easement and the illegal entry into the lodge, and in each instance, Robbins had a civil remedy in damages for trespass. Understandably, he brought no such action after learning about the survey, which was doubtless annoying but not physically damaging. For the incident at the lodge, he chose not to pursue a tort remedy, though there is no question that one was available to him if he could prove his allegations. Cf. *Correctional Services Corp.*, *supra*, at 72–73 (considering availability of state tort remedies in refusing to recognize a *Bivens* remedy).

The charges brought against Robbins include a series of administrative claims for trespass and other land-use violations, a fine for the unauthorized road repair in 1997, and the two criminal charges that same year. Robbins had the opportunity to contest all of the administrative charges; he did fight some (but not all) of the various land-use and trespass citations, and he challenged the road repair fine as far as the IBLA, though he did not take advantage of judicial review when he lost in that tribunal.[5] He exercised his

[5] There was some uncertainty, if not inconsistency, about the willingness of the IBLA to entertain the sorts of claims Robbins advances here. Compare *In re Robbins*, 146 I. B. L. A. 213, 219 (1998) (rejecting a claim of "'blackmail'" on the merits), with *Robbins* v. *Bureau of Land Management*, 170 I. B. L. A. 219, 226 (2006) (holding that "the trespass decision must be upheld regardless of BLM's motive in issuing the decision"). In

right to jury trial on the criminal complaints, and although the rapid acquittal tended to support his charge of baseless action by the prosecution (egged on by Bureau employees), the federal judge who presided at the trial did not think the Government's case thin enough to justify awarding attorney's fees, and Robbins's appeal from that decision was late. See *Robbins*, 179 F. 3d, at 1269–1270. The trial judge's denial of fees may reflect facts that dissuaded Robbins from bringing a state-law action for malicious prosecution, though it is also possible that a remedy would have been unavailable against federal officials, see *Blake* v. *Rupe*, 651 P. 2d 1096, 1107 (Wyo. 1982) ("Malicious prosecution is not an action available against a law enforcement official").[6] For each charge, in any event, Robbins had some procedure to defend and make good on his position. He took advantage of some opportunities, and let others pass; although he had mixed success, he had the means to be heard.

The more conventional agency action included the 1995 cancellation of the right-of-way in Robbins's favor (originally given in return for the unrecorded easement for the Government's benefit); the 1995 decision to reduce the SRUP from five years to one; the termination of the SRUP in 1999; and the revocation of the grazing permit that same year. Each time, the Bureau claimed that Robbins was at fault, and for each claim, administrative review was available, subject to ultimate judicial review under the APA. Robbins took no

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any event, he could have advanced the claims in federal court whether or not the IBLA was willing to listen to them. Cf. *In re Robbins*, 167 I. B. L. A. 239, 241 (2005) (noting that Robbins "concede[d] that these assertions [of equal protection violations and harassment] are properly cognizable by a court and he raise[d] them only to preserve them as part of the record").

[6] Robbins brought a Fourth Amendment claim for malicious prosecution in this litigation, but the District Court dismissed it, *Robbins* v. *Bureau of Land Management*, 252 F. Supp. 2d 1286, 1295–1298 (Wyo. 2003), and Robbins has pursued it no further.

appeal from the 1995 decisions, stopped after losing an IBLA appeal of the SRUP denial, and obtained a stay from the IBLA of the Bureau's revocation of the grazing permit.

Three events elude classification. The 1995 incident in which Robbins's horse was struck primarily involved Robbins and his neighbor, not the Bureau, and the sheriff never brought criminal charges. The videotaping of ranch guests during the 2000 drive, while no doubt thoroughly irritating and bad for business, may not have been unlawful, depending, among other things, upon the location on public or private land of the people photographed. Cf. Restatement (Second) of Torts §652B (1976) (defining tort of intrusion upon seclusion).[7] Even if a tort was committed, it is unclear whether Robbins, rather than his guests, would be the proper plaintiff, or whether the tort should be chargeable against the Government (as distinct from employees) under the FTCA, cf. *Carlson*, 446 U. S., at 19–20 (holding that FTCA and *Bivens* remedies were "parallel, complementary causes of action" and that the availability of the former did not preempt the latter). The significance of Wallace's 2001 attempt to pressure Smith into impounding Robbins's cattle is likewise up in the air. The legitimacy of any impoundment that might have occurred would presumably have depended on where particular cattle were on the patchwork of private and public lands, and in any event, Smith never impounded any.

In sum, Robbins has an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints. He suffered no charges of wrongdoing on his own part without an opportunity to defend himself (and, in the case of the criminal charges, to recoup the consequent expense, though a judge found his claim wanting). And final agency action, as in canceling permits, for example, was open

[7] We are aware of no Wyoming case considering this tort.

to administrative and judicial review, as the Court of Appeals realized, 433 F. 3d, at 772.

This state of the law gives Robbins no intuitively meritorious case for recognizing a new constitutional cause of action, but neither does it plainly answer no to the question whether he should have it. Like the combination of public and private land ownership around the ranch, the forums of defense and redress open to Robbins are a patchwork, an assemblage of state and federal, administrative and judicial benches applying regulations, statutes, and common law rules. It would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim. Compare *Bush*, 462 U. S., at 388 (refusing to create a *Bivens* remedy when faced with "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations"); and *Schweiker*, 487 U. S., at 426 ("Congress chose specific forms and levels of protection for the rights of persons affected"), with *Bivens*, 403 U. S., at 397 (finding "no explicit congressional declaration that persons injured [in this way] may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress").

B

This, then, is a case for *Bivens* step two, for weighing reasons for and against the creation of a new cause of action, the way common law judges have always done. See *Bush*, *supra*, at 378. Here, the competing arguments boil down to one on a side: from Robbins, the inadequacy of discrete, incident-by-incident remedies; and from the Government and its employees, the difficulty of defining limits to legitimate zeal on the public's behalf in situations where hard bargaining is to be expected in the back-and-forth between public and private interests that the Government's employees engage in every day.

1

As we said, when the incidents are examined one by one, Robbins's situation does not call for creating a constitutional cause of action for want of other means of vindication, so he is unlike the plaintiffs in cases recognizing freestanding claims: Davis had no other remedy, Bivens himself was not thought to have an effective one, and in *Carlson* the plaintiff had none against Government officials. *Davis*, 442 U. S., at 245 ("For Davis, as for Bivens, 'it is damages or nothing'" (quoting *Bivens*, *supra*, at 410 (Harlan, J., concurring in judgment))); *Carlson*, *supra*, at 23 ("[W]e cannot hold that Congress relegated respondent exclusively to the FTCA remedy" against the Government).

But Robbins's argument for a remedy that looks at the course of dealing as a whole, not simply as so many individual incidents, has the force of the metaphor Robbins invokes, "death by a thousand cuts." Brief for Respondent 40. It is one thing to be threatened with the loss of grazing rights, or to be prosecuted, or to have one's lodge broken into, but something else to be subjected to this in combination over a period of six years, by a series of public officials bent on making life difficult. Agency appeals, lawsuits, and criminal defense take money, and endless battling depletes the spirit along with the purse. The whole here is greater than the sum of its parts.

2

On the other side of the ledger there is a difficulty in defining a workable cause of action. Robbins describes the wrong here as retaliation for standing on his right as a property owner to keep the Government out (by refusing a free replacement for the right-of-way it had lost), and the mention of retaliation brings with it a tailwind of support from our longstanding recognition that the Government may not retaliate for exercising First Amendment speech rights, see *Rankin* v. *McPherson*, 483 U. S. 378 (1987), or certain others

of constitutional rank, see, *e. g.*, *Lefkowitz* v. *Turley*, 414 U. S. 70 (1973) (Fifth Amendment privilege against self-incrimination); *United States* v. *Jackson*, 390 U. S. 570 (1968) (Sixth Amendment right to trial by jury).

But on closer look, the claim against the Bureau's employees fails to fit the prior retaliation cases. Those cases turn on an allegation of impermissible purpose and motivation; an employee who spoke out on matters of public concern and then was fired, for example, would need to "prove that the conduct at issue was constitutionally protected, and that it was a substantial or motivating factor in the termination." *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 675 (1996). In its defense, the Government may respond that the firing had nothing to do with the protected speech, or that "it would have taken the same action even in the absence of the protected conduct." *Ibid.* In short, the outcome turns on "what for" questions: what was the Government's purpose in firing him and would he have been fired anyway? Questions like these have definite answers, and we have established methods for identifying the presence of an illicit reason (in competition with others), not only in retaliation cases but on claims of discrimination based on race or other characteristics. See *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973).

But a *Bivens* case by Robbins could not be resolved merely by answering a "what for" question or two. All agree that the Bureau's employees intended to convince Robbins to grant an easement.[8] But unlike punishing someone for speaking out against the Government, trying to induce someone to grant an easement for public use is a perfectly legitimate purpose: as a landowner, the Government may have, and in this instance does have, a valid interest in get-

[8] This is the "simple" question Robbins presents for review: "[C]an government officials avoid the Fifth Amendment's prohibition against taking property without just compensation by using their regulatory powers to harass, punish, and coerce a private citizen into giving the Government his property without payment?" Brief for Respondent 21.

ting access to neighboring lands. The "what for" question thus has a ready answer in terms of lawful conduct.

Robbins's challenge, therefore, is not to the object the Government seeks to achieve, and for the most part his argument is not that the means the Government used were necessarily illegitimate; rather, he says that defendants simply demanded too much and went too far. But as soon as Robbins's claim is framed this way, the line-drawing difficulties it creates are immediately apparent. A "too much" kind of liability standard (if standard at all) can never be as reliable a guide to conduct and to any subsequent liability as a "what for" standard, and that reason counts against recognizing freestanding liability in a case like this.

The impossibility of fitting Robbins's claim into the simple "what for" framework is demonstrated, repeatedly, by recalling the various actions he complains about. Most of them, such as strictly enforcing rules against trespass or conditions on grazing permits, are legitimate tactics designed to improve the Government's negotiating position. Just as a private landowner, when frustrated at a neighbor's stubbornness in refusing an easement, may press charges of trespass every time a cow wanders across the property line or call the authorities to report every land-use violation, the Government too may stand firm on its rights and use its power to protect public property interests. Though Robbins protests that the Government was trying to extract the easement for free instead of negotiating, that line is slippery even in this case; the Government was not offering to buy the easement, but it did have valuable things to offer in exchange, like continued permission for Robbins to use Government land on favorable terms (at least to the degree that the terms of a permit were subject to discretion).[9]

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[9] In light of JUSTICE GINSBURG's emphasis on the extent and duration of the harm suffered by Robbins, we do not read her opinion to suggest that any single adverse action taken by the Government in response to a valid exercise of property rights would give rise to a retaliation claim. It thus appears that even if a "what for" question could be imported into

It is true that the Government is no ordinary landowner, with its immense economic power, its role as trustee for the public, its right to cater to particular segments of the public (like the recreational users who would take advantage of the right-of-way to get to remote tracts), and its wide discretion to bring enforcement actions. But in many ways, the Government deals with its neighbors as one owner among the rest (albeit a powerful one). Each may seek benefits from the others, and each may refuse to deal with the others by insisting on valuable consideration for anything in return. And as a potential contracting party, each neighbor is entitled to drive a hard bargain, as even Robbins acknowledges, see Tr. of Oral Arg. 31–32. That, after all, is what Robbins did by flatly refusing to regrant the easement without further recompense, and that is what the defendant employees did on behalf of the Government. So long as they had authority to withhold or withdraw permission to use Government land and to enforce the trespass and land-use rules (as the IBLA confirmed that they did have at least most of the time), they were within their rights to make it plain that Robbins's willingness to give the easement would determine how complaisant they would be about his trespasses on public land, when they had discretion to enforce the law to the letter.[10]

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this case, Robbins could not obtain relief without also satisfying an unspecified, and unworkable, "too much" standard.

[10] JUSTICE GINSBURG says we mistakenly fail to see that Robbins's retaliation claim presents only a "what for" question: did defendants take the various actions against Robbins in retaliation for refusing to grant the desired right-of-way *gratis* (or simply out of malice prompted by Robbins's refusal and their own embarrassment after forgetting to record the Nelson grant)? But seeing the case as raising only a traditional "what for" question gives short shrift to the Government's right to bargain hard in a continuing contest.

In the standard retaliation case recognized in our precedent, the plaintiff has performed some discrete act in the past, typically saying some-

Robbins does make a few allegations, like the unauthorized survey and the unlawful entry into the lodge, that charge defendants with illegal action plainly going beyond

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thing that irritates the defendant official; the question is whether the official's later action against the plaintiff was taken for a legitimate purpose (firing to rid the work force of a substandard performer, for example) or for the purpose of punishing for the exercise of a constitutional right (that is, retaliation, probably motivated by spite). The plaintiff's action is over and done with, and the only question is the defendant's purpose, which may be maliciously motivated.

In this case, however, the past act or acts (refusing the right-of-way without compensation) are simply particular steps in an ongoing refusal to grant requests for a right-of-way. The purpose of the continuing requests is lawful (the Government still could use the right-of-way), and there are actions the Government may lawfully take to induce or coerce Robbins to end his refusal (presumably like canceling the nonpermanent reciprocal right-of-way originally given to Nelson). The action claimed to be retaliatory may gratify malice in the heart of the official who takes it, but the official act remains an instance of hard bargaining intended to induce the plaintiff to come to legitimate terms. We do not understand Robbins to contend that malice alone, as distinguished from malice combined with the desire to acquire an easement, caused defendants to act the way they did. See Brief for Respondent 21 (accusing defendants of "using their regulatory powers to harass, punish, and coerce a private citizen into giving the Government his property without payment"); but cf. *post*, at 578–579, n. 3 (GINSBURG, J., concurring in part and dissenting in part) ("'Their cause, if they had one, is nothing to them now; They hate for hate's sake'" (quoting There Will Be No Peace, reprinted in W. H. Auden: Collected Poems 615 (E. Mendelson ed. 2007))). Thus, we are not dealing with one discrete act by a plaintiff and one discrete (possibly retaliatory) act by a defendant, the purpose of which is in question. Instead we are confronting a continuing process in which each side has a legitimate purpose in taking action contrary to the other's interest.

"Retaliation" cannot be classed as a basis of liability here, then, except on one or the other of two assumptions. The first is that the antagonistic acts by the officials extend beyond the scope of acceptable means for accomplishing the legitimate purpose; the acts go beyond hard bargaining on behalf of the Government (whatever spite may lurk in the defendant's heart). They are "too much." The second assumption is that the presence of malice or spite in an official's heart renders any action unconstitu-

hard bargaining. If those were the only coercive acts charged, Robbins could avoid the "too much" problem by fairly describing the Government behavior alleged as illegality in attempting to obtain a property interest for nothing, but that is not a fair summary of the body of allegations before us, according to which defendants' improper exercise of the Government's "regulatory powers" is essential to the claim. Brief for Respondent 21. (Of course, even in that simpler case, the tort or torts by Government employees would be so clearly actionable under the general law that it would furnish only the weakest argument for recognizing a generally available constitutional tort.) Rather, the bulk of Robbins's charges go to actions that, on their own, fall within the Government's enforcement power.

It would not answer the concerns just expressed to change conceptual gears and consider the more abstract concept of liability for retaliatory or undue pressure on a property owner for standing firm on property rights; looking at the

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tionally retaliatory, even if it would otherwise have been done in the name of legitimate hard bargaining. The motive-is-all test is not the law of our retaliation precedent. If a spiteful heart rendered any official efforts actionable as unconstitutional retaliation, our retaliation discharge cases would have asked not only whether the plaintiff was fired for cause (and would have been fired for cause anyway), but whether the official who discharged the plaintiff tainted any legitimate purpose with spitefulness in firing this particular, outspoken critic. But we have taken no such position; to the contrary, we have held that proof that the action was independently justified on grounds other than the improper one defeats the claim. See *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977). Any other approach would have frustrated an employer's legitimate interest in securing a competent work force (comparable to the Government's interest as a landowner here), and would have introduced the complication of proving motive even in cases in which the action taken was plainly legitimate.

Since JUSTICE GINSBURG disclaims the second alternative, *post*, at 580, n. 6, the acts of spite and ill will that she emphasizes will necessarily count in a "too much" calculation.

claim that way would not eliminate the problem of degree, and it would raise a further reason to balk at recognizing a *Bivens* claim. For at this high level of generality, a *Bivens* action to redress retaliation against those who resist Government impositions on their property rights would invite claims in every sphere of legitimate governmental action affecting property interests, from negotiating tax claim settlements to enforcing Occupational Safety and Health Administration regulations. Exercising any governmental authority affecting the value or enjoyment of property interests would fall within the *Bivens* regime, and across this enormous swath of potential litigation would hover the difficulty of devising a "too much" standard that could guide an employee's conduct and a judicial factfinder's conclusion.[11]

The point here is not to deny that Government employees sometimes overreach, for of course they do, and they may have done so here if all the allegations are true. The point is the reasonable fear that a general *Bivens* cure would be worse than the disease.

C

In sum, defendants were acting in the name of the Bureau, which had the authority to grant (and had given) Robbins some use of public lands under its control and wanted a right-of-way in return. Defendants bargained hard by capitalizing on their discretionary authority and Robbins's violations of various permit terms, though truculence was apparent on both sides. One of the defendants, at least, clearly

[11] JUSTICE GINSBURG points out that apprehension of many lawsuits is not a good reason to refrain from creating a *Bivens* action. *Post*, at 577, 582. But there is a world of difference between a popular *Bivens* remedy for a well-defined violation, on the one hand, and (on the other) litigation invited because the elements of a claim are so unclear that no one can tell in advance what claim might qualify or what might not. We ground our judgment on the elusiveness of a limiting principle for Robbins's claim, not on the potential popularity of a claim that could be well defined.

crossed the line into impermissible conduct in breaking into Robbins's lodge, although it is not clear from the record that any other action by defendants was more serious than garden-variety trespass, and the Government has successfully defended every decision to eliminate Robbins's permission to use public lands in the ways he had previously enjoyed. Robbins had ready at hand a wide variety of administrative and judicial remedies to redress his injuries. The proposal, nonetheless, to create a new *Bivens* remedy to redress such injuries collectively on a theory of retaliation for exercising his property right to exclude, or on a general theory of unjustifiably burdening his rights as a property owner, raises a serious difficulty of devising a workable cause of action. A judicial standard to identify illegitimate pressure going beyond legitimately hard bargaining would be endlessly knotty to work out, and a general provision for tortlike liability when Government employees are unduly zealous in pressing a governmental interest affecting property would invite an onslaught of *Bivens* actions.

We think accordingly that any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation. "Congress is in a far better position than a court to evaluate the impact of a new species of litigation" against those who act on the public's behalf. *Bush*, 462 U. S., at 389. And Congress can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees. *Ibid.* ("[Congress] may inform itself through factfinding procedures such as hearings that are not available to the courts"); cf. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 814 (1982) (recognizing "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties" (internal quotation marks and brackets omitted)).

III

Robbins's other claim is under RICO, which gives civil remedies to "[a]ny person injured in his business or property by reason of a violation of [18 U. S. C. § 1962]." 18 U. S. C. § 1964(c). Section 1962(c) makes it a crime for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." RICO defines "racketeering activity" to include "any act which is indictable under" the Hobbs Act as well as "any act or threat involving . . . extortion . . . , which is chargeable under State law and punishable by imprisonment for more than one year." §§ 1961(1)(A)–(B) (2000 ed., Supp. IV). The Hobbs Act, finally, criminalizes interference with interstate commerce by extortion, along with attempts or conspiracies, § 1951(a), extortion being defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right," § 1951(b)(2).

Robbins charges defendants with violating the Hobbs Act by wrongfully trying to get the easement under color of official right, to which defendants reply with a call to dismiss the RICO claim for two independent reasons: the Hobbs Act does not apply when the National Government is the intended beneficiary of the allegedly extortionate acts; and a valid claim of entitlement to the disputed property is a complete defense against extortion. Because we agree with the first contention, we do not reach the second.

The Hobbs Act does not speak explicitly to efforts to obtain property for the Government rather than a private party, and that leaves defendants' contention to turn on the common law conception of "extortion," which we presume Congress meant to incorporate when it passed the Hobbs Act in 1946. See *Scheidler* v. *National Organization for Women, Inc.*, 537 U. S. 393, 402 (2003) (construing the term

"extortion" in the Hobbs Act by reference to its common law meaning); *Evans* v. *United States*, 504 U. S. 255, 259 (1992) (same); see also *Morissette* v. *United States*, 342 U. S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken").

"At common law, extortion was a property offense committed by a public official who took any money or thing of value that was not due to him under the pretense that he was entitled to such property by virtue of his office." *Scheidler*, *supra*, at 402 (quoting 4 W. Blackstone, Commentaries on the Laws of England 141 (1769), and citing 3 R. Anderson, Wharton's Criminal Law and Procedure § 1393, pp. 790–791 (1957); internal quotation marks omitted). In short, "[e]xtortion by the public official was the rough equivalent of what we would now describe as 'taking a bribe.'" *Evans*, *supra*, at 260. Thus, while Robbins is certainly correct that public officials were not immune from charges of extortion at common law, see Brief for Respondent 43, the crime of extortion focused on the harm of public corruption, by the sale of public favors for private gain, not on the harm caused by overzealous efforts to obtain property on behalf of the Government.[12]

The importance of the line between public and private beneficiaries for common law and Hobbs Act extortion is con-

[12] Although the legislative history of the Hobbs Act is generally "sparse and unilluminating with respect to the offense of extortion," *Evans*, 504 U. S., at 264, we know that Congress patterned the Act after two sources of law: "the Penal Code of New York and the Field Code, a 19th-century model penal code," *Scheidler*, 537 U. S., at 403. In borrowing from these sources, the Hobbs Act expanded the scope of common law extortion to include private perpetrators while retaining the core idea of extortion as a species of corruption, akin to bribery. But Robbins provides no basis for believing that Congress thought of broadening the definition of extortion under color of official right beyond its common law meaning.

firmed by our own case law, which is completely barren of an example of extortion under color of official right undertaken for the sole benefit of the Government. See, *e. g.*, *McCormick* v. *United States*, 500 U. S. 257, 273 (1991) (discussing circumstances in which public official's receipt of campaign contributions constitutes extortion under color of official right); *Evans*, *supra*, at 257 (Hobbs Act prosecution for extortion under color of official right, where public official accepted cash in exchange for favorable votes on a rezoning application); *United States* v. *Gillock*, 445 U. S. 360, 362 (1980) (Hobbs Act prosecution for extortion under color of official right, where state senator accepted money in exchange for blocking a defendant's extradition and agreeing to introduce legislation); cf. *United States* v. *Deaver*, 14 F. 595, 597 (WDNC 1882) (under the "technical meaning [of extortion] in the common law, . . . [t]he officer must unlawfully and corruptly receive such money or article of value for *his own benefit* or *advantage*"). More tellingly even, Robbins has cited no decision by any court, much less this one, from the entire 60-year period of the Hobbs Act that found extortion in efforts of Government employees to get property for the exclusive benefit of the Government.

Of course, there is usually a case somewhere that provides comfort for just about any claim. Robbins musters two for his understanding of extortion under color of official right, neither of which, however, addressed the beneficiary question with any care: *People* v. *Whaley*, 6 Cow. 661 (N. Y. 1827), and *Willett* v. *Devoy*, 170 App. Div. 203, 155 N. Y. S. 920 (1915). *Whaley* was about a charge of extortion against a justice of the peace who wrongfully ordered a litigant to pay compensation to the other party as well as a small administrative fee to the court. Because the case involved illegally obtaining property for the benefit of a private third party, it does not stand for the proposition that an act for the benefit of the Government alone can be extortion. The second case, *Willett*, again from New York, construed a provision of the

State's Public Officers Law. That statute addressed the problem of overcharging by public officers, see 4 Birdseye's Consol. Laws of N. Y. Ann., Art. V, § 67, p. 4640 (1909), and the court's opinion on it said that common law extortion did not draw any distinction "on the ground that the official keeps the fee himself," 170 App. Div., at 204, 155 N. Y. S., at 921. But a single, two-page opinion from a state intermediate appellate court issued in 1915 is not much indication that the Hobbs Act was adopted in 1946 subject to the understanding that common law extortion was spacious enough to cover the case Robbins states. There is a reason he is plumbing obscurity.

Robbins points to what we said in *United States* v. *Green*, 350 U. S. 415, 420 (1956), that "extortion as defined in the [Hobbs Act] in no way depends upon having a direct benefit conferred on the person who obtains the property." He infers that Congress could not have meant to prohibit extortionate acts in the interest of private entities like unions, but ignore them when the intended beneficiary is the Government. See Brief for Respondent 47–48. But Congress could very well have meant just that; drawing a line between private and public beneficiaries prevents suits (not just recoveries) against public officers whose jobs are to obtain property owed to the Government. So, without some other indication from Congress, it is not reasonable to assume that the Hobbs Act (let alone RICO) was intended to expose all federal employees, whether in the Bureau of Land Management, the Internal Revenue Service, the Office of the Comptroller of the Currency (OCC), or any other agency, to extortion charges whenever they stretch in trying to enforce Government property claims. See *Sinclair* v. *Hawke*, 314 F. 3d 934, 944 (CA8 2003) (OCC employees "do not become racketeers by acting like aggressive regulators"). As we just suggested, Robbins does not face up to the real problem when he says that requiring proof of a wrongful intent to extort would shield well-intentioned Government employees

from liability. It is not just final judgments, but the fear of criminal charges or civil claims for treble damages that could well take the starch out of regulators who are supposed to bargain and press demands vigorously on behalf of the Government and the public. This is the reason we would want to see some text in the Hobbs Act before we could say that Congress meant to go beyond the common law preoccupation with official corruption, to embrace the expansive notion of extortion Robbins urges on us.

He falls back to the argument that defendants violated Wyoming's blackmail statute, see Wyo. Stat. Ann. § 6–2–402 (2005),[13] which he says is a separate predicate offense for purposes of RICO liability. But even assuming that defendants' conduct would be "chargeable under State law and punishable by imprisonment for more than one year," 18 U. S. C. § 1961(1)(A), it cannot qualify as a predicate offense for a RICO suit unless it is "capable of being generically classified as extortionate," *Scheidler*, 537 U. S., at 409, 410; accord, *United States* v. *Nardello*, 393 U. S. 286, 296 (1969). For the reasons just given, the conduct alleged does not fit the traditional definition of extortion, so Robbins's RICO claim does not survive on a theory of state-law derivation.

* * *

Because neither *Bivens* nor RICO gives Robbins a cause of action, there is no reason to enquire further into the merits of his claim or the asserted defense of qualified immunity. The judgment of the Court of Appeals for the Tenth Circuit

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[13] Section 6–2–402 provides:

"(a) A person commits blackmail if, with the intent to obtain property of another or to compel action or inaction by any person against his will, the person:

. . . . . .

"(ii) Accuses or threatens to accuse a person of a crime or immoral conduct which would tend to degrade or disgrace the person or subject him to the ridicule or contempt of society."

is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring.

The Court correctly concludes that *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), does not supply a cause of action in this case. I therefore join its opinion. I write separately because I would not extend *Bivens* even if its reasoning logically applied to this case. "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action." *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 75 (2001) (SCALIA, J., joined by THOMAS, J., concurring). Accordingly, in my view, *Bivens* and its progeny should be limited "to the precise circumstances that they involved." *Malesko*, *supra*, at 75.

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, concurring in part and dissenting in part.

Bureau of Land Management (BLM) officials in Wyoming made a careless error. They failed to record an easement obtained for the United States along a stretch of land on the privately owned High Island Ranch. Plaintiff-respondent Frank Robbins purchased the ranch knowing nothing about the easement granted by the prior owner. Under Wyoming law, Robbins took title to the land free of the easement. BLM officials, realizing their mistake, demanded from Robbins an easement—for which they did not propose to pay—to replace the one they carelessly lost. Their demand, one of them told Robbins, was nonnegotiable. Robbins was directed to provide the easement, or else. When he declined to follow that instruction, the BLM officials mounted a seven-year campaign of relentless harassment and intimidation to force Robbins to give in. They refused to maintain

the road providing access to the ranch, trespassed on Robbins' property, brought unfounded criminal charges against him, canceled his special recreational use permit and grazing privileges, interfered with his business operations, and invaded the privacy of his ranch guests on cattle drives.

Robbins commenced this lawsuit to end the incessant harassment and intimidation he endured. He asserted that the Fifth Amendment's Takings Clause forbids government action calculated to acquire private property coercively and cost free. He further urged that federal officials dishonor their constitutional obligation when they act in retaliation for the property owner's resistance to an uncompensated taking. In support of his claim for relief, Robbins relied on *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). The Court recognizes that the "remedy" to which the Government would confine Robbins—a discrete challenge to each offending action as it occurs—is inadequate. A remedy so limited would expose Robbins' business to "death by a thousand cuts." See *ante*, at 555 (quoting Brief for Respondent 40). Nevertheless, the Court rejects his claim, for it fears the consequences. Allowing Robbins to pursue this suit, the Court maintains, would open the floodgates to a host of unworthy suits "in every sphere of legitimate governmental action affecting property interests." *Ante*, at 561.

But this is no ordinary case of "hard bargaining," *ante*, at 560, or bureaucratic arrogance. Robbins charged "vindictive action" to extract property from him without paying a fair price. He complains of a course of conduct animated by an illegitimate desire to "get him." That factor is sufficient to minimize the Court's concern. Cf. *Village of Willowbrook* v. *Olech*, 528 U. S. 562, 565–566 (2000) (BREYER, J., concurring in result) (internal quotation marks omitted). Taking Robbins' allegations as true, as the Court must at this stage of the litigation, the case presents this question: Does the Fifth Amendment provide an effective check on federal offi-

cers who abuse their regulatory powers by harassing and punishing property owners who refuse to surrender their property to the United States without fair compensation? The answer should be a resounding "Yes."

I

The Court acknowledges that, at this stage of proceedings, the facts must be viewed in the light most favorable to Robbins. *Ante,* at 543, n. 2. The full force of Robbins' complaint, however, is not quite captured in the Court's restrained account of his allegations. A more complete rendition of the saga that sparked this suit is in order.

Upon discovering that BLM had mistakenly allowed its easement across High Island Ranch to expire, BLM area manager Joseph Vessels contacted Robbins at his home in Alabama to demand that Robbins grant a new easement. Vessels was on shaky legal ground. A federal regulation authorized BLM to require a landowner seeking a right-of-way across Government land to grant reciprocal access to his own land. See 43 CFR § 2801.1–2 (2004). But Robbins never applied for a right-of-way across federal land (the prior owner did), and the Government cites no law or regulation commanding Robbins to grant a new easement to make up for BLM's neglect in losing the first one. Robbins was unwilling to capitulate to unilateral demands, but told Vessels he would negotiate with BLM when he moved to Wyoming. Vessels would have none of it: "This is what you're going to do," he told Robbins. Plaintiff-Appellee's Supp. App. in No. 04–8016 (CA10), p. 325 (hereinafter CA10 App.).

Edward Parodi, a range technician in the BLM office, testified that from the very beginning, agency employees referred to Robbins as "the rich SOB from Alabama [who] got [the Ranch]." App. 121. Trouble started almost immediately. Shortly after their first conversation, Vessels wrote Robbins to ask permission to survey his land, presumably to establish the contours of the easement. Robbins refused,

believing there was no need for a survey until an agreement had been reached. Vessels conducted the survey anyway, and chuckled when he told Robbins of the trespass. CA10 App. 325–327. At their first face-to-face meeting in Wyoming, Robbins bridled at the one-sided deal BLM proposed. But Vessels was adamant: "The Federal Government does not negotiate," he declared. *Id.*, at 326. Over time, Parodi reported, Vessels' attitude toward Robbins changed from "professional" to "hostile," and "just got worse and worse and worse." App. 124.

Other BLM employees shared Vessels' animosity. In one notable instance, Robbins alleged, BLM agent Gene Leone provoked a violent encounter between Robbins and a neighboring landowner, LaVonne Pennoyer. Leone knew Robbins was looking for a water source for his cattle, and he called Pennoyer to warn her to be on the lookout. Robbins, unfamiliar with the territory and possibly misled by BLM, drove cattle onto Pennoyer's land to water at a creek. Pennoyer showed up in her truck, yelling, blowing the horn, and bumping cows. Realizing that he was on Pennoyer's land, Robbins started to push his cows out of her way, when Pennoyer revved her engine and drove her truck straight into the horse Robbins was riding. *Id.*, at 49; CA10 App. 331–332, 676–681; 9 Record, Pl. Exh. 2, pp. 164–166; 10 *id.*, Pl. Exh. 35a, at 102–108. According to Parodi, after the dustup, Leone boasted, "I think I finally got a way to get [Robbins'] permits and get him out of business." App. 125, 126. Leone pressed the local sheriff to charge Robbins for his conduct in the encounter with Pennoyer, but the sheriff declined to do so. CA10 App. 331–332.

Leone cited the Pennoyer incident as one ground, among others, to suspend Robbins' special recreation use permit. That permit allowed Robbins to lead ranch guests on cattle drives, which were his primary source of revenue from the property. App. 49. BLM aimed at the cattle drives in other ways too. Undermining the authenticity of the expe-

rience Robbins offered his guests, BLM employees followed along in trucks, videotaping participants. The Government suggests that this surveillance was a legitimate way to document instances when Robbins crossed onto federal land without permission. The suggestion, however, hardly explains why, on one occasion, BLM employees videotaped several female guests who were seeking privacy so they could relieve themselves. CA10 App. 506–507.

As part of the campaign against Robbins, Parodi was instructed to "look closer" for trespass violations, to "investigate harder" and "if [he] could find anything, to find it." App. 129, 130. Parodi testified, in relation to the instructions he was given, that he did not have problems with Robbins: He never found a trespass violation he regarded as willful, and Robbins promptly addressed every concern Parodi raised. *Id.*, at 124, 127.

The Court maintains that the BLM employees "were within their rights to make it plain that Robbins's willingness to give the easement would determine how complaisant they would be" about his infractions, but the record leaves doubt. *Ante*, at 558. Parodi testified that he was asked to "do things [he] wasn't authorized [to do]," App. 124, and that Leone's projections about what BLM officers would do to Robbins exceeded "the appropriate mission of the BLM," *id.*, at 128. About Vessels, Parodi said, "[i]t has been my experience that people given authority and not being held in check and not having solid convictions will run amuck and that [is] what I saw happening." *Id.*, at 125. Eventually, Parodi was moved to warn Robbins that, if he continued to defy BLM officials, "there would be war, a long war and [BLM] would outlast him and outspend him." *Id.*, at 132. Parodi found BLM's treatment of Robbins so disturbing that it became "the volcanic point" in his decision to retire. *Id.*, at 133. "It's one thing to go after somebody that is willfully busting the regulations and going out of their way to get

something out of the government," Parodi said, but he saw Robbins only "as a man standing up for his property rights." 10 Record, Pl. Exh. 35C, at 41.

The story thus far told is merely illustrative of Robbins' allegations. The record is replete with accounts of trespasses to Robbins' property, vindictive cancellations of his rights to access federal land, and unjustified or selective enforcement actions. Indeed, BLM was not content with the arrows in its own quiver. Robbins charged that BLM officials sought to enlist other federal agencies in their efforts to harass him. In one troubling incident, a BLM employee, petitioner David Wallace, pressured a Bureau of Indian Affairs (BIA) manager to impound Robbins' cattle, asserting that he was "a bad character" and that "something need[ed] to be done with [him]." CA10 App. 359. The manager rejected the request, observing that the BIA had no problems with Robbins. *Ibid.*

Even more disconcerting, there was sufficient evidence, the District Court recognized, to support Robbins' allegation that BLM employees filed false criminal charges against him, claiming that he forcibly interfered with a federal officer. Federal prosecutors took up the cause, but Robbins was acquitted by a jury in less than 30 minutes.[1] A news account reported that the jurors "were appalled at the actions of the

[1] Despite the rapid acquittal, the trial court denied Robbins' request for counsel fees, finding that he failed to prove "the position of the United States was vexatious, frivolous, or in bad faith." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, § 617, 111 Stat. 2519, note following 18 U. S. C. § 3006A. The Court counts this a significant point favoring petitioners. See *ante*, at 552 ("[T]he federal judge who presided at the trial did not think the Government's case thin enough to justify awarding attorney's fees."). But, as Robbins notes, the trial court passed only on the prosecutor's litigation position, not on whether the allegations of the BLM employees, which prompted the prosecution, were made in bad faith. Brief for Respondent 7, n. 5.

government," one of them commenting that "Robbins could not have been railroaded any worse . . . if he worked for the Union Pacific." *Id.*, at 852.

BLM's seven-year campaign of harassment had a devastating impact on Robbins' business. Robbins testified that in a typical summer, the High Island Ranch would accommodate 120 guests spread across six cattle drives. As a result of BLM's harassment, in 2003, Robbins was able to organize only one cattle drive with 21 guests. *Id.*, at 507–508. In addition, Robbins reports that he spent "hundreds of thousands of dollars in costs and attorney's fees" seeking to fend off BLM. Brief for Respondent 9, n. 6.

To put an end to the incessant harassment, Robbins filed this suit, alleging that the Fifth Amendment forbids government action calculated to acquire private property coercively and cost free, and measures taken in retaliation for the owner's resistance to an uncompensated taking. Even assuming Robbins is correct about the Fifth Amendment, he may not proceed unless he has a right to sue. To ground his claim for relief, Robbins relies on *Bivens*, 403 U. S. 388.

II

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803). In *Bivens*, the Court drew upon that venerable principle in holding that a victim of a Fourth Amendment violation by federal officers has a claim for relief in the form of money damages. "Historically," the Court observed, "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U. S., at 395.

The Court's decisions recognize that the reasoning underlying *Bivens* is not confined to Fourth Amendment claims. In *Davis* v. *Passman*, 442 U. S. 228, 248–249 (1979), the Court allowed a suit seeking money damages for employ-

ment discrimination in violation of the equal protection component of the Fifth Amendment. "[U]nless [constitutional] rights are to become merely precatory," the Court stated, "litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for . . . protection." *Id.*, at 242. Soon after *Passman*, the Court applied *Bivens* again, recognizing a federal right of action to gain damages for an Eighth Amendment violation. *Carlson* v. *Green*, 446 U. S. 14 (1980).

Carlson announced two exceptions to *Bivens*' rule. "The first [applies] when defendants demonstrate special factors counselling hesitation in the absence of affirmative action by Congress." 446 U. S., at 18 (quoting *Bivens*, 403 U. S., at 396). "The second [applies] when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson*, 446 U. S., at 18–19 (emphasis in original). Prior decisions have invoked these exceptions to bar *Bivens* suits against federal officers in only three contexts.[2]

In *Bush* v. *Lucas*, 462 U. S. 367, 368 (1983), a federal employee sought recovery for First Amendment violations alleged to have occurred in his workplace. As a civil servant, the plaintiff had recourse to "an elaborate, comprehensive scheme" administered by the Civil Service Commission, in which constitutional challenges were "fully cognizable." *Id.*, at 385, 386. The Court declined to recognize a judicial remedy, lest it interfere with Congress' carefully calibrated system. For similar reasons, in *Schweiker* v. *Chilicky*, 487

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[2] The Court cites *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61 (2001) (suit against private prison), and *FDIC* v. *Meyer*, 510 U. S. 471 (1994) (suit against federal agency), among cases in which we have declined to extend *Bivens*. *Ante*, at 550. Neither was a suit against a federal officer.

U. S. 412, 414, 424–429 (1988), the Court held that the Social Security Act's scheme of administrative and judicial remedies left no void to be filled by a *Bivens* action. Likewise, on two occasions, the Court concluded that "the unique disciplinary structure of the Military Establishment" precluded a *Bivens* action for harm to military personnel through activity incident to service. *United States* v. *Stanley*, 483 U. S. 669, 679 (1987) (internal quotation marks omitted); *Chappell* v. *Wallace*, 462 U. S. 296, 304 (1983).

Some Members of this Court consider *Bivens* a dated precedent. See *ante*, at 568 (THOMAS, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action." (quoting *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 75 (2001) (SCALIA, J., concurring))). But the Court has so far adhered to *Bivens*' core holding: Absent congressional command or special factors counseling hesitation, "victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson*, 446 U. S., at 18.

III

A

The Court does not hold that Robbins' *Bivens* suit is precluded by a carefully calibrated administrative regime like those at issue in *Bush*, *Chilicky*, *Chappell*, or *Stanley*, nor could it. As the Court recognizes, Robbins has no alternative remedy for the relentless torment he alleges. True, Robbins may have had discrete remedies for particular instances of harassment. But, in these circumstances, piecemeal litigation, the Court acknowledges, cannot forestall "death by a thousand cuts." *Ante*, at 555 (quoting Brief for Respondent 40). For plaintiffs in Robbins' shoes, "it is damages or nothing." *Bivens*, 403 U. S., at 410 (Harlan, J., concurring in judgment).

Despite the Court's awareness that Robbins lacks an effective alternative remedy, it nevertheless bars his suit. The Court finds, on the facts of this case, a special factor counseling hesitation quite unlike any we have recognized before. Allowing Robbins to seek damages for years of harassment, the Court says, "would invite an onslaught of *Bivens* actions," *ante,* at 562, with plaintiffs pressing claims "in every sphere of legitimate governmental action affecting property interests," *ante,* at 561.

The "floodgates" argument the Court today embraces has been rehearsed and rejected before. In *Passman*, the Court of Appeals emphasized, as a reason counseling denial of a *Bivens* remedy, the danger of "deluging federal courts with [Fifth Amendment based employment discrimination] claims." 442 U. S., at 248 (internal quotation marks omitted). This Court disagreed, turning to Justice Harlan's concurring opinion in *Bivens* to explain why.

The only serious policy argument against recognizing a right of action for Bivens, Justice Harlan observed, was the risk of inundating courts with Fourth Amendment claims. He found the argument unsatisfactory:

> "[T]he question appears to be how Fourth Amendment interests rank on a scale of social values compared with, for example, the interests of stockholders defrauded by misleading proxies. Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests." 403 U. S., at 410–411 (citation omitted).

In attributing heavy weight to the floodgates concern pressed in this case, the Court today veers away from Justice Harlan's sound counsel.

B

In the Court's view Robbins' complaint poses an inordinate risk of imposing on vigilant federal officers, and inundating federal courts, for his pleading "fails to fit the [Court's] prior retaliation cases." *Ante*, at 556. "Those cases," the Court says, "turn[ed] on an allegation of [an] impermissible purpose and motivation." *Ibid.* (citing *Rankin* v. *McPherson*, 483 U. S. 378 (1987); *Lefkowitz* v. *Turley*, 414 U. S. 70 (1973); and *United States* v. *Jackson*, 390 U. S. 570 (1968)). Robbins' suit, the Court maintains, raises a different sort of claim: that BLM employees went "too far" in their efforts to achieve an objective that "[a]ll agree" was "perfectly legitimate": "trying to induce [Robbins] to grant an easement for public use." *Ante*, at 556. Developing a legal test to determine when federal officials have gone "too far," *ante*, at 557, the Court asserts, would be an "endlessly knotty" task; the attendant uncertainty, the Court fears, would bring on a "tide of suits," inducing an undesirable timidity on the part of federal officials, *ante*, at 562.

The Court's assertion that the BLM officials acted with a "perfectly legitimate" objective, *ante*, at 556, is a dubious characterization of the long campaign to "bury" Robbins. See App. 49. One may accept that, at the outset, the BLM agents were motivated simply by a desire to secure an easement. But after Robbins refused to cover for the officials' blunder, they resolved to drive him out of business.[3] Even

[3] Robbins agreed, the Court relates, "that the Bureau's employees intended to convince Robbins to grant an easement." *Ante*, at 556. In support, the Court notes that Robbins posed this question: "[C]an government officials avoid the Fifth Amendment's prohibition against taking property without just compensation by using their regulatory powers to harass, punish, and coerce a private citizen into giving the Government his property without payment?" *Ibid.*, n. 8 (quoting Brief for Respondent 21; alteration in original). Robbins' descriptive words—"harass, punish, and coerce"—are hardly synonyms for "convince." Robbins has maintained throughout that the officials' motives were vindictive, a characterization amply supported by the record. Indeed, the agents' seven-year campaign of harassment calls to mind W. H. Auden's famous lines: "Their

if we allowed that the BLM employees had a permissible objective throughout their harassment of Robbins, and also that they pursued their goal through "legitimate tactics," *ante*, at 557,[4] it would not follow that Robbins failed to state a retaliation claim amenable to judicial resolution.

Impermissible retaliation may well involve lawful action in service of legitimate objectives. For example, in *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668 (1996), this Court held that a county board of commissioners may cross into unconstitutional territory if it fires a contractor for speaking out against members of the board on matters of public concern. The Court recognized that terminating a contractor for public criticism of board practices might promote legitimate governmental objectives (*e. g.*, maintaining relationships of trust with those from whom services are purchased). *Id.*, at 674. The Court, furthermore, instructed that even where the background law allows a government agency to terminate a contractor at will, the agency lacks *carte blanche* to do so in retaliation for constitutionally protected conduct. *Id.*, at 677.[5] The same is true here:

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cause, if they had one, is nothing to them now; They hate for hate's sake." There Will Be No Peace, reprinted in W. H. Auden: Collected Poems 615 (E. Mendelson ed. 2007).

[4] The Court observes that the Interior Board of Land Appeals (IBLA) approved some of BLM's enforcement actions against Robbins. *Ante*, at 545, 546, 558. Significantly, however, the IBLA declared that, as it was not a court "of general jurisdiction," it had "no authority to invalidate [BLM action] based on proof of improper motive on the part of a BLM official or employee involved in the development or issuance of the decision." *Robbins* v. *Bureau of Land Management*, 170 I. B. L. A. 219, 227 (2006). Accordingly, the IBLA refused to entertain Robbins' contention that BLM enforcement actions were "part of a pattern of activities amounting to willful violations of civil, criminal, or constitutional law." *Ibid.*

[5] Invoking *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968), the Court, in *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 685 (1996), held that the board's legitimate interests must be balanced against the free speech interests at stake to arrive at the appropriate constitutional judgment.

BLM officials may have had the authority to cancel Robbins' permits or penalize his trespasses, but they are not at liberty to do so selectively, in retaliation for his exercise of a constitutional right.[6]

I therefore cannot join the Court in concluding that Robbins' allegations present questions more "knotty" than the mine-run of constitutional retaliation claims. Because "we have established methods for identifying the presence of an illicit reason . . . in retaliation cases," *ante*, at 556, Robbins' suit can be resolved in familiar fashion. A court need only ask whether Robbins engaged in constitutionally protected conduct (resisting the surrender of his property sans compensation), and if so, whether that was the reason BLM agents harassed him.[7]

C

The Court's opinion is driven by the "fear" that a "*Bivens* cure" for the retaliation Robbins experienced may be "worse

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[6] In *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977), the Court held that a defendant in a First Amendment employment retaliation case can avoid liability by showing that "it would have reached the same decision as to [the plaintiff's] reemployment . . . in the absence of the protected conduct." This test, the Court explained, is necessary to "distinguis[h] between a result caused by a constitutional violation and one not so caused." *Id.*, at 286. *Mt. Healthy*'s causation standard, as today's opinion notes, is applicable here; hence, Robbins' claim is not governed by a "motive-is-all test." See *ante*, at 560, n. 10. Thus, if the BLM officials proved at trial that, even if Robbins had not refused to grant an easement *gratis*, they nonetheless would have canceled his permits, harassed his guests, and filed false criminal charges against him, they would escape liability for retaliation in violation of the Fifth Amendment (though perhaps exposing themselves to other sanctions).

[7] The Government, I recognize, should not be hampered in pursuing lawful means to drive a hard bargain. See *ante*, at 558–560, n. 10. Trespassing, filing false criminal charges, and videotaping women seeking privacy to relieve themselves, however, are not the tools of "hard bargaining." They have a closer relationship to the armed thug's demand: "Your money or your life." By concentrating on the allegedly lawful actions the BLM agents took (*e. g.*, canceling a right-of-way), *ibid.*, the Court gives a bloodless account of Robbins' complaint.

than the disease." *Ante*, at 561. This concern seems to me exaggerated. Robbins' suit is predicated upon the agents' vindictive motive, and the presence of this element in his claim minimizes the risk of making everyday bureaucratic overreaching fare for constitutional litigation. See *Olech*, 528 U. S., at 566 (BREYER, J., concurring in result) ("In my view, the presence of [vindictive action] in this case is sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right.").

Indeed, one could securely forecast that the flood the Court fears would not come to pass. In *Passman*, the Courts said that it did not "perceive the potential for . . . a deluge," because, under 42 U. S. C. § 1983, "a damages remedy [was] already available to redress injuries such as petitioner's when they occur under color of state law." 442 U. S., at 248. A similar side-glance could be cast here. Because we have no reason to believe that state employees are any more or less respectful of Fifth Amendment rights than federal agents, § 1983 provides a controlled experiment. If numerous *Bivens* claims would eventuate were courts to entertain claims like Robbins', then courts should already have encountered endeavors to mount Fifth Amendment Takings Clause suits under § 1983. But the Court of Appeals, the Solicitor General, and Robbins all agree that there are no reported cases on charges of retaliation by state officials against the exercise of Takings Clause rights. 433 F. 3d 755, 767 (CA10 2006); Brief for Petitioners 48; Brief for Respondent 31. Harassment of the sort Robbins alleges, it seems, is exceedingly rare. Cf. *Olech*, 528 U. S., at 565–566 (BREYER, J., concurring in result).[8]

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[8] The rarity of such harassment makes it unlikely that Congress will develop an alternative remedy for plaintiffs in Robbins' shoes, and it strengthens the case for allowing a *Bivens* suit. As noted above, every time the Court declined to recognize a *Bivens* action against a federal officer, it did so in deference to a specially crafted administrative regime. See *supra*, at 575–576.

One can assume, *arguendo*, that, as the Court projects, an unqualified judgment for Robbins could prompt "claims in every sphere of legitimate governmental action affecting property interests." *Ante*, at 561. Nevertheless, shutting the door to all plaintiffs, even those roughed up as badly as Robbins, is a measure too extreme. Cf. *Hein* v. *Freedom From Religion Foundation, Inc.*, *post*, at 640, n. 1 (dissenting opinion) ("To the degree . . . claims are meritorious, fear that there will be many of them does not provide a compelling reason . . . to keep them from being heard."). There are better ways to ensure that run-of-the-mill interactions between citizens and their Government do not turn into cases of constitutional right. Cf. *Bivens*, 403 U. S., at 410 (Harlan, J., concurring in judgment) ("I simply cannot agree . . . that the possibility of frivolous claims . . . warrants closing the courthouse doors to people in Bivens' situation. There are other ways, short of that, of coping with frivolous lawsuits." (internal quotation marks omitted)).

Sexual harassment jurisprudence is a helpful guide. Title VII, the Court has held, does not provide a remedy for every epithet or offensive remark. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 67 (1986) (internal quotation marks and brackets omitted). See also *National Railroad Passenger Corporation* v. *Morgan*, 536 U. S. 101, 115 (2002) (hostile work environments develop "over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own"). Adopting a similar standard for Fifth Amendment retaliation claims would "lesse[n] the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Ante*, at 562. Discrete episodes of hard bargaining that might be viewed as oppressive would not entitle a litigant to relief. But where a plaintiff could prove a pattern

of severe and pervasive harassment in duration and degree well beyond the ordinary rough-and-tumble one expects in strenuous negotiations, a *Bivens* suit would provide a remedy. Robbins would have no trouble meeting that standard.[9]

IV

Because I conclude that *Robbins* has a right to sue under *Bivens*, I must briefly address the BLM employees' argument that they are entitled to qualified immunity. In resolving claims of official immunity on summary judgment, we ask two questions. First, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). And, if so, was that right clearly established, such that a reasonable officer would have known that his conduct was unlawful? *Id.*, at 201–202.[10]

The Takings Clause instructs that no "private property [shall] be taken for public use, without just compensation." U. S. Const., Amdt. 5. Robbins argues that this provision confers on him the right to insist upon compensation as a condition of the taking of his property. He is surely correct. Correlative to the right to be compensated for a taking is the right to refuse to submit to a taking where no compensation is in the offing. Cf. *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994) (invalidating a permit condition that would have

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[9] My "emphasis on the extent and duration of the harm suffered by Robbins," the Court asserts, indicates that under my approach, Robbins "could not obtain relief without . . . satisfying an unspecified, and unworkable, 'too much' standard." *Ante*, at 557–558, n. 9. My approach, however, is no less specific nor more unworkable than the approach courts routinely employ in Title VII harassment cases.

[10] As I have elsewhere indicated, in appropriate cases, I would allow courts to move directly to the second inquiry. See *Brosseau* v. *Haugen*, 543 U. S. 194, 201–202 (2004) (BREYER, J., joined by SCALIA and GINSBURG, JJ., concurring). See also *County of Sacramento* v. *Lewis*, 523 U. S. 833, 859 (1998) (STEVENS, J., concurring in judgment).

constituted a taking); *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987) (same).

Robbins further argues that the BLM agents' persistent harassment impermissibly burdened his right to refuse to grant the Government something for nothing. Once again, he is surely correct. To cover for their mistake in failing to record the prior easement, BLM demanded, with no legal authority, that Robbins cede a new easement. Robbins refused, as was his constitutional right. At that point, BLM might have sought to take Robbins' property by eminent domain (assuming the agency was authorized to do so), or it might have attempted to negotiate with him. Instead, the agents harassed Robbins and tried to drive him out of business.

The Court has held that the Government may not unnecessarily penalize the exercise of constitutional rights. This principle has been applied, most notably, to protect the freedoms guaranteed by the First Amendment. See, *e. g.*, *Umbehr*, 518 U. S., at 674–675, 686 (freedom of speech); *O'Hare Truck Service, Inc.* v. *City of Northlake*, 518 U. S. 712, 716–720 (1996) (freedom of association); *Sherbert* v. *Verner*, 374 U. S. 398, 403–406 (1963) (freedom of religion). But it has also been deployed to protect other constitutional guarantees, including the privilege against self-incrimination, *Turley*, 414 U. S., at 82–84, the right to trial by a jury, *Jackson*, 390 U. S., at 581–583, and the right to travel, *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 254–262 (1974). The principle should apply here too. The constitutional guarantee of just compensation would be worthless if federal agents were permitted to harass and punish landowners who refuse to give up property without it. The Fifth Amendment, therefore, must be read to forbid government action calculated to acquire private property coercively and cost free, and measures taken in retaliation for the owner's resistance to uncompensated taking. Viewing the facts in the

light most favorable to Robbins, BLM agents plainly violated his Fifth Amendment right to be free of such coercion.

The closest question in this case is whether the officials are nevertheless entitled to immunity because it is not clearly established that retaliation for the exercise of Fifth Amendment rights runs afoul of the Constitution. The "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U. S., at 202. As noted, all concede that there are no reported cases recognizing a Fifth Amendment right to be free from retaliation. However, it is inconceivable that any reasonable official could have believed to be lawful the pernicious harassment Robbins alleges. In the egregious circumstances of this case, the text of the Takings Clause and our retaliation jurisprudence provided the officers fair warning that their behavior impermissibly burdened a constitutional right. See *Hope* v. *Pelzer*, 536 U. S. 730, 739–741 (2002).

* * *

Thirty-six years ago, the Court created the *Bivens* remedy. In doing so, it ensured that federal officials would be subject to the same constraints as state officials in dealing with the fundamental rights of the people who dwell in this land. Today, the Court decides that elaboration of *Bivens* to cover Robbins' case should be left to Congress. *Ante*, at 562. But see *supra*, at 580, n. 6. The *Bivens* analog to § 1983, however, is hardly an obscure part of the Court's jurisprudence. If Congress wishes to codify and further define the *Bivens* remedy, it may do so at anytime. Unless and until Congress acts, however, the Court should not shy away from the effort to ensure that bedrock constitutional rights do not become "merely precatory." *Passman*, 442 U. S., at 242.

For the reasons stated, I would affirm the judgment of the Court of Appeals insofar as it addressed Robbins' Fifth Amendment retaliation claim.[11]

[11] I agree that Robbins failed to state a claim under Racketeer Influenced and Corrupt Organizations Act and therefore join Part III of the Court's opinion.

Syllabus

HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL. *v.* FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.

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

No. 06–157. Argued February 28, 2007—Decided June 25, 2007

The President, by executive orders, created a White House office and several centers within federal agencies to ensure that faith-based community groups are eligible to compete for federal financial support. No congressional legislation specifically authorized these entities, which were created entirely within the Executive Branch, nor has Congress enacted any law specifically appropriating money to their activities, which are funded through general Executive Branch appropriations. Respondents, an organization opposed to Government endorsement of religion and three of its members, brought this suit alleging that petitioners, the directors of the federal offices, violated the Establishment Clause by organizing conferences that were designed to promote, and had the effect of promoting, religious community groups over secular ones. The only asserted basis for standing was that the individual respondents are federal taxpayers opposed to Executive Branch use of congressional appropriations for these conferences. The District Court dismissed the claims for lack of standing, concluding that under *Flast* v. *Cohen*, 392 U. S. 83, federal taxpayer standing is limited to Establishment Clause challenges to the constitutionality of exercises of congressional power under the taxing and spending clause of Art. I, § 8. Because petitioners acted on the President's behalf and were not charged with administering a congressional program, the court held that the challenged activities did not authorize taxpayer standing under *Flast*. The Seventh Circuit reversed, reading *Flast* as granting federal taxpayers standing to challenge Executive Branch programs on Establishment Clause grounds so long as the activities are financed by a congressional appropriation, even where there is no statutory program and the funds are from appropriations for general administrative expenses. According to the court, a taxpayer has standing to challenge anything done by a federal agency so long as the marginal or incremental cost to the public of the alleged Establishment Clause violation is greater than zero.

Syllabus

Held: The judgment is reversed.

433 F. 3d 989, reversed.

JUSTICE ALITO, joined by THE CHIEF JUSTICE and JUSTICE KENNEDY, concluded that because the Seventh Circuit's broad reading of *Flast* is incorrect, respondents lack standing. Pp. 597–615.

1. Federal-court jurisdiction is limited to actual "Cases" and "Controversies." U. S. Const., Art. III. A controlling factor in the definition of such a case or controversy is standing, *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 613, the requisite elements of which are well established: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U. S. 737, 751. Pp. 597–599.

2. Generally, a federal taxpayer's interest in seeing that Treasury funds are spent in accordance with the Constitution is too attenuated to give rise to the kind of redressable "personal injury" required for Article III standing. See, *e. g.*, *Frothingham* v. *Mellon*, decided with *Massachusetts* v. *Mellon*, 262 U. S. 447, 485–486. Pp. 599–601.

3. In *Flast*, the Court carved out a narrow exception to the general constitutional prohibition against taxpayer standing. The taxpayer-plaintiffs there alleged that the distribution of federal funds to religious schools under a federal statute violated the Establishment Clause. The Court set out a two-part test for determining standing: "First, . . . a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8. . . . Secondly, the taxpayer must . . . show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." 392 U. S., at 102–103. The Court then held that the particular taxpayer had satisfied both prongs of the test. *Id.*, at 103–104. Pp. 602–603.

4. Respondents' broad reading of the *Flast* exception to cover any expenditure of Government funds in violation of the Establishment Clause fails to observe "the rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 481. Given that the alleged Establishment Clause violation in *Flast* was funded by a specific congressional appropriation and was undertaken pursuant to an express congressional mandate, the Court concluded that the taxpayer-plaintiffs had established the requisite "logical link between [their taxpayer] status and the type of legislative enactment attacked." 392 U. S., at 102. "Their constitutional

challenge [was] made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare." *Id.*, at 103. But *Flast* "limited taxpayer standing to challenges directed 'only [at] exercises of congressional power'" under the Taxing and Spending Clause. *Valley Forge*, *supra*, at 479. Pp. 603–604.

5. The link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here. Respondents neither challenge any specific congressional action or appropriation nor ask the Court to invalidate any congressional enactment or legislatively created program as unconstitutional. That is because the expenditures at issue were not made pursuant to any Act of Congress, but under general appropriations to the Executive Branch to fund day-to-day activities. These appropriations did not expressly authorize, direct, or even mention the expenditures in question, which resulted from executive discretion, not congressional action. The Court has never found taxpayer standing under such circumstances. *Bowen* v. *Kendrick*, 487 U. S. 589, 619–620, distinguished. Pp. 605–609.

6. Respondents argue to no avail that distinguishing between money spent pursuant to congressional mandate and expenditures made in the course of executive discretion is arbitrary because the injury to taxpayers in both situations is the same as that targeted by the Establishment Clause and *Flast*—the expenditure for the support of religion of funds exacted from taxpayers. But *Flast* focused on congressional action, and the invitation to extend its holding to encompass discretionary Executive Branch expenditures must be declined. The Court has repeatedly emphasized that the *Flast* exception has a "narrow application," *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 348, that only "slightly lowered" the bar on taxpayer standing, *United States* v. *Richardson*, 418 U. S. 166, 173, and that must be applied with "rigor," *Valley Forge*, *supra*, at 481. Pp. 609–610.

7. Also rejected is respondents' argument that Executive Branch expenditures in support of religion are no different from legislative extractions. *Flast* itself rejected this equivalence. 392 U. S., at 102. Because almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action—be it a conference, proclamation, or speech—to Establishment Clause challenge by any taxpayer in federal court. Respondents' proposed rule would also raise serious separation-of-powers concerns, enlisting the federal courts to superintend, at the behest of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials. Pp. 610–612.

Syllabus

8. Both the Seventh Circuit and respondents implicitly recognize that unqualified federal taxpayer standing to assert Establishment Clause claims would go too far, but neither has identified a workable limitation. Taking the Circuit's zero-marginal-cost test literally—*i. e.*, that any marginal cost greater than zero suffices—taxpayers might well have standing to challenge some (and perhaps many) speeches by Government officials. At a minimum, that approach would create difficult and uncomfortable line-drawing problems. Respondents' proposal to require an expenditure to be fairly traceable to the conduct alleged to violate the Establishment Clause, so that challenges to the content of any particular speech would be screened out, is too vague and ill defined to be accepted. Pp. 612–614.

9. None of the parade of horribles respondents claim could occur if *Flast* is not extended to discretionary Executive Branch expenditures has happened. In the unlikely event any do take place, Congress can quickly step in. And respondents make no effort to show that these improbable abuses could not be challenged in federal court by plaintiffs possessed of standing based on grounds other than their taxpayer status. P. 614.

10. This case does not require the Court to reconsider *Flast.* The Seventh Circuit did not apply *Flast;* it extended it. *Valley Forge Christian Academy* illustrates that a necessary concomitant of *stare decisis* is that a precedent is not always expanded to the limit of its logic. That is the approach taken here. *Flast* is neither extended nor overruled. It is simply left as it was. Pp. 614–615.

JUSTICE SCALIA, joined by JUSTICE THOMAS, concurred in the Court's judgment, concluding that *Flast* v. *Cohen,* 392 U. S. 83, should be overruled as wholly irreconcilable with the Article III restrictions on federal-court jurisdiction that are embodied in the standing doctrine. Pp. 618–637.

1. The Court's taxpayer-standing cases involving Establishment Clause challenges to government expenditures are notoriously inconsistent because they have inconsistently described the relevant "injury in fact" that Article III requires. Some cases have focused on the financial effect on the taxpayer's wallet, whereas *Flast* and the cases that follow its teaching have emphasized the mental displeasure the taxpayer suffers when his funds are extracted and spent in aid of religion. There are only two logical routes available with respect to taxpayer standing. If the mental displeasure created by Establishment Clause violations is concrete and particularized enough to constitute an Article III "injury in fact," then *Flast* should be applied to (at a minimum) *all* challenges to government expenditures allegedly violating constitutional provi-

sions that specifically limit the taxing and spending power; if not, *Flast* should be overturned. Pp. 618–628.

2. Today's plurality avails itself of neither principled option, instead accepting the Government's submission that *Flast* should be limited to challenges to expenditures that are expressly authorized or mandated by specific congressional enactment. However, the plurality gives no explanation as to why the factual differences between this case and *Flast* are material. (Whether the challenged government expenditure is expressly allocated by a specific congressional enactment is not relevant to the Article III criteria of injury in fact, traceability, and redressability.) Yet the plurality is also unwilling to acknowledge that *Flast* erred by relying on purely mental injury. Pp. 628–631.

3. Respondents' legal position is no more coherent than the plurality's. They refuse to admit that their argument logically implies that *every* expenditure of tax revenues that is alleged to violate the Establishment Clause is subject to suit under *Flast.* Of course, *that* position finds no support in this Court's precedents or this Nation's history. Pp. 631–632.

4. A taxpayer's purely psychological displeasure that his funds are being spent in an allegedly unlawful manner is never sufficiently concrete and particularized to support Article III standing. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 573–574. Although overruling precedents is a serious undertaking, *stare decisis* should not prevent the Court from doing so here. *Flast* was inconsistent with the cases that came before it and undervalued the separation-of-powers function of standing. Its lack of a logical theoretical underpinning has rendered the Court's taxpayer-standing doctrine so incomprehensible that appellate judges do not know what to make of it. The case has engendered no reliance interests. Few cases less warrant *stare decisis* effect. It is past time to overturn *Flast.* Pp. 633–637.

ALITO, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and KENNEDY, J., joined. KENNEDY, J., filed a concurring opinion, *post,* p. 615. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post,* p. 618. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post,* p. 637.

Solicitor General Clement argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Keisler, Deputy Solicitor General Garre, Patricia A. Millett, Robert M. Loeb,* and *Lowell V. Sturgill, Jr.*

Andrew J. Pincus argued the cause for respondents. With him on the brief were *Charles A. Rothfeld*, *Richard L. Bolton*, and *Giovanna Shay.**

JUSTICE ALITO announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE KENNEDY join.

This is a lawsuit in which it was claimed that conferences held as part of the President's Faith-Based and Community Initiatives program violated the Establishment Clause of the First Amendment because, among other things, President Bush and former Secretary of Education Paige gave speeches that used "religious imagery" and praised the efficacy of faith-based programs in delivering social services.

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*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Steve Carter*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, and *Julie A. Hoffman*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *John Suthers* of Colorado, *Bill McCollum* of Florida, *Michael A. Cox* of Michigan, *George J. Chanos* of Nevada, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Henry McMaster* of South Carolina, *Greg Abbott* of Texas, *Robert F. McDonnell* of Virginia, and *Rob McKenna* of Washington; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Walter M. Weber*, *Colby M. May*, *Stuart J. Roth*, *John P. Tuskey*, and *Laura B. Hernandez;* for the Christian Legal Society by *Gregory S. Baylor* and *Steven H. Aden;* for the Foundation for Moral Law, Inc., by *Roy S. Moore*, *Gregory M. Jones*, and *Benjamin D. DuPré;* and for We Care America by *Benjamin W. Bull* and *Jordan Lorence*.

Briefs of amici curiae urging affirmance were filed for American Atheists, Inc., by *Robert Corn-Revere*, *Ronald G. London*, *David M. Shapiro*, and *Edwin F. Kagin;* for the American Civil Liberties Union et al. by *Anne Harkavy*, *Caroline Rogus*, *Judith E. Schaeffer*, *Howard W. Goldstein*, *Steven M. Freeman*, *Steven C. Sheinberg*, *Steven R. Shapiro*, *Daniel Mach*, *Ayesha N. Khan*, *Richard B. Katskee*, and *K. Hollyn Hollman;* for the American Jewish Congress et al. by *Marc D. Stern* and *Jeffrey Sinensky;* for the Center for Inquiry et al. by *Irvin B. Nathan*, *Daniel S. Pariser*, and *Ronald A. Lindsay;* and for Legal and Religious Historians and Law Scholars by *Matthew M. Shors* and *Steven K. Green*.

The plaintiffs contend that they meet the standing requirements of Article III of the Constitution because they pay federal taxes.

It has long been established, however, that the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government. In light of the size of the federal budget, it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm. And if every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus.

In *Flast* v. *Cohen*, 392 U. S. 83 (1968), we recognized a narrow exception to the general rule against federal taxpayer standing. Under *Flast*, a plaintiff asserting an Establishment Clause claim has standing to challenge a law authorizing the use of federal funds in a way that allegedly violates the Establishment Clause. In the present case, Congress did not specifically authorize the use of federal funds to pay for the conferences or speeches that the plaintiffs challenged. Instead, the conferences and speeches were paid for out of general Executive Branch appropriations. The Court of Appeals, however, held that the plaintiffs have standing as taxpayers because the conferences were paid for with money appropriated by Congress.

The question that is presented here is whether this broad reading of *Flast* is correct. We hold that it is not. We therefore reverse the decision of the Court of Appeals.

I

A

In 2001, the President issued an executive order creating the White House Office of Faith-Based and Community Initiatives within the Executive Office of the President. Exec. Order No. 13199, 3 CFR 752 (2001 Comp.). The purpose of

this new office was to ensure that "private and charitable community groups, including religious ones . . . have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes" and adhere to "the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality." *Ibid.* The office was specifically charged with the task of eliminating unnecessary bureaucratic, legislative, and regulatory barriers that could impede such organizations' effectiveness and ability to compete equally for federal assistance. *Id.*, at 752–753.

By separate executive orders, the President also created Executive Department Centers for Faith-Based and Community Initiatives within several federal agencies and departments.[1] These centers were given the job of ensuring that faith-based community groups would be eligible to compete for federal financial support without impairing their independence or autonomy, as long as they did "not use direct Federal financial assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization." Exec. Order No. 13279, 3 CFR §2(f), p. 260 (2002 Comp.). To this end, the President directed that "[n]o organization should be discriminated against on the basis of religion or religious belief in the administration or distribution of Federal financial assistance under social service programs," *id.*, §2(c), at 260, and that "[a]ll organizations that receive Federal financial assistance under social services programs should be prohibited from discriminating against beneficiaries or potential beneficiaries of the social services programs on the basis of religion or religious belief," *id.*, §2(d), at 260. Petitioners, who have been sued in their official capacities, are the directors of the White House Office and various Executive Department Centers.

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[1] See, *e. g.*, Exec. Order No. 13198, 3 CFR 750 (2001 Comp.); Exec. Order No. 13280, 3 CFR 262 (2002 Comp.); Exec. Order No. 13342, 3 CFR 180 (2004 Comp.); Exec. Order No. 13397, 71 Fed. Reg. 12275 (2006).

No congressional legislation specifically authorized the creation of the White House Office or the Executive Department Centers. Rather, they were "created entirely within the executive branch . . . by Presidential executive order." *Freedom From Religion Foundation, Inc.* v. *Chao*, 433 F. 3d 989, 997 (CA7 2006). Nor has Congress enacted any law specifically appropriating money for these entities' activities. Instead, their activities are funded through general Executive Branch appropriations. For example, the Department of Education's Center is funded from money appropriated for the Office of the Secretary of Education, while the Department of Housing and Urban Development's Center is funded through that Department's salaries and expenses account. See GAO, Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability 21 (GAO–06–616, June 2006), online at http://www.gao.gov/new.items/d06616.pdf (as visited June 25, 2007, and available in Clerk of Court's case file); see also Amended Complaint in No. 04–C–381–S (WD Wis.), ¶ 23, App. to Pet. for Cert. 71a–72a.

B

The respondents are Freedom From Religion Foundation, Inc., a nonstock corporation "opposed to government endorsement of religion," *id.*, ¶ 5, App. to Pet. for Cert. 68a, and three of its members. Respondents brought suit in the United States District Court for the Western District of Wisconsin, alleging that petitioners violated the Establishment Clause by organizing conferences at which faith-based organizations allegedly "are singled out as being particularly worthy of federal funding . . . , and the belief in God is extolled as distinguishing the claimed effectiveness of faith-based social services." *Id.*, ¶ 32, App. to Pet. for Cert. 73a. Respondents further alleged that the content of these conferences sent a message to religious believers "that they are insiders and favored members of the political community"

and that the conferences sent the message to nonbelievers "that they are outsiders" and "not full members of the political community." *Id.*, ¶ 37, App. to Pet. for Cert. 76a. In short, respondents alleged that the conferences were designed to promote, and had the effect of promoting, religious community groups over secular ones.

The only asserted basis for standing was that the individual respondents are federal taxpayers who are "opposed to the use of Congressional taxpayer appropriations to advance and promote religion." *Id.*, ¶ 10, App. to Pet. for Cert. 69a; see also *id.*, ¶¶ 7–9, App. to Pet. for Cert. 68a–69a. In their capacity as federal taxpayers, respondents sought to challenge Executive Branch expenditures for these conferences, which, they contended, violated the Establishment Clause.

C

The District Court dismissed the claims against petitioners for lack of standing. See *Freedom From Religion Foundation, Inc.* v. *Towey*, No. 04–C–381–S (WD Wis., Nov. 15, 2004), App. to Pet. for Cert. 27a–35a. It concluded that under *Flast*, 392 U. S. 83, federal taxpayer standing is limited to Establishment Clause challenges to the constitutionality of "'exercises of congressional power under the taxing and spending clause of Art. I, § 8.'" App. to Pet. for Cert. 31a (quoting *Flast*, *supra*, at 102). Because petitioners in this case acted "at the President's request and on the President's behalf" and were not "charged with the administration of a congressional program," the District Court concluded that the challenged activities were "not 'exercises of congressional power'" sufficient to provide a basis for taxpayer standing under *Flast*. App. to Pet. for Cert. 33a–34a.

A divided panel of the United States Court of Appeals for the Seventh Circuit reversed. 433 F. 3d 989. The majority read *Flast* as granting federal taxpayers standing to challenge Executive Branch programs on Establishment Clause grounds so long as the activities are "financed by a congres-

sional appropriation." 433 F. 3d, at 997. This was the case, the majority concluded, even where "there is no statutory program" enacted by Congress and the funds are "from appropriations for the general administrative expenses, over which the President and other executive branch officials have a degree of discretionary power." *Id.*, at 994. According to the majority, a taxpayer has standing to challenge anything done by a federal agency or officer so long as "the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause" is greater than "zero." *Id.*, at 995.

In dissent, Judge Ripple opined that the majority's decision reflected a "dramatic expansion of current standing doctrine," *id.*, at 997, that "cuts the concept of taxpayer standing loose from its moorings," *id.*, at 998. Noting that "[t]he executive can do nothing without general budget appropriations from Congress," *id.*, at 1000, he criticized the majority for overstepping *Flast*'s requirement that a "plaintiff must bring an attack against a disbursement of public funds made in the exercise of *Congress'* taxing and spending power," 433 F. 3d, at 1000 (emphasis in original).

The Court of Appeals denied en banc review by a vote of 7 to 4. *Freedom From Religion Foundation, Inc.* v. *Chao*, 447 F. 3d 988 (CA7 2006). Concurring in the denial of rehearing, Chief Judge Flaum expressed doubt about the panel decision, but noted that "the obvious tension which has evolved in this area of jurisprudence . . . can only be resolved by the Supreme Court." *Ibid.* We granted certiorari to resolve this question, 549 U. S. 1074 (2006), and we now reverse.

II

A

Article III of the Constitution limits the judicial power of the United States to the resolution of "Cases" and "Controversies," and "'Article III standing . . . enforces the Con-

stitution's case-or-controversy requirement.'" *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 342 (2006) (quoting *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 11 (2004)). "'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Raines* v. *Byrd*, 521 U. S. 811, 818 (1997) (quoting *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 37 (1976)).

"[O]ne of the controlling elements in the definition of a case or controversy under Article III" is standing. *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 613 (1989) (opinion of KENNEDY, J.). The requisite elements of Article III standing are well established: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U. S. 737, 751 (1984).

The constitutionally mandated standing inquiry is especially important in a case like this one, in which taxpayers seek "to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens." *ASARCO*, *supra*, at 613 (opinion of KENNEDY, J.). This is because "[t]he judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 471 (1982). The federal courts are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution. Rather, federal courts sit "solely, to decide on the rights of individuals," *Marbury* v. *Madison*, 1 Cranch 137, 170 (1803), and must "'refrai[n] from passing upon the constitutionality of an act . . . unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it,'" *Valley Forge*,

supra, at 474 (quoting *Blair* v. *United States*, 250 U. S. 273, 279 (1919)). As we held over 80 years ago, in another case involving the question of taxpayer standing:

> "We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. . . . The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Frothingham* v. *Mellon*, decided with *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923).

B

As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable "personal injury" required for Article III standing. Of course, a taxpayer has standing to challenge the *collection* of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer. See, *e. g.*, *Follett* v. *Town of McCormick*, 321 U. S. 573 (1944) (invalidating tax on preaching on First Amendment grounds). But that is not the interest on which respondents assert standing here. Rather, their claim is that, having paid lawfully collected taxes into the Federal Treasury at some point, they have a continuing, legally cognizable interest in ensuring that those funds are not *used* by the Government in a way that violates the Constitution.

We have consistently held that this type of interest is too generalized and attenuated to support Article III standing.

In *Frothingham*, a federal taxpayer sought to challenge federal appropriations for mothers' and children's health, arguing that federal involvement in this area intruded on the rights reserved to the States under the Tenth Amendment and would "increase the burden of future taxation and thereby take [the plaintiff's] property without due process of law." 262 U. S., at 486. We concluded that the plaintiff lacked the kind of particularized injury required for Article III standing:

> "[I]nterest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.
>
> "The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern." *Id.*, at 487.

Because the interests of the taxpayer are, in essence, the interests of the public at large, deciding a constitutional claim based solely on taxpayer standing "would be[,] not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." *Id.*, at 489; see also *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 478–479 (1938).

In *Doremus* v. *Board of Ed. of Hawthorne*, 342 U. S. 429, 433 (1952), we reaffirmed this principle, explaining that "the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure." We therefore rejected a state taxpayer's claim of standing to challenge a

state law authorizing public school teachers to read from the Bible because "the grievance which [the plaintiff] sought to litigate . . . is not a direct dollars-and-cents injury but is a religious difference." *Id.*, at 434. In so doing, we gave effect to the basic constitutional principle that

> "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 573–574 (1992).[2]

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[2] See also *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 344 (2006) ("Standing has been rejected" where "the alleged injury is not 'concrete and particularized,' . . . but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally'" (quoting *Defenders of Wildlife*, 504 U. S., at 560, and *Frothingham* v. *Mellon*, decided with *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923))); *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 616 (1989) (opinion of KENNEDY, J.) ("[G]eneralized grievances brought by concerned citizens . . . are not cognizable in the federal courts"); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 483 (1982) ("[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III"); *United States* v. *Richardson*, 418 U. S. 166, 174 (1974) ("[A] taxpayer may not 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System'" (quoting *Flast* v. *Cohen*, 392 U. S. 83, 114 (1968) (Stewart, J., concurring); some internal quotation marks omitted)); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 217 (1974) ("Respondents seek to have the Judicial Branch compel the Executive Branch to act in conformity with the Incompatibility Clause [of the Constitution], an interest shared by all citizens. . . . And that claimed nonobservance, standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury"); *Frothingham*, *supra*, at 488 ("The party who invokes the power [of judicial review] must be able to show not only that

C

In *Flast*, the Court carved out a narrow exception to the general constitutional prohibition against taxpayer standing. The taxpayer-plaintiffs in that case challenged the distribution of federal funds to religious schools under the Elementary and Secondary Education Act of 1965, alleging that such aid violated the Establishment Clause. The Court set out a two-part test for determining whether a federal taxpayer has standing to challenge an allegedly unconstitutional expenditure:

> "First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, §8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, §8." 392 U. S., at 102–103.

The Court held that the taxpayer-plaintiffs in *Flast* had satisfied both prongs of this test: The plaintiff's "constitutional challenge [was] made to an exercise by Congress of its

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the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally").

power under Art. I, § 8, to spend for the general welfare," and she alleged a violation of the Establishment Clause, which "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8." *Id.*, at 103–104.

III

A

Respondents argue that this case falls within the *Flast* exception, which they read to cover any "expenditure of government funds in violation of the Establishment Clause." Brief for Respondents 12. But this broad reading fails to observe "the rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied." *Valley Forge*, 454 U. S., at 481.

The expenditures at issue in *Flast* were made pursuant to an express congressional mandate and a specific congressional appropriation. The plaintiff in that case challenged disbursements made under the Elementary and Secondary Education Act of 1965, 79 Stat. 27. That Act expressly appropriated the sum of $100 million for fiscal year 1966, § 201(b), *id.*, at 36, and authorized the disbursement of those funds to local educational agencies for the education of low-income students, see *Flast, supra*, at 86. The Act mandated that local educational agencies receiving such funds "ma[k]e provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment)" in which students enrolled in private elementary and secondary schools could participate, § 2, 79 Stat. 30–31. In addition, recipient agencies were required to ensure that "library resources, textbooks, and other instructional materials" funded through the grants "be provided on an equitable basis for the use of children and teachers in private elementary and secondary schools," § 203(a)(3)(B), *id.*, at 37.

The expenditures challenged in *Flast*, then, were funded by a specific congressional appropriation and were disbursed to private schools (including religiously affiliated schools) pursuant to a direct and unambiguous congressional mandate.[3] Indeed, the *Flast* taxpayer-plaintiffs' constitutional claim was premised on the contention that if the Government's actions were "'within the authority and intent of the Act, the Act is to that extent unconstitutional and void.'" *Flast*, *supra*, at 90. And the judgment reviewed by this Court in *Flast* solely concerned the question whether "if [the challenged] expenditures are authorized by the Act the statute constitutes a 'law respecting an establishment of religion' and a law 'prohibiting the free exercise thereof'" under the First Amendment. *Flast* v. *Gardner*, 271 F. Supp. 1, 2 (SDNY 1967).

Given that the alleged Establishment Clause violation in *Flast* was funded by a specific congressional appropriation and was undertaken pursuant to an express congressional mandate, the Court concluded that the taxpayer-plaintiffs had established the requisite "logical link between [their taxpayer] status and the type of legislative enactment attacked." In the Court's words, "[t]heir constitutional challenge [was] made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare." 392 U. S., at 102, 103. But as this Court later noted, *Flast* "limited taxpayer standing to challenges directed 'only [at] exercises of congressional power'" under the Taxing and Spending Clause. *Valley Forge*, *supra*, at 479.

[3] At around the time the Act was passed and *Flast* was decided, the great majority of nonpublic elementary and secondary schools in the United States were associated with a church. In 1965–1966, for example, 91.1 percent of all nonpublic elementary schools and 78.2 percent of all nonpublic secondary schools in the United States were religiously affiliated. Dept. of Health, Education, and Welfare, Statistics of Nonpublic Elementary and Secondary Schools 1965–66, p. 7 (1968). Congress surely understood that much of the aid mandated by the statute would find its way to religious schools.

B

The link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here. Respondents do not challenge any specific congressional action or appropriation; nor do they ask the Court to invalidate any congressional enactment or legislatively created program as unconstitutional. That is because the expenditures at issue here were not made pursuant to any Act of Congress. Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities.[4] These appropriations did not expressly authorize, direct, or even mention the expenditures of which respondents complain. Those expenditures resulted from executive discretion, not congressional action.

We have never found taxpayer standing under such circumstances. In *Valley Forge*, we held that a taxpayer lacked standing to challenge "a decision by [the federal Department of Health, Education and Welfare] to transfer a parcel of federal property" to a religious college because this transfer was "not a congressional action." 454 U. S., at 479. In fact, the connection to congressional action was closer in *Valley Forge* than it is here, because in that case, the "particular Executive Branch action" being challenged was at least "arguably authorized" by the Federal Property and Administrative Services Act of 1949, which permitted federal agencies to transfer surplus property to private entities. *Ibid.*, n. 15. Nevertheless, we found that the plaintiffs lacked standing because *Flast* "limited taxpayer standing to challenges directed 'only [at] exercises of congressional power'" under the Taxing and Spending Clause. 454 U. S., at 479 (quoting *Flast*, *supra*, at 102).[5]

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[4] See, *e. g.*, 119 Stat. 2472 (appropriating $53,830,000 "to be available for allocation within the Executive Office of the President").

[5] *Valley Forge* also relied on a second rationale: that the authorizing Act was an exercise of Congress' power under the Property Clause of Art. IV, § 3, cl. 2, and not the Taxing and Spending Clause of Art. I, § 8. 454 U. S.,

Similarly, in *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208 (1974), the taxpayer-plaintiffs contended that the Incompatibility Clause of Article I prohibited Members of Congress from holding commissions in the Armed Forces Reserve. We held that these plaintiffs lacked standing under *Flast* because they "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status." 418 U. S., at 228. This was the case even though the plaintiffs sought to reclaim reservist pay received by those Members—pay that presumably was funded through Congress' general appropriations for the support of the Armed Forces: "Such relief would follow from the invalidity of Executive action in paying persons who could not lawfully have been reservists, not from the invalidity of the statutes authorizing pay to those who lawfully were Reservists." *Ibid.*, n. 17. See also *United States* v. *Richardson*, 418 U. S. 166, 175 (1974) (denying taxpayers standing to compel publication of accounting for the Central Intelligence Agency because "there is no 'logical nexus' between the asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the expenditures of that agency").

Bowen v. *Kendrick*, 487 U. S. 589 (1988), on which respondents rely heavily, is not to the contrary. In that case, we held that the taxpayer-plaintiffs had standing to mount an as-applied challenge to the Adolescent Family Life Act (AFLA), which authorized federal grants to private community service groups including religious organizations. The Court found "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power," notwithstanding the fact that "the funding authorized by Congress ha[d] flowed through

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at 480. But this conclusion merely provided an additional—"and perhaps redundan[t]," *ibid.*—basis for denying a claim of standing that was already foreclosed because it was not based on any congressional action.

and been administered" by an Executive Branch official. *Id.*, at 620, 619.

But the key to that conclusion was the Court's recognition that AFLA was "at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers," and that the plaintiffs' claims "call[ed] into question how the funds authorized by Congress [were] being disbursed *pursuant to the AFLA's statutory mandate.*" *Id.*, at 619–620 (emphasis added). AFLA not only expressly authorized and appropriated specific funds for grantmaking, it also expressly contemplated that some of those moneys might go to projects involving religious groups. See *id.*, at 595–596; see also *id.*, at 623 (O'Connor, J., concurring) (noting the "partnership between governmental and religious institutions contemplated by the AFLA").[6] Unlike this case, *Kendrick* involved a "program of disbursement of funds pursuant to Congress' taxing and spending powers" that "Congress had created," "authorized," and "mandate[d]." *Id.*, at 619–620.

Respondents attempt to paint their lawsuit as a *Kendrick*-style as-applied challenge, but this effort is unavailing for the simple reason that they can cite no statute whose application they challenge. The best they can do is to point to unspecified, lump-sum "Congressional budget appropriations" for the general use of the Executive Branch—the allocation of which "is a[n] administrative decision

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[6] For example, the statute noted that the problems of adolescent premarital sex and pregnancy "are best approached through a variety of integrated and essential services provided to adolescents and their families" by "religious and charitable organizations," among other groups. 42 U. S. C. §300z(a)(8)(B) (1982 ed.). It went on to mandate that federally provided services in that area should "emphasize the provision of support by other family members, religious and charitable organizations, voluntary associations, and other groups." §300z(a)(10)(C). And it directed that demonstration projects funded by the government "shall . . . make use of support systems" such as religious organizations, §300z–2(a), and required grant applicants to describe how they would "involve religious and charitable organizations" in their projects, §300z–5(a)(21)(B).

traditionally regarded as committed to agency discretion." *Lincoln* v. *Vigil*, 508 U. S. 182, 192 (1993). Characterizing this case as an "as-applied challenge" to these general appropriations statutes would stretch the meaning of that term past its breaking point. It cannot be that every legal challenge to a discretionary Executive Branch action implicates the constitutionality of the underlying congressional appropriation. When a criminal defendant charges that a federal agent carried out an unreasonable search or seizure, we do not view that claim as an as-applied challenge to the constitutionality of the statute appropriating funds for the Federal Bureau of Investigation. Respondents have not established why the discretionary Executive Branch expenditures here, which are similarly funded by no-strings, lump-sum appropriations, should be viewed any differently.[7]

In short, this case falls outside "the narrow exception" that *Flast* "created to the general rule against taxpayer standing established in *Frothingham*." *Kendrick*, *supra*, at 618. Because the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment, respondents' lawsuit is not directed at an exercise of congressional power, see *Valley Forge*, 454 U. S., at 479, and thus lacks the requisite "logical nexus" be-

[7] Nor is it relevant that Congress may have informally "earmarked" portions of its general Executive Branch appropriations to fund the offices and centers whose expenditures are at issue here. See, *e. g.*, H. R. Rep. No. 107–342, p. 108 (2001). "[A] fundamental principle of appropriations law is that where 'Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on' the agency." *Lincoln*, 508 U. S., at 192 (quoting *In re LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975)); see also *TVA* v. *Hill*, 437 U. S. 153, 191 (1978) ("Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress").

tween taxpayer status "and the type of legislative enactment attacked," *Flast*, 392 U. S., at 102.

IV

A

1

Respondents argue that it is "arbitrary" to distinguish between money spent pursuant to congressional mandate and expenditures made in the course of executive discretion, because "the injury to taxpayers in both situations is the very injury targeted by the Establishment Clause and *Flast*—the expenditure for the support of religion of funds exacted from taxpayers." Brief for Respondents 13. The panel majority below agreed, based on its observation that "there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause." 433 F. 3d, at 995.

But *Flast* focused on congressional action, and we must decline this invitation to extend its holding to encompass discretionary Executive Branch expenditures. *Flast* itself distinguished the "incidental expenditure of tax funds in the administration of an essentially regulatory statute," 392 U. S., at 102, and we have subsequently rejected the view that taxpayer standing "extends to 'the Government as a whole, regardless of which branch is at work in a particular instance,' " *Valley Forge*, *supra*, at 484, n. 20. Moreover, we have repeatedly emphasized that the *Flast* exception has a "narrow application in our precedent," *Cuno*, 547 U. S., at 348, that only "slightly lowered" the bar on taxpayer standing, *Richardson*, 418 U. S., at 173, and that must be applied with "rigor," *Valley Forge*, *supra*, at 481.

It is significant that, in the four decades since its creation, the *Flast* exception has largely been confined to its facts. We have declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause. See *Tilton* v. *Richardson*, 403 U. S. 672 (1971) (no taxpayer standing to sue under Free Ex-

ercise Clause of First Amendment); *Richardson*, 418 U. S., at 175 (no taxpayer standing to sue under Statement and Account Clause of Art. I); *Schlesinger*, 418 U. S., at 228 (no taxpayer standing to sue under Incompatibility Clause of Art. I); *Cuno*, *supra*, at 349 (no taxpayer standing to sue under Commerce Clause). We have similarly refused to extend *Flast* to permit taxpayer standing for Establishment Clause challenges that do not implicate Congress' taxing and spending power. See *Valley Forge*, *supra*, at 479–482 (no taxpayer standing to challenge Executive Branch action taken pursuant to Property Clause of Art. IV); see also *District of Columbia Common Cause* v. *District of Columbia*, 858 F. 2d 1, 3–4 (CADC 1988); *In re United States Catholic Conference*, 885 F. 2d 1020, 1028 (CA2 1989). In effect, we have adopted the position set forth by Justice Powell in his concurrence in *Richardson* and have "limit[ed] the expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization to an outer boundary drawn by the *results* in *Flast* . . . ." 418 U. S., at 196.

2

While respondents argue that Executive Branch expenditures in support of religion are no different from legislative extractions, *Flast* itself rejected this equivalence: "It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." 392 U. S., at 102.

Because almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action—be it a conference, proclamation, or speech—to Establishment Clause challenge by any taxpayer in federal court. To see the wide swathe of activity that respondents' proposed rule would cover, one need look no further than the amended complaint in this action, which focuses largely on speeches and presentations

made by Executive Branch officials. See, *e. g.*, Amended Complaint ¶ 32, App. to Pet. for Cert. 73a (challenging Executive Branch officials' "support of national and regional conferences"); *id.*, ¶ 33, App. to Pet. for Cert. 73a–75a (challenging content of speech by Secretary of Education); *id.*, ¶¶ 35, 36, App. to Pet. for Cert. 76a (challenging content of Presidential speeches); *id.*, ¶ 41, App. to Pet. for Cert. 77a (challenging Executive Branch officials' "public appearances" and "speeches"). Such a broad reading would ignore the first prong of *Flast*'s standing test, which requires "a logical link between [taxpayer] status and the type of legislative enactment attacked." 392 U. S., at 102.

It would also raise serious separation-of-powers concerns. As we have recognized, *Flast* itself gave too little weight to these concerns. By framing the standing question solely in terms of whether the dispute would be presented in an adversary context and in a form traditionally viewed as capable of judicial resolution, *Flast* "failed to recognize that this doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches, concrete adverseness or not." *Lewis* v. *Casey*, 518 U. S. 343, 353, n. 3 (1996); see also *Valley Forge*, 454 U. S., at 471. Respondents' position, if adopted, would repeat and compound this mistake.

The constitutional requirements for federal-court jurisdiction—including the standing requirements and Article III—"are an essential ingredient of separation and equilibration of powers." *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 101 (1998). "Relaxation of standing requirements is directly related to the expansion of judicial power," and lowering the taxpayer standing bar to permit challenges of purely executive actions "would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government." *Richardson*, *supra*, at 188 (Powell, J., concurring). The rule respondents propose would enlist the federal courts to superintend, at the behest

of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials. This would "be quite at odds with . . . *Flast*'s own promise that it would not transform federal courts into forums for taxpayers' 'generalized grievances'" about the conduct of government, *Cuno*, 547 U. S., at 348 (quoting *Flast*, *supra*, at 106), and would "open the Judiciary to an arguable charge of providing 'government by injunction,'" *Schlesinger*, *supra*, at 222. It would deputize federal courts as "'virtually continuing monitors of the wisdom and soundness of Executive action,'" and that, most emphatically, "'is not the role of the judiciary.'" *Allen*, 468 U. S., at 760 (quoting *Laird* v. *Tatum*, 408 U. S. 1, 15 (1972)).

3

Both the Court of Appeals and respondents implicitly recognize that unqualified federal taxpayer standing to assert Establishment Clause claims would go too far, but neither the Court of Appeals nor respondents has identified a workable limitation. The Court of Appeals, as noted, conceded only that a taxpayer would lack standing where "the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause" is "zero." 433 F. 3d, at 995. Applying this rule, the Court of Appeals opined that a taxpayer would not have standing to challenge a President's favorable reference to religion in a State of the Union address because the costs associated with the speech "would be no greater merely because the President had mentioned Moses rather than John Stuart Mill." *Ibid.*

There is reason to question whether the Court of Appeals intended for its zero-marginal-cost test to be taken literally, because the court, without any apparent inquiry into the costs of Secretary Paige's speech, went on to agree that the plaintiffs lacked standing to challenge that speech. *Id.*, at 996. But if we take the Court of Appeals' test literally—*i. e.*, that any marginal cost greater than zero suffices—tax-

payers might well have standing to challenge some (and perhaps many) speeches. As Judge Easterbrook observed: "The total cost of presidential proclamations and speeches by Cabinet officers that touch on religion (Thanksgiving and several other holidays) surely exceeds $500,000 annually; it may cost that much to use Air Force One and send a Secret Service detail to a single speaking engagement." 447 F. 3d, at 989–990 (concurring in denial of rehearing en banc). At a minimum, the Court of Appeals' approach (asking whether the marginal cost exceeded zero) would surely create difficult and uncomfortable line-drawing problems. Suppose that it is alleged that a speechwriter or other staff member spent extra time doing research for the purpose of including "religious imagery" in a speech. Suppose that a President or a Cabinet officer attends or speaks at a prayer breakfast and that the time spent was time that would have otherwise been spent on secular work.

Respondents take a somewhat different approach, contending that their proposed expansion of *Flast* would be manageable because they would require that a challenged expenditure be "fairly traceable to the conduct alleged to violate the Establishment Clause." Brief for Respondents 17. Applying this test, they argue, would "scree[n] out . . . challenge[s to] the content of one particular speech, for example the State of the Union address, as an Establishment Clause violation." *Id.*, at 21.

We find little comfort in this vague and ill-defined test. As an initial matter, respondents fail to explain why the (often substantial) costs that attend, for example, a Presidential address are any less "traceable" than the expenses related to the Executive Branch statements and conferences at issue here. Indeed, respondents concede that even lawsuits involving *de minimis* amounts of taxpayer money can pass their proposed "traceability" test. *Id.*, at 20, n. 6.

Moreover, the "traceability" inquiry, depending on how it is framed, would appear to prove either too little or too

much. If the question is whether an allegedly unconstitutional executive action can somehow be traced to taxpayer funds *in general*, the answer will always be yes: Almost all Executive Branch activities are ultimately funded by *some* congressional appropriation, whether general or specific, which is in turn financed by tax receipts. If, on the other hand, the question is whether the challenged action can be traced to the contributions of a *particular* taxpayer-plaintiff, the answer will almost always be no: As we recognized in *Frothingham*, the interest of any individual taxpayer in a particular federal expenditure "is comparatively minute and indeterminable . . . and constantly changing." 262 U. S., at 487.

B

Respondents set out a parade of horribles that they claim could occur if *Flast* is not extended to discretionary Executive Branch expenditures. For example, they say, a federal agency could use its discretionary funds to build a house of worship or to hire clergy of one denomination and send them out to spread their faith. Or an agency could use its funds to make bulk purchases of Stars of David, crucifixes, or depictions of the star and crescent for use in its offices or for distribution to the employees or the general public. Of course, none of these things has happened, even though *Flast* has not previously been expanded in the way that respondents urge. In the unlikely event that any of these executive actions did take place, Congress could quickly step in. And respondents make no effort to show that these improbable abuses could not be challenged in federal court by plaintiffs who would possess standing based on grounds other than taxpayer standing.

C

Over the years, *Flast* has been defended by some and criticized by others. But the present case does not require us to reconsider that precedent. The Court of Appeals did not

apply *Flast;* it extended *Flast.* It is a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always expanded to the limit of its logic. That was the approach that then-Justice Rehnquist took in his opinion for the Court in *Valley Forge*, and it is the approach we take here. We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it.

JUSTICE SCALIA says that we must either overrule *Flast* or extend it to the limits of its logic. His position is not "[in]sane," inconsistent with the "rule of law," or "utterly meaningless." *Post*, at 618 (opinion concurring in judgment). But it is wrong. JUSTICE SCALIA does not seriously dispute either (1) that *Flast* itself spoke in terms of "legislative enactment[s]" and "exercises of congressional power," 392 U. S., at 102, or (2) that in the four decades since *Flast* was decided, we have never extended its narrow exception to a purely discretionary Executive Branch expenditure. We need go no further to decide this case. Relying on the provision of the Constitution that limits our role to resolving the "Cases" and "Controversies" before us, we decide only the case at hand.

* * *

For these reasons, the judgment of the Court of Appeals for the Seventh Circuit is reversed.

It is so ordered.

JUSTICE KENNEDY, concurring.

The separation-of-powers design in the Constitution is implemented, among other means, by Article III's case-or-controversy limitation and the resulting requirement of standing. See, *e. g.*, *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 559–560 (1992). The Court's decision in *Flast* v. *Cohen*, 392 U. S. 83 (1968), and in later cases applying it, must be interpreted as respecting separation-of-powers principles but acknowledging as well that these principles, in some cases, must accommodate the First Amendment's Es-

tablishment Clause. The Clause expresses the Constitution's special concern that freedom of conscience not be compromised by government taxing and spending in support of religion. In my view the result reached in *Flast* is correct and should not be called into question. For the reasons set forth by JUSTICE ALITO, however, *Flast* should not be extended to permit taxpayer standing in the instant matter. And I join his opinion in full.

Respondents' amended complaint challenged the religious nature of national and regional conferences that promoted President Bush's Faith-Based and Community Initiatives. See App. to Pet. for Cert. 73a–77a. To support the allegation respondents pointed to speeches given by the President and other executive officers, speeches with religious references. *Id.*, at 73a–76a. The complaint relies on respondents' taxpayer status as the sole basis for standing to maintain the suit but points to no specific use of Congress' taxing and spending power other than general appropriations to fund the administration of the Executive Branch. *Id.*, at 71a–73a.

Flast established a "narrow exception" to the rule against taxpayer standing. *Bowen* v. *Kendrick*, 487 U. S. 589, 618 (1988). To find standing in the circumstances of this case would make the narrow exception boundless. The public events and public speeches respondents seek to call in question are part of the open discussion essential to democratic self-government. The Executive Branch should be free, as a general matter, to discover new ideas, to understand pressing public demands, and to find creative responses to address governmental concerns. The exchange of ideas between and among the State and Federal Governments and their manifold, diverse constituencies sustains a free society. Permitting any and all taxpayers to challenge the content of these prototypical executive operations and dialogues would lead to judicial intervention so far exceeding traditional boundaries on the Judiciary that there would arise a real

danger of judicial oversight of executive duties. The burden of discovery to ascertain if relief is justified in these potentially innumerable cases would risk altering the free exchange of ideas and information. And were this constant supervision to take place the courts would soon assume the role of speech editors for communications issued by executive officials and event planners for meetings they hold.

The courts must be reluctant to expand their authority by requiring intrusive and unremitting judicial management of the way the Executive Branch performs its duties. The Court has refused to establish a constitutional rule that would require or allow "permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Garcetti* v. *Ceballos*, 547 U. S. 410, 423 (2006); see also *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 382 (2004) (noting that "separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President" and that "mandamus standards are broad enough . . . to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities"). In the Article III context the Court explained that concerns based on separation of powers "counsel[ed] against recognizing standing in a case brought . . . to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties." *Allen* v. *Wright*, 468 U. S. 737, 761 (1984).

The same principle applies here. The Court should not authorize the constant intrusion upon the executive realm that would result from granting taxpayer standing in the instant case. As JUSTICE ALITO explains in detail, the Court's precedents do not require it to do so. The separation-of-powers concerns implicated by intrusive judicial regulation of day-to-day executive operations reinforce his interpretation of *Flast*'s framework. Cf. *Allen*, *supra*,

at 761, n. 26 (relying "on separation of powers principles to interpret the 'fairly traceable' component of the standing requirement").

It must be remembered that, even where parties have no standing to sue, members of the Legislative and Executive Branches are not excused from making constitutional determinations in the regular course of their duties. Government officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

Today's opinion is, in one significant respect, entirely consistent with our previous cases addressing taxpayer standing to raise Establishment Clause challenges to government expenditures. Unfortunately, the consistency lies in the creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently. If this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides: Either *Flast* v. *Cohen*, 392 U. S. 83 (1968), should be applied to (at a minimum) *all* challenges to the governmental expenditure of general tax revenues in a manner alleged to violate a constitutional provision specifically limiting the taxing and spending power, or *Flast* should be repudiated. For me, the choice is easy. *Flast* is wholly irreconcilable with the Article III restrictions on federal-court jurisdiction that this Court has repeatedly confirmed are embodied in the doctrine of standing.

I

A

There is a simple reason why our taxpayer-standing cases involving Establishment Clause challenges to government

expenditures are notoriously inconsistent: We have inconsistently described the first element of the "irreducible constitutional minimum of standing," which minimum consists of (1) a "concrete and particularized" "'injury in fact'" that is (2) fairly traceable to the defendant's alleged unlawful conduct and (3) likely to be redressed by a favorable decision. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). We have alternately relied on two entirely distinct conceptions of injury in fact, which for convenience I will call "Wallet Injury" and "Psychic Injury."

Wallet Injury is the type of concrete and particularized injury one would expect to be asserted in a *taxpayer* suit, namely, a claim that the plaintiff's tax liability is higher than it would be, but for the allegedly unlawful government action. The stumbling block for suits challenging government expenditures based on this conventional type of injury is quite predictable. The plaintiff cannot satisfy the traceability and redressability prongs of standing. It is uncertain what the plaintiff's tax bill would have been had the allegedly forbidden expenditure not been made, and it is even more speculative whether the government will, in response to an adverse court decision, lower taxes rather than spend the funds in some other manner.

Psychic Injury, on the other hand, has nothing to do with the plaintiff's tax liability. Instead, the injury consists of the taxpayer's *mental displeasure* that money extracted from him is being spent in an unlawful manner. This shift in focus eliminates traceability and redressability problems. Psychic Injury is directly traceable to the improper *use* of taxpayer funds, and it is redressed when the improper use is enjoined, regardless of whether that injunction affects the taxpayer's purse. *Flast* and the cases following its teaching have invoked a peculiarly restricted version of Psychic Injury, permitting taxpayer displeasure over unconstitutional spending to support standing *only if* the constitutional provision allegedly violated is a specific limitation on the taxing and spending power. Restricted or not, this conceptualizing

of injury in fact in purely mental terms conflicts squarely with the familiar proposition that a plaintiff lacks a concrete and particularized injury when his only complaint is the generalized grievance that the law is being violated. As we reaffirmed unanimously just this Term: "'We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.'" *Lance* v. *Coffman*, 549 U. S. 437, 439 (2007) *(per curiam)* (quoting *Lujan*, *supra*, at 573–574).

As the following review of our cases demonstrates, we initially denied taxpayer standing based on Wallet Injury, but then found standing in some later cases based on the limited version of Psychic Injury described above. The basic logical flaw in our cases is thus twofold: We have never explained why Psychic Injury was insufficient in the cases in which standing was denied, and we have never explained why Psychic Injury, however limited, is cognizable under Article III.

B

1

Two pre-*Flast* cases are of critical importance. In *Frothingham* v. *Mellon*, decided with *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923), the taxpayer challenged the constitutionality of the Maternity Act of 1921, alleging in part that the federal funding provided by the Act was not authorized by any provision of the Constitution. See *id.*, at 476–477 (argument for Frothingham), 479–480 (opinion of the Court). The Court held that the taxpayer lacked standing. After emphasizing that "the effect upon future taxation . . . of any payment out of [Treasury] funds" was "remote, fluctuating and uncertain," *id.*, at 487, the Court concluded that "[t]he party who invokes the power [of judicial review] must be able

to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally," *id.*, at 488. The Court was thus describing the traceability and redressability problems with Wallet Injury, and rejecting Psychic Injury as a generalized grievance rather than concrete and particularized harm.

The second significant pre-*Flast* case is *Doremus* v. *Board of Ed. of Hawthorne*, 342 U. S. 429 (1952). There the taxpayers challenged under the Establishment Clause a state law requiring public-school teachers to read the Bible at the beginning of each schoolday. *Id.*, at 430, 433.[1] Relying extensively on *Frothingham*, the Court denied standing. After first emphasizing that there was no allegation that the Bible reading increased the plaintiffs' taxes or the cost of running the schools, 342 U. S., at 433, and then reaffirming that taxpayers must allege more than an indefinite injury suffered in common with people generally, *id.*, at 434, the Court concluded that the "grievance which [the plaintiffs] sought to litigate here is not a direct dollars-and-cents injury but is a religious difference," *ibid.* In addition to reiterating *Frothingham*'s description of the unavoidable obstacles to recovery under a taxpayer theory of Wallet Injury, *Doremus* rejected Psychic Injury in unmistakable terms. The opinion's deprecation of a mere "religious difference," in contrast to a real "dollars-and-cents injury," can only be understood as a flat denial of standing supported only by taxpayer disapproval of the unconstitutional use of tax funds. If the

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[1] The text of the statute did not just authorize public-school teachers to read from the Bible, but *mandated* that they do so: "At least five verses taken from that portion of the Holy Bible known as the Old Testament *shall be read*, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, *by the teacher in charge*, at the opening of school upon every school day . . . ." N. J. Rev. Stat. § 18:14–77 (1937) (emphasis added).

Court had thought that Psychic Injury was a permissible basis for standing, it should have sufficed (as the dissenting Justices in *Doremus* suggested, see 342 U. S., at 435 (opinion of Douglas, J.)) that public employees were being paid in part to violate the Establishment Clause.

2

Sixteen years after *Doremus*, the Court took a pivotal turn. In *Flast* v. *Cohen*, 392 U. S. 83 (1968), taxpayers challenged the Elementary and Secondary Education Act of 1965, alleging that funds expended pursuant to the Act were being used to support parochial schools. *Id.*, at 85–87. They argued that either the Act itself proscribed such expenditures or that the Act violated the Establishment Clause. *Id.*, at 87, 90. The Court held that the taxpayers had standing. Purportedly in order to determine whether taxpayers have the "personal stake and interest" necessary to satisfy Article III, a two-pronged nexus test was invented. *Id.*, at 101–102.

The first prong required the taxpayer to "establish a logical link between [taxpayer] status and the type of legislative enactment." *Id.*, at 102. The Court described what that meant as follows:

> "[A] taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, §8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus* . . . ." *Ibid.*

The second prong required the taxpayer to "establish a nexus between [taxpayer] status and the precise nature of the constitutional infringement alleged." *Ibid.* The Court elaborated that this required "the taxpayer [to] show that

the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." *Id.*, at 102–103. The Court held that the Establishment Clause was the type of specific limitation on the taxing and spending power that it had in mind because "one of the specific evils feared by" the Framers of that Clause was that the taxing and spending power would be used to favor one religion over another or to support religion generally. *Id.*, at 103–104 (relying exclusively upon Madison's famous Memorial and Remonstrance Against Religious Assessments).

Because both prongs of its newly minted two-part test were satisfied, *Flast* held that the taxpayers had standing. Wallet Injury could not possibly have been the basis for this conclusion, since the taxpayers in *Flast* were no more able to prove that success on the merits would reduce their tax burden than was the taxpayer in *Frothingham*. Thus, *Flast* relied on Psychic Injury to support standing, describing the "injury" as the taxpayer's allegation that "his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." 392 U. S., at 106.

But that created a problem: If the taxpayers in *Flast* had standing based on Psychic Injury, and without regard to the effect of the litigation on their ultimate tax liability, why did not the taxpayers in *Doremus* and *Frothingham* have standing on a similar basis? Enter the magical two-pronged nexus test. It has often been pointed out, and never refuted, that the criteria in *Flast*'s two-part test are *entirely unrelated* to the purported goal of ensuring that the plaintiff has a sufficient "stake in the outcome of the controversy," 392 U. S., at 103. See *id.*, at 121–124 (Harlan, J., dissenting); see also *id.*, at 107 (Douglas, J., concurring); *United States* v. *Richardson*, 418 U. S. 166, 183 (1974) (Powell, J.,

concurring). In truth, the test was designed for a quite different goal. Each prong was meant to disqualify from standing one of the two prior cases that would otherwise contradict the holding of *Flast*. The first prong distinguished *Doremus* as involving a challenge to an "incidental expenditure of tax funds in the administration of an essentially regulatory statute," rather than a challenge to a taxing and spending statute. See 392 U. S., at 102. Did the Court proffer any reason why a taxpayer's Psychic Injury is less concrete and particularized, traceable, or redressable when the challenged expenditures are incidental to an essentially regulatory statute (whatever that means)? Not at all. *Doremus* had to be evaded, and so it was. In reality, of course, there is simply no material difference between *Flast* and *Doremus* as far as Psychic Injury is concerned: If taxpayers upset with the government's giving money to parochial schools had standing to sue, so should the taxpayers who disapproved of the government's paying public-school teachers to read the Bible.[2]

Flast's dispatching of *Frothingham* via the second prong of the nexus test was only marginally less disingenuous. Not only does the relationship of the allegedly violated provision to the taxing and spending power have no bearing upon the concreteness or particularity of the Psychic Injury, see Part III, *infra*, but the existence of that relationship does

[2] There is a natural impulse to respond that the portion of the teachers' salary that corresponded to the time that they were required to read from the Bible was *de minimis*. But even *Flast* had the decency not to seize on a *de minimis* exception to distinguish *Doremus:* Having relied exclusively on Madison's Remonstrance to justify the conclusion that the Establishment Clause was a specific limitation on the taxing and spending power, see *Flast*, 392 U. S., at 103–104, the Court could not simultaneously ignore Madison's admonition that "'the same authority which can force a citizen *to contribute three pence only* of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever,'" *id.*, at 103 (quoting Madison's Remonstrance; emphasis added).

not even genuinely distinguish *Flast* from *Frothingham*. It is impossible to maintain that the Establishment Clause is a more direct limitation on the taxing and spending power than the constitutional limitation invoked in *Frothingham*, *which is contained within the very provision creating the power to tax and spend.* Article I, § 8, cl. 1, provides: "The Congress shall have Power To lay and collect Taxes . . . , to pay the Debts and provide for the common Defence *and general Welfare* of the United States." (Emphasis added.) Though unmentioned in *Flast*, it was precisely this limitation upon the permissible purposes of taxing and spending upon which Mrs. Frothingham relied. See, *e. g.*, Brief for Appellant in *Frothingham*, O. T. 1922, No. 962, p. 68 ("[T]he words 'provide for the common defence and general welfare of the United States' are used *as limitations on the taxing power*"); *id.*, at 26–81 (discussing the general welfare limitation at length).

3

Coherence and candor have fared no better in our later taxpayer-standing cases. The three of them containing lengthy discussion of the Establishment Clause warrant analysis.

Flast was dismissively and unpersuasively distinguished just 13 years later in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982). The taxpayers there challenged the decision of the Department of Health, Education, and Welfare to give a 77-acre tract of Government property, worth over half a million dollars, to a religious organization. *Id.*, at 468. The Court, adhering to the strict letter of *Flast*'s two-pronged nexus test, held that the taxpayers lacked standing. *Flast*'s first prong was not satisfied: Rather than challenging a congressional taxing and spending statute, the plaintiffs were attacking an agency decision to transfer federal property pursuant to Congress's power under the Property Clause, Art. IV, § 3, cl. 2. 454 U. S., at 479–480.

In distinguishing between the Spending Clause and the Property Clause, *Valley Forge* achieved the seemingly impossible: It surpassed the high bar for irrationality set by *Flast*'s distinguishing of *Doremus* and *Frothingham*. Like the dissenters in *Valley Forge*, see 454 U. S., at 511–512 (opinion of Brennan, J.); *id.*, at 513–514 (opinion of STEVENS, J.), I cannot fathom why Article III standing should turn on whether the government enables a religious organization to obtain real estate by giving it a check drawn from general tax revenues or instead by buying the property itself and then transferring title.

While *Valley Forge*'s application of the first prong to distinguish *Flast* was unpersuasive, the Court was at least not trying to hide the ball. Its holding was forthrightly based on a resounding rejection of the very concept of Psychic Injury:

> "[Plaintiffs] fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." 454 U. S., at 485–486 (emphasis deleted).

Of course, in keeping with what was to become the shameful tradition of our taxpayer-standing cases, the Court's candor about the inadequacy of Psychic Injury was combined with a notable silence as to why *Flast* itself was not doomed.

A mere six years later, *Flast* was resuscitated in *Bowen* v. *Kendrick*, 487 U. S. 589 (1988). The taxpayers there

brought facial and as-applied Establishment Clause challenges to the Adolescent Family Life Act, which was a congressional scheme that provided grants to public or nonprofit private organizations to combat premarital adolescent pregnancy and sex. *Id.*, at 593. The as-applied challenge focused on whether particular grantees selected by the Secretary of Health and Human Services were constitutionally permissible recipients. *Id.*, at 620–622. The Solicitor General argued that, under *Valley Forge*'s application of *Flast*'s first prong, the taxpayers lacked standing for their as-applied claim because that claim was really a challenge to executive decisionmaking, not to Congress's exercise of its taxing and spending power. 487 U. S., at 618–619. The Court rejected this contention, holding that the taxpayers' as-applied claim was still a challenge to Congress's taxing and spending power even though disbursement of the funds authorized by Congress had been administered by the Secretary. *Id.*, at 619.

Kendrick, like *Flast* before it, was obviously based on Psychic Injury: The taxpayers could not possibly make, and did not attempt to make, the showing required for Wallet Injury. But by relying on Psychic Injury, *Kendrick* perfectly revealed the incompatibility of that concept with the outcome in *Doremus*. Just as *Kendrick* did not care whether the appropriated funds would have been spent anyway—given to a different, permissible recipient—so also *Doremus* should not have cared that the teachers would likely receive the same salary once their classroom activities were limited to secular conduct. *Flast* and *Kendrick*'s acceptance of Psychic Injury is fundamentally at odds with *Frothingham*, *Doremus*, and *Valley Forge*.

Which brings me to the final case worthy of mention. Last Term, in *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332 (2006), we concisely confirmed that *Flast* was based on Psychic Injury. The taxpayers in that case sought to rely on

Flast to raise a Commerce Clause challenge to a state franchise tax credit. 547 U. S., at 347. In rejecting the analogy and denying standing, we described *Flast* as follows:

> "The Court . . . understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff. And an injunction against the spending would of course redress *that* injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally." 547 U. S., at 348–349 (citation omitted; some alterations in original).

What *Cuno*'s conceptualization of *Flast* reveals is that there are only two logical routes available to this Court. We must initially decide whether Psychic Injury is consistent with Article III. If it is, we should apply *Flast* to *all* challenges to government expenditures in violation of constitutional provisions that specifically limit the taxing and spending power; if it is not, we should overturn *Flast.*

II

A

The plurality today avails itself of neither principled option. Instead, essentially accepting the Solicitor General's primary submission, it limits *Flast* to challenges to expenditures that are "expressly authorized or mandated by . . . specific congressional enactment." *Ante,* at 608. It offers no intellectual justification for this limitation, except that "[i]t is a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always expanded to the limit of its logic." *Ante,* at 615. That is true enough, but since courts purport to be engaged in *reasoned* decisionmaking, it is *only* true when (1) the precedent's logic is seen to require narrowing or readjustment in light of relevant distinctions that the new fact situation brings to the fore; or (2) its logic is funda-

mentally flawed, and so deserves to be limited to the facts that begot it. Today's plurality claims neither of these justifications. As to the first, the plurality offers no explanation of why the factual differences between this case and *Flast* are *material.* It virtually admits that express congressional allocation *vel non* has nothing to do with whether the plaintiffs have alleged an injury in fact that is fairly traceable and likely to be redressed. See *ante,* at 609–610. As the dissent correctly contends and I shall not belabor, see *post,* at 639–640 (opinion of SOUTER, J.), *Flast* is *indistinguishable* from this case for purposes of Article III. Whether the challenged government expenditure is expressly allocated by a specific congressional enactment *has absolutely no relevance* to the Article III criteria of injury in fact, traceability, and redressability.

Yet the plurality is also unwilling to acknowledge that the logic of *Flast* (its Psychic Injury rationale) is simply wrong, and *for that reason* should not be extended to other cases. Despite the lack of acknowledgment, however, that is the only plausible explanation for the plurality's indifference to whether the "distinguishing" fact is legally material, and for its determination to limit *Flast* to its "'*resul[t],*'" *ante,* at 610.[3] Why, then, pick a distinguishing fact that may breathe life into *Flast* in future cases, preserving the disreputable disarray of our Establishment Clause standing jurisprudence? Why not hold that only taxpayers raising Establishment Clause challenges to expenditures pursuant to the Elementary and Secondary Education Act of 1965 have

[3] This explanation does not suffice with regard to JUSTICE KENNEDY, who, unlike the other Members of the plurality, openly and avowedly contends both that *Flast* was correctly decided and that respondents should nevertheless lose this case. *Ante,* at 616 (concurring opinion). He thus has the distinction of being the only Justice who affirms both propositions. I cannot begin to comprehend how the amorphous separation-of-powers concerns that motivate him, *ante,* at 615–618, bear upon whether the express-allocation requirement is grounded in the Article III criteria of injury in fact, traceability, or redressability.

standing? That, I suppose, would be too obvious a repudiation of *Flast*, and thus an impediment to the plurality's pose of minimalism.

Because the express-allocation line has no mooring to our tripartite test for Article III standing, it invites demonstrably absurd results. For example, the plurality would deny standing to a taxpayer challenging the President's disbursement to a religious organization of a discrete appropriation that Congress had not explicitly allocated to that purpose, even if everyone knew that Congress and the President had informally negotiated that the entire sum would be spent in that precise manner. See *ante*, at 608, n. 7 (holding that nonstatutory earmarks are insufficient to satisfy the express-allocation requirement). And taxpayers should lack standing to bring Establishment Clause challenges to the Executive Branch's use of appropriated funds when those expenditures have the *added vice* of violating congressional restrictions. If, for example, Congress instructs the President to disburse grants to hospitals that he deems worthy, and the President instead gives all of the money to the Catholic Church, "[t]he link between congressional action and constitutional violation that supported taxpayer standing in *Flast* [would be] missing." *Ante*, at 605. Indeed, taking the plurality at its word, Congress could insulate the President from *all Flast*-based suits by codifying the truism that no appropriation can be spent by the Executive Branch in a manner that violates the Establishment Clause.

Any last pretense of minimalism—of adhering to prior law but merely declining to "extend" it—is swept away by the fact that the Court's holding flatly contradicts *Kendrick*. The whole point of the as-applied challenge in *Kendrick* was that the Secretary, not Congress, had *chosen* inappropriate grant recipients. 487 U. S., at 620–622. Both *Kendrick* and this case equally involve, in the relevant sense, attacks on executive discretion rather than congressional decision: Congress generally authorized the spending of tax funds for cer-

tain purposes but did not explicitly mandate that they be spent in the *unconstitutional* manner challenged by the taxpayers. I thus share the dissent's bewilderment, see *post*, at 640–641, as to why the plurality fixates on the amount of *additional* discretion the Executive Branch enjoys under the law beyond the only discretion relevant to the Establishment Clause issue: whether to spend taxpayer funds for a purpose that is unconstitutional. See *ante*, at 615 (focusing on whether the case involves "a *purely* discretionary Executive Branch expenditure" (emphasis added)).

B

While I have been critical of the Members of the plurality, I by no means wish to give the impression that respondents' legal position is any more coherent. Respondents argue that *Flast* did not turn on whether Congress has expressly allocated the funds to the allegedly unconstitutional use, and their case plainly rests on Psychic Injury. They repeatedly emphasize that the injury in *Flast* was merely the governmental extraction and spending of tax money in aid of religion. See, *e. g.*, Brief for Respondents 28. Respondents refuse to admit that their argument logically implies, for the reasons already discussed, that *every* expenditure of tax revenues that is alleged to violate the Establishment Clause is subject to suit under *Flast*.

Of course, such a concession would run headlong into the denial of standing in *Doremus*. Respondents' only answer to *Doremus* is the cryptic assertion that the injury there was not fairly traceable to the unconstitutional conduct. Brief for Respondents 21, and n. 7. This makes no sense. On *Flast*'s theory of Psychic Injury, the injury in *Doremus* was perfectly traceable and not in any way attenuated. It consisted of the psychic frustration that tax funds were being used in violation of the Establishment Clause, which was directly caused by the paying of teachers to read the Bible, and which would have been remedied by prohibition of that

expenditure.[4] The hollowness of respondents' traceability argument is perhaps best demonstrated by their counsel's game submission at oral argument that there would be standing to challenge the hiring of a single Secret Service agent who guarded the President during religious trips, but no standing if those responsibilities (and the corresponding taxpayer-funded compensation) were spread out over the entire Secret Service protective detail. Tr. of Oral Arg. 38–39.

The logical consequence of respondents' position finds no support in this Court's precedents or our Nation's history. Any taxpayer would be able to sue whenever tax funds were used in alleged violation of the Establishment Clause. So, for example, any taxpayer could challenge the fact that the Marshal of our Court is paid, in part, to call the courtroom to order by proclaiming "God Save the United States and this Honorable Court." As much as respondents wish to deny that this is what *Flast* logically entails, it blinks reality to conclude otherwise. If respondents are to prevail, they must endorse a future in which ideologically motivated taxpayers could "roam the country in search of governmental wrongdoing and . . . reveal their discoveries in federal court," transforming those courts into "ombudsmen of the general welfare" with respect to Establishment Clause issues. *Valley Forge*, 454 U. S., at 487.

C

Ultimately, the arguments by the parties in this case and the opinions of my colleagues serve only to confirm that *Flast*'s adoption of Psychic Injury has to be addressed head-

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[4] Nor is the dissent's oblique suggestion that *Doremus* did not involve an "identifiable amoun[t]" of taxpayer funds, *post*, at 639, any more persuasive. One need not consult a CPA to realize that the portion of the school-day during which the teachers' educational responsibilities were to read the Bible corresponded to a fraction of the teachers' taxpayer-funded salaries. And while the amount of money might well have been inconsequential, it was probably greater than three pence. See n. 2, *supra*.

on. Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future. The rule of law is ill served by forcing lawyers and judges to make arguments that deaden the soul of the law, which is logic and reason. Either *Flast* was correct, and must be accorded the wide application that it logically dictates, or it was not, and must be abandoned in its entirety. I turn, finally, to that question.

III

Is a taxpayer's purely psychological displeasure that his funds are being spent in an allegedly unlawful manner ever sufficiently concrete and particularized to support Article III standing? The answer is plainly no.

As I noted at the outset, *Lujan* explained that the "consisten[t]" view of this Court has been that "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." 504 U. S., at 573–574. As evidence of the consistency with which we have affirmed that understanding, *Lujan* relied on the reasoning in *Frothingham*, and in several other cases, including *Ex parte Lévitt*, 302 U. S. 633 (1937) *(per curiam)* (dismissing suit challenging Justice Black's appointment to this Court in alleged violation of the Ineligibility Clause, Art. I, § 6, cl. 2), *United States* v. *Richardson*, 418 U. S. 166 (1974) (denying standing to challenge the Government's failure to disclose the CIA's expenditures in alleged violation of the Accounts Clause, Art. I, § 9, cl. 7), and *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208 (1974) (rejecting challenge to Members of Congress holding commissions in the military Reserves in alleged violation of the Incompatibility Clause, Art. I, § 6, cl. 2). See

504 U. S., at 573–577. Just this Term, relying on precisely the same cases and the same reasoning, we held unanimously that suits raising only generalized grievances do not satisfy Article III's requirement that the injury in fact be concrete and particularized. See *Lance*, 549 U. S., at 439–441.[5]

Nor does *Flast*'s limitation on Psychic Injury—the limitation that it suffices only when the two-pronged "nexus" test is met—cure the Article III deficiency. The fact that it is the alleged violation of a specific constitutional limit on the taxing and spending power that produces the taxpayer's mental angst does not change the fundamental flaw. It remains the case that the taxpayer seeks "relief that no more directly and tangibly benefits him than it does the public at large." *Lujan*, *supra*, at 573–574. And it is of no conceivable relevance to this issue whether the Establishment Clause was originally conceived of as a specific limitation on the taxing and spending power. Madison's Remonstrance has nothing whatever to say on the question whether suits alleging violations of that limitation are anything other than the generalized grievances that federal courts had always been barred from considering before *Flast*. *Flast* was forced to rely on the slim reed of the Remonstrance since there was no better support for its novel conclusion, in 1968, that violation of the Establishment Clause, unique among the provisions of our law, had always inflicted a personalized Psychic Injury upon all taxpayers that federal courts had the power to remedy.

Moreover, *Flast* is damaged goods, not only because its fanciful two-pronged "nexus" test has been demonstrated to be irrelevant to the test's supposed objective, but also be-

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[5] It is true that this Court has occasionally in dicta described the prohibition on generalized grievances as merely a prudential bar. But the fountainhead of this dicta, *Warth* v. *Seldin*, 422 U. S. 490 (1975), supported its statement only by naked citation of *Schlesinger*, *Richardson*, and *Lévitt*. 422 U. S., at 499. And those cases squarely rested on Article III considerations, as the analysis in *Lujan* and *Lance* confirms.

cause its cavalier treatment of the standing requirement rested upon a fundamental underestimation of that requirement's importance. *Flast* was explicitly and erroneously premised on the idea that Article III standing does not perform a crucial separation-of-powers function:

> "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." 392 U. S., at 100–101.

A perceptive Frenchman, visiting the United States some 135 years before Chief Justice Warren wrote these words, perceived that they were false.

> "It is true that . . . judicial censure, exercised by the courts on legislation, cannot extend without distinction to all laws, *for there are some of them that can never give rise to the sort of clearly formulated dispute that one calls a case.*" A. de Tocqueville, Democracy in America 97 (H. Mansfield & D. Winthrop transls. and eds. 2000) (emphasis added).

Flast's crabbed (and judge-empowering) understanding of the role Article III standing plays in preserving our system of separated powers has been repudiated:

> "To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judi-

> ciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger*, 418 U. S., at 222.

See also *Richardson*, 418 U. S., at 179–180; *Valley Forge*, 454 U. S., at 474; *Lujan*, *supra*, at 576–577. We twice have noted explicitly that *Flast* failed to recognize the vital separation-of-powers aspect of Article III standing. See *Spencer* v. *Kemna*, 523 U. S. 1, 11–12 (1998); *Lewis* v. *Casey*, 518 U. S. 343, 353, n. 3 (1996). And once a proper understanding of the relationship of standing to the separation of powers is brought to bear, Psychic Injury, even as limited in *Flast*, is revealed for what it is: a contradiction of the basic propositions that the function of the judicial power "is, solely, to decide on the rights of individuals," *Marbury* v. *Madison*, 1 Cranch 137, 170 (1803), and that generalized grievances affecting the public at large have their remedy in the political process.

Overruling prior precedents, even precedents as disreputable as *Flast*, is nevertheless a serious undertaking, and I understand the impulse to take a minimalist approach. But laying just claim to be honoring *stare decisis* requires more than beating *Flast* to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive. Even before the addition of the new meaningless distinction devised by today's plurality, taxpayer standing in Establishment Clause cases has been a game of chance. In the proceedings below, well-respected federal judges declined to hear this case en banc, not because they thought the issue unimportant or the panel decision correct, but simply because they found our cases so lawless that there was no point in, quite literally, second-guessing the panel. See *Freedom From Religion Foundation, Inc.* v. *Chao*, 447 F. 3d 988 (CA7 2006) (Flaum, C. J., concurring in denial of rehearing en banc); *id.*, at 989–

990 (Easterbrook, J., concurring in denial of rehearing en banc) (describing our cases as "arbitrary," "illogical," and lacking in "comprehensiveness and rationality"). We had an opportunity today to erase this blot on our jurisprudence, but instead have simply smudged it.

My call for the imposition of logic and order upon this chaotic set of precedents will perhaps be met with the snappy epigram that "[t]he life of the law has not been logic: it has been experience." O. Holmes, The Common Law 1 (1881). But what experience has shown is that *Flast*'s lack of a logical theoretical underpinning has rendered our taxpayer-standing doctrine such a jurisprudential disaster that our appellate judges do not know what to make of it. And of course the case has engendered no reliance interests, not only because one does not arrange his affairs with an eye to standing, but also because there is no relying on the random and irrational. I can think of few cases less warranting of *stare decisis* respect. It is time—it is past time—to call an end. *Flast* should be overruled.

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

Flast v. *Cohen*, 392 U. S. 83, 102 (1968), held that plaintiffs with an Establishment Clause claim could "demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements." Here, the controlling, plurality opinion declares that *Flast* does not apply, but a search of that opinion for a suggestion that these taxpayers have any less stake in the outcome than the taxpayers in *Flast* will come up empty: the plurality makes no such finding, nor could it. Instead, the controlling opinion closes the door on these taxpayers because the Executive Branch, and not the Legislative Branch, caused their injury. I see no basis for this distinction in either logic or precedent, and respectfully dissent.

I

We held in *Flast*, and repeated just last Term, that the "'injury' alleged in Establishment Clause challenges to federal spending" is "the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion." *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 348 (2006) (quoting *Flast*, *supra*, at 106; alterations in original). As the Court said in *Flast*, the importance of that type of injury has deep historical roots going back to the ideal of religious liberty in James Madison's Memorial and Remonstrance Against Religious Assessments, that the government in a free society may not "force a citizen to contribute three pence only of his property for the support of any one establishment" of religion. 2 Writings of James Madison 183, 186 (G. Hunt ed. 1901) (hereinafter Madison), quoted in *Flast*, *supra*, at 103. Madison thus translated into practical terms the right of conscience described when he wrote that "[t]he Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." Madison 184; see also *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 711, n. 22 (2002) (SOUTER, J., dissenting) ("As a historical matter, the protection of liberty of conscience may well have been the central objective served by the Establishment Clause"); *Locke* v. *Davey*, 540 U. S. 712, 722 (2004) ("Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion"); N. Feldman, Divided By God: America's Church-State Problem—And What We Should Do About It 48 (2005) ("The advocates of a constitutional ban on establishment were concerned about paying taxes to support religious purposes that their consciences told them not to support").

The right of conscience and the expenditure of an identifiable three pence raised by taxes for the support of a religious cause are therefore not to be split off from one another.

The three pence implicates the conscience, and the injury from Government expenditures on religion is not accurately classified with the "Psychic Injury" that results whenever a congressional appropriation or executive expenditure raises hackles of disagreement with the policy supported, see *ante*, at 624–625 (SCALIA, J., concurring in judgment). Justice Stewart recognized this in his concurring opinion in *Flast*, when he said that "every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution," and thus distinguished the case from one in which a taxpayer sought only to air a generalized grievance in federal court. 392 U. S., at 114.

Here, there is no dispute that taxpayer money in identifiable amounts is funding conferences, and these are alleged to have the purpose of promoting religion. Cf. *Doremus* v. *Board of Ed. of Hawthorne*, 342 U. S. 429, 434 (1952). The taxpayers therefore seek not to "extend" *Flast*, *ante*, at 615 (plurality opinion), but merely to apply it. When executive agencies spend identifiable sums of tax money for religious purposes, no less than when Congress authorizes the same thing, taxpayers suffer injury. And once we recognize the injury as sufficient for Article III, there can be no serious question about the other elements of the standing enquiry: the injury is indisputably "traceable" to the spending, and "likely to be redressed by" an injunction prohibiting it. *Allen* v. *Wright*, 468 U. S. 737, 751 (1984); see also *Cuno*, *supra*, at 348 ("[A]n injunction against the spending would of course redress *that* injury").

The plurality points to the separation of powers to explain its distinction between legislative and executive spending decisions, see *ante*, at 611–612, but there is no difference on that point of view between a Judicial Branch review of an executive decision and a judicial evaluation of a congressional one. We owe respect to each of the other branches, no more to the former than to the latter, and no one has suggested that the Establishment Clause lacks applicability

to executive uses of money. It would surely violate the Establishment Clause for the Department of Health and Human Services to draw on a general appropriation to build a chapel for weekly church services (no less than if a statute required it), and for good reason: if the Executive could accomplish through the exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection would melt away.[1]

So in *Bowen* v. *Kendrick*, 487 U. S. 589 (1988), we recognized the equivalence between a challenge to a congressional spending bill and a claim that the Executive Branch was spending an appropriation, each in violation of the Establishment Clause. We held that the "claim that . . . funds [were] being used improperly by individual grantees [was no] less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary," and we added that "we have not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges, even when their claims raised questions about the administratively made grants." *Id.*, at 619.

The plurality points out that the statute in *Bowen* "expressly authorized and appropriated specific funds for grantmaking" and "expressly contemplated that some of those moneys might go to projects involving religious groups."

[1] The plurality warns that a parade of horribles would result if there were standing to challenge executive action, because all federal activities are "ultimately funded by some congressional appropriation." *Ante*, at 610. But even if there is Article III standing in all of the cases posited by the plurality (and the Court of Appeals thought that at least sometimes there is not, *Freedom From Religion Foundation, Inc.* v. *Chao*, 433 F. 3d 989, 996 (CA7 2006)), that does not mean taxpayers will prevail in such suits. If these claims are frivolous on the merits, I fail to see the harm in dismissing them for failure to state a claim instead of for lack of jurisdiction. To the degree the claims are meritorious, fear that there will be many of them does not provide a compelling reason, much less a reason grounded in Article III, to keep them from being heard.

Ante, at 607. That is all true, but there is no reason to think it should matter, and every indication in *Bowen* that it did not. In *Bowen* we already had found the statute valid on its face before we turned to the taxpayers' as-applied challenge, see 487 U. S., at 618, so the case cannot be read to hold that taxpayers have standing only to claim that congressional action, but not its implementation, violates the Establishment Clause. Thus, after *Bowen*, the plurality's distinction between a "congressional mandate" on the one hand and "executive discretion" on the other, *ante*, at 609, is at once arbitrary and hard to manage: if the statute itself is constitutional, all complaints must be about the exercise of "executive discretion," so there is no line to be drawn between *Bowen* and the case before us today.[2]

II

While *Flast* standing to assert the right of conscience is in a class by itself, it would be a mistake to think that case is unique in recognizing standing in a plaintiff without injury to flesh or purse. Cognizable harm takes account of the nature of the interest protected, which is the reason that "the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition,"

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[2] *Bowen* also indicated that the barrier to standing in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982), was that the taxpayers challenged "an exercise of executive authority pursuant to the Property Clause of Article IV, § 3." 487 U. S., at 619. In *Valley Forge*, we had first discussed the executive rather than legislative nature of the action at issue there and then, "perhaps redundantly," 454 U. S., at 480, pointed to the distinction between the Property Clause and the Taxing and Spending Clause. Although at the time *Valley Forge* might have been taken to support the distinction the plurality draws today, *Bowen* said that *Valley Forge* rested on the distinction between the Property Clause on the one hand and the Taxing and Spending Clause on the other. See also *Valley Forge*, *supra*, at 480, n. 17 (noting that the transfer of property to a religious college involved no expenditure of funds).

leaving it impossible "to make application of the constitutional standing requirement a mechanical exercise." *Allen*, 468 U. S., at 751. The question, ultimately, has to be whether the injury alleged is "too abstract, or otherwise not appropriate, to be considered judicially cognizable." *Id.*, at 752.[3]

In the case of economic or physical harms, of course, the "injury in fact" question is straightforward. But once one strays from these obvious cases, the enquiry can turn subtle. Are esthetic harms sufficient for Article III standing? What about being forced to compete on an uneven playing field based on race (without showing that an economic loss resulted), or living in a racially gerrymandered electoral district? These injuries are no more concrete than seeing one's tax dollars spent on religion, but we have recognized each one as enough for standing. See *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 183 (2000) (esthetic injury); *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656, 666 (1993) ("[T]he 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract"); *United States* v. *Hays*, 515 U. S. 737, 744–745 (1995) (living in a racially gerrymandered electoral district). This is not to say that any sort of alleged injury will satisfy Article III, but only that intangible harms must be evaluated case by case.[4]

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[3] Although the plurality makes much of the fact that the injury in this case is "generalized," *ante*, at 599, and shared with the "public at large," *ante*, at 600, those properties on their own do not strip a would-be plaintiff of standing. See *Federal Election Comm'n* v. *Akins*, 524 U. S. 11, 24 (1998) ("Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact' ").

[4] Outside the Establishment Clause context, as the plurality points out, we have not found the injury to a taxpayer when funds are improperly expended to suffice for standing. See *ante*, at 609–610 (citing examples).

Thus, *Flast* speaks for this Court's recognition (shared by a majority of the Court today) that when the Government spends money for religious purposes a taxpayer's injury is serious and concrete enough to be "judicially cognizable," *Allen*, *supra*, at 752. The judgment of sufficient injury takes account of the Madisonian relationship of tax money and conscience, but it equally reflects the Founders' pragmatic "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions," *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 11 (1947), and the realization continuing to the modern day that favoritism for religion "'sends the . . . message to . . . nonadherents "that they are outsiders, not full members of the political community,"'" *McCreary County* v. *American Civil Liberties Union of Ky.*, 545 U. S. 844, 860 (2005) (quoting *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 309–310 (2000), in turn quoting *Lynch* v. *Donnelly*, 465 U. S. 668, 688 (1984) (O'Connor, J., concurring); omissions in original).[5]

Because the taxpayers in this case have alleged the type of injury this Court has seen as sufficient for standing, I would affirm.

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[5] There will not always be competitors for the funds who would make better plaintiffs (and indeed there appears to be no such competitor here), so after accepting the importance of the injury there is no reason to refuse standing as a prudential matter.

Syllabus

NATIONAL ASSOCIATION OF HOME BUILDERS ET AL. *v.* DEFENDERS OF WILDLIFE ET AL.

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

No. 06–340. Argued April 17, 2007—Decided June 25, 2007*

Under the Clean Water Act (CWA), petitioner Environmental Protection Agency (EPA) initially administers each State's National Pollution Discharge Elimination System (NPDES) permitting program, but CWA § 402(b) provides that the EPA "shall approve" transfer of permitting authority to a State upon application and a showing that the State has met nine specified criteria. Section 7(a)(2) of the Endangered Species Act of 1973 (ESA) requires federal agencies to consult with agencies designated by the Secretaries of Commerce and the Interior to "insure" that a proposed agency action is unlikely to jeopardize an endangered or threatened species. The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) administer the ESA. Once a consultation process is complete, a written biological opinion is issued, which may suggest alternative actions to protect a jeopardized species or its critical habitat. When Arizona officials sought EPA authorization to administer the State's NPDES program, the EPA initiated consultation with the FWS to determine whether the transfer would adversely affect any listed species. The FWS regional office wanted potential impacts taken into account, but the EPA disagreed, finding that § 402(b)'s mandatory nature stripped it of authority to disapprove a transfer based on any other considerations. The dispute was referred to the agencies' national offices for resolution. The FWS' biological opinion concluded that the requested transfer would not jeopardize listed species. The EPA concluded that Arizona had met each of § 402(b)'s nine criteria and approved the transfer, noting that the biological opinion had concluded the consultation "required" by ESA § 7(a)(2). Respondents sought review in the Ninth Circuit, petitioner National Association of Home Builders intervened, and part of respondent Defenders of Wildlife's separate action was consolidated with the suit. The court held that the EPA's transfer approval was arbitrary and capricious because the EPA had relied on contradictory positions regarding its § 7(a)(2) responsibilities during the administrative process. Rather

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*Together with No. 06–549, *Environmental Protection Agency* v. *Defenders of Wildlife et al.*, also on certiorari to the same court.

than remanding the case for the EPA to explain its decision, however, the court reviewed the EPA's substantive construction of the statutes. It did not dispute that Arizona had met CWA § 402(b)'s nine criteria, but nevertheless concluded that ESA § 7(a)(2) required the EPA to determine whether its transfer decision would jeopardize listed species, in effect adding a tenth criterion. The court dismissed the argument that the EPA's approval was not subject to § 7(a)(2) because it was not a "discretionary action" under 50 CFR § 402.03, § 7(a)(2)'s interpretative regulation. The court thus vacated the EPA's transfer decision.

Held:

1. The Ninth Circuit's determination that the EPA's action was arbitrary and capricious is not fairly supported by the record. This Court will not vacate an agency's decision under the arbitrary and capricious standard unless the agency "relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43. Here, the Ninth Circuit concluded that the EPA's decision was internally inconsistent in its statements during the review process. Federal courts ordinarily are empowered to review only an agency's *final* action, and the fact that a local agency representative's preliminary determination is later overruled at a higher agency level does not render the decisionmaking process arbitrary and capricious. The EPA's final approval notice stating that § 7(a)(2)'s required consultation process had been concluded may be inconsistent with its previously expressed position—and position in this litigation—that § 7(a)(2)'s consultation requirement is not triggered by a § 402 transfer application, but that is not the type of error requiring a remand. By the time the statement was issued, the EPA and the FWS had already consulted, and the question whether that consultation had been *required* was not germane to the final agency decision. Thus, this Court need not further delay the permitting authority transfer by remanding to the EPA for clarification. Respondents suggest that the EPA nullified their right to participate in the application proceedings by altering its legal position during the pendency of the transfer decision and its associated litigation, but they do not suggest that they were deprived of their right to comment during the comment period made available under the EPA's regulations. Pp. 657–661.

2. Because § 7(a)(2)'s no-jeopardy duty covers only discretionary agency actions, it does not attach to actions (like the NPDES permitting

transfer authorization) that an agency is *required* by statute to undertake once certain specified triggering events have occurred. Pp. 661–672.

(a) At first glance the legislative commands here are irreconcilable. Section 402(b)'s "shall approve" language is mandatory and its list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application. Section 7(a)(2)'s similarly imperative language would literally add a tenth criterion to § 402(b). Pp. 661–662.

(b) While a later enacted statute (such as the ESA) can sometimes operate to amend or even repeal an earlier statutory provision (such as the CWA), "repeals by implication are not favored" and will not be presumed unless the legislature's intention "to repeal [is] clear and manifest." *Watt* v. *Alaska*, 451 U. S. 259, 267. Statutory repeal will not be inferred "unless the later statute '"expressly contradict[s] the original act"' or such a construction '"is absolutely necessary [to give the later statute's words] any meaning at all."'" *Traynor* v. *Turnage*, 485 U. S. 535, 548. Otherwise, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 153. The Ninth Circuit's reading of § 7(a)(2) would effectively repeal § 402(b)'s mandate that the EPA "shall" issue a permit whenever all nine exclusive statutory prerequisites are met. Section 402(b) does not just set *minimum* requirements; it affirmatively mandates a transfer's approval, thus operating as a ceiling as well as a floor. By adding an additional criterion, the Ninth Circuit raises that floor and alters the statute's command. Read broadly, the Ninth Circuit's construction would also partially override every federal statute mandating agency action by subjecting such action to the further condition that it not jeopardize listed species. Pp. 662–664.

(c) Title 50 CFR § 402.03, promulgated by the NMFS and the FWS and applying § 7(a)(2) "to all actions in which there is *discretionary* Federal involvement or control" (emphasis added), harmonizes the CWA and the ESA by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but not when the agency is forbidden from considering such extrastatutory factors. The Court owes "some degree of deference to the Secretary's reasonable interpretation" of the ESA, *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 703. Deference is not due if Congress has made its intent "clear" in the statutory text, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842, but "if the statute is silent or ambiguous . . . the question . . . is whether the agency's answer is based on a permissible construction of the statute," *id.*, at 843. Because the "meaning—or ambiguity—of certain words or phrases may

only become evident . . . in context," *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 132, § 7(a)(2) must be read against the statutory backdrop of the many mandatory agency directives whose operation it would implicitly abrogate or repeal were it construed as broadly as the Ninth Circuit did below. Such a reading leaves a fundamental ambiguity. An agency cannot simultaneously obey the differing mandates of ESA § 7(a)(2) and CWA § 402(b), and consequently the statutory language—read in light of the canon against implied repeals—does not itself provide clear guidance as to which command must give way. Thus, it is appropriate to look to the implementing agency's expert interpretation, which harmonizes the statutes by applying § 7(a)(2) to guide agencies' existing discretionary authority, but not reading it to override express statutory mandates. This interpretation is reasonable in light of the statute's text and the overall statutory scheme and is therefore entitled to *Chevron* deference. The regulation's focus on "discretionary" actions accords with the commonsense conclusion that, when an agency is *required* to do something by statute, it simply lacks the power to "insure" that such action will not jeopardize listed species. The basic principle of *Department of Transportation* v. *Public Citizen*, 541 U. S. 752—that an agency cannot be considered the legal "cause" of an action that it has no statutory discretion *not* to take, *id.*, at 770—supports the reasonableness of the FWS' interpretation. Pp. 664–669.

(d) Respondents' contrary position is not supported by *TVA* v. *Hill*, 437 U. S. 153, which had no occasion to answer the question presented in these cases. Pp. 669–671.

(e) Also unavailing is the argument that the EPA's decision to transfer NPDES permitting authority to Arizona represented a "discretionary" agency action. While the EPA may exercise some judgment in determining whether a State has shown that it can carry out § 402(b)'s enumerated criteria, the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list. Nothing in § 402(b) authorizes the EPA to consider the protection of listed species as an end in itself when evaluating a transfer application. And to the extent that some of § 402(b)'s criteria may result in environmental benefits to marine species, Arizona has satisfied each of those criteria. Respondents' argument has also been disclaimed by the FWS and the NMFS, the agencies primarily charged with administering § 7(a)(2) and the drafters of the regulations implementing that section. Pp. 671–672.

420 F. 3d 946, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dis-

senting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 673. BREYER, J., filed a dissenting opinion, *post*, p. 698.

Deputy Solicitor General Kneedler argued the cause for petitioners in both cases. With him on the briefs for petitioner Environmental Protection Agency were *Solicitor General Clement*, *Acting Assistant Attorney General McKeown*, *Malcolm L. Stewart*, *Andrew C. Mergen*, and *David C. Shilton*. *Norman D. James*, *Duane J. Desiderio*, *Thomas J. Ward*, and *Russell S. Frye* filed briefs for petitioners National Association of Home Builders et al. in No. 06–340. *Terry Goddard*, Attorney General of Arizona, *Mary O'Grady*, Solicitor General, *Paula Bickett*, Chief Counsel, and *James T. Skardon*, Assistant Attorney General, filed briefs for the State of Arizona as respondent under this Court's Rule 12.6, in support of petitioners.

Eric R. Glitzenstein argued the cause for respondents in both cases. With him on the brief were *Katherine A. Meyer* and *Michael P. Senatore*.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the State of Nebraska et al. by *Jon C. Bruning*, Attorney General of Nebraska, *David D. Cookson*, Assistant Attorney General, and *Donald G. Blankenau* and *Thomas R. Wilmoth*, Special Assistant Attorneys General, by *Roberto J. Sánchez-Ramos*, Secretary of Justice of Puerto Rico, and by the Attorneys General and other officials for their respective States as follows: *Troy King* of Alabama, *Talis J. Colberg* of Alaska, *John W. Suthers* of Colorado, *Lawrence Wasden* of Idaho, *Jeremiah W. (Jay) Nixon* of Missouri, *Catherine Cortez Masto* of Nevada, *Gary K. King* of New Mexico, and *Stephen R. Farris* and *Frances C. Bassett*, Assistant Attorneys General of New Mexico, *Wayne Stenehjem* of North Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, and *Patrick J. Crank* of Wyoming; for the American Farm Bureau Federation by *Ellen Steen* and *Thomas R. Lundquist;* for the American Road and Transportation Builders Association et al. by *Lawrence R. Liebesman* and *Nick Goldstein;* for the Arizona Power Authority et al. by *Virginia S. Albrecht*, *Karma B. Brown*, and *Kathy Robb;* for the Association of California Water Agencies et al. by *Roderick E. Walston*, *Karen L. Tachiki*, *John C. Clairday*, *Linus Masouredis*, *Daniel O'Hanlon*, *Christopher Onstott*, *Daniel S. Hentschke*, *Peter D. Nichols*, *Robert V. Trout*, and *Peggy E. Montano;* for CropLife America by *Douglas T. Nelson*, *Steven P. Quarles*, and *J. Mi-*

JUSTICE ALITO delivered the opinion of the Court.

These cases concern the interplay between two federal environmental statutes. Section 402(b) of the Clean Water Act requires that the Environmental Protection Agency transfer certain permitting powers to state authorities upon an application and a showing that nine specified criteria have been met. Section 7(a)(2) of the Endangered Species Act of 1973 provides that a federal agency must consult with agencies designated by the Secretaries of Commerce and the Interior in order to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." The question presented is whether § 7(a)(2) effectively operates as a tenth criterion on which the transfer of permitting power under the first statute must be conditioned. We conclude that it does not. The transfer of permitting authority to state authorities—who will exercise that authority under continuing federal oversight to ensure compliance with relevant mandates of the Endangered Spe-

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chael Klise; for the Federal Water Quality Coalition by *Daniel P. Albers;* for High Production Homebuilders by *Carter G. Phillips*, *Stephen M. Nickelsburg*, and *Eric A. Shumsky;* for the National Hydropower Association et al. by *Sam Kalen* and *Michael A. Swiger;* for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp;* and for the Western Urban Water Coalition by *Benjamin S. Sharp* and *Guy R. Martin.*

M. Reed Hopper filed a brief for the Pacific Legal Foundation as *amicus curiae* urging reversal in No. 06–340.

Roger J. Marzulla and *Nancie G. Marzulla* filed a brief for the Kern County Water Agency et al. as *amici curiae* urging reversal in No. 06–549.

Briefs of *amici curiae* urging affirmance in both cases were filed for the American Bird Conservancy et al. by *Michael J. Bean;* and for Jared M. Diamond et al. by *Daniel J. Rohlf.*

Briefs of *amici curiae* were filed in both cases for the American Fisheries Society et al. by *Jan E. Hasselman*, *Patti A. Goldman*, *John F. Kostyack*, and *Mary Randolph Sargent;* for the Mountain States Legal Foundation by *William Perry Pendley;* and for the National Association of Clean Water Agencies by *William A. Anderson II*, *Sean M. Sullivan*, *D. Cameron Prell*, and *Alexandra D. Dunn.*

cies Act and other federal environmental protection statutes—was proper. We therefore reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

I

A

1

The Clean Water Act (CWA), 86 Stat. 816, as amended, 33 U. S. C. § 1251 *et seq.*, established a National Pollution Discharge Elimination System (NPDES) that is designed to prevent harmful discharges into the Nation's waters. The Environmental Protection Agency (EPA or Agency) initially administers the NPDES permitting system for each State, but a State may apply for a transfer of permitting authority to state officials. See 33 U. S. C. § 1342; see also § 1251(b) ("It is the policy of Congress that the Stat[e] . . . implement the permit progra[m] under sectio[n] 1342 . . . of this title"). If authority is transferred, then state officials—not the federal EPA—have the primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight.[1]

Under § 402(b) of the CWA, "the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to [the EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact," as well as a certification "that the laws of such State . . . provide adequate authority to carry out the described program." 33 U. S. C. § 1342(b). The same section provides that the EPA "shall approve each submitted program" for transfer of permitting authority to

[1] The State must advise the EPA of each permit it proposes to issue, and the EPA may object to any permit. 33 U. S. C. §§ 1342(d)(1), (2); see also 40 CFR § 123.44(c) (2006). If the State cannot address the EPA's concerns, authority over the permit reverts to the EPA. 33 U. S. C. § 1342(d)(4).

a State "unless [it] determines that adequate authority does not exist" to ensure that nine specified criteria are satisfied. *Ibid.* These criteria all relate to whether the state agency that will be responsible for permitting has the requisite authority under state law to administer the NPDES program.[2] If the criteria are met, the transfer must be approved.

2

The Endangered Species Act of 1973 (ESA), 87 Stat. 884, as amended, 16 U. S. C. § 1531 *et seq.*, is intended to protect and conserve endangered and threatened species and their habitats. Section 4 of the ESA directs the Secretaries of Commerce and the Interior to list threatened and endangered species and to designate their critical habitats. § 1533. The Fish and Wildlife Service (FWS) administers the ESA with respect to species under the jurisdiction of the Secretary of the Interior, while the National Marine Fisheries Service (NMFS) administers the ESA with respect to species under the jurisdiction of the Secretary of Commerce. See 50 CFR §§ 17.11, 222.101(a), 223.102, 402.01(b) (2006).

[2] The State must demonstrate that it has the ability: (1) to issue fixed-term permits that apply and ensure compliance with the CWA's substantive requirements and which are revocable for cause; (2) to inspect, monitor, and enter facilities and to require reports to the extent required by the CWA; (3) to provide for public notice and public hearings; (4) to ensure that the EPA receives notice of each permit application; (5) to ensure that any other State whose waters may be affected by the issuance of a permit may submit written recommendations and that written reasons be provided if such recommendations are not accepted; (6) to ensure that no permit is issued if the Army Corps of Engineers concludes that it would substantially impair the anchoring and navigation of navigable waters; (7) to abate violations of permits or the permit program, including through civil and criminal penalties; (8) to ensure that any permit for a discharge from a publicly owned treatment works includes conditions requiring the identification of the type and volume of certain pollutants; and (9) to ensure that any industrial user of any publicly owned treatment works will comply with certain of the CWA's substantive provisions. §§ 1342(b)(1)–(9).

Section 7 of the ESA prescribes the steps that federal agencies must take to ensure that their actions do not jeopardize endangered wildlife and flora. Section 7(a)(2) provides that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U. S. C. § 1536(a)(2).

Once the consultation process contemplated by § 7(a)(2) has been completed, the Secretary is required to give the agency a written biological opinion "setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." § 1536(b)(3)(A); see also 50 CFR § 402.14(h). If the Secretary concludes that the agency action would place the listed species in jeopardy or adversely modify its critical habitat, "the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate [§ 7(a)(2)] and can be taken by the Federal agency . . . in implementing the agency action." 16 U. S. C. § 1536(b)(3)(A); see also 50 CFR § 402.14(h)(3). Regulations promulgated jointly by the Secretaries of Commerce and the Interior provide that, in order to qualify as a "reasonable and prudent alternative," an alternative course of action must be able to be implemented in a way "consistent with the scope of the Federal agency's legal authority and jurisdiction." § 402.02. Following the issuance of a "jeopardy" opinion, the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee pursuant to 16 U. S. C. § 1536(e). The regulations also provide that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 CFR § 402.03.

B

1

In February 2002, Arizona officials applied for EPA authorization to administer that State's NPDES program.[3] The EPA initiated consultation with the FWS to determine whether the transfer of permitting authority would adversely affect any listed species.

The FWS regional office concluded that the transfer of authority would not cause any direct impact on water quality that would adversely affect listed species. App. to Pet. for Cert. in No. 06–340, p. 564. However, the FWS office was concerned that the transfer could result in the issuance of more discharge permits, which would lead to more development, which in turn could have an indirect adverse effect on the habitat of certain upland species, such as the cactus ferruginous pygmy-owl and the Pima pineapple cactus. Specifically, the FWS feared that, because § 7(a)(2)'s consultation requirement does not apply to permitting decisions by state authorities,[4] the transfer of authority would empower Arizona officials to issue individual permits without considering and mitigating their indirect impact on these upland species. *Id.*, at 565–566. The FWS regional office therefore urged that, in considering the proposed transfer of permitting authority, those involved in the consultation process should take these potential indirect impacts into account.

The EPA disagreed, maintaining that "its approval action, which is an administrative transfer of authority, [would not be] the cause of future non-discharge-related impacts on endangered species from projects requiring State NPDES permits." *Id.*, at 564. As a factual matter, the EPA believed

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[3] At the time when Arizona applied, the EPA had already transferred permitting authority to local authorities in 44 other States and several United States Territories.

[4] By its terms, § 7(a)(2)'s consultation requirement applies only to "action[s] authorized, funded, or carried out" by "Federal agenc[ies]."

that the link between the transfer of permitting authority and the potential harm that could result from increased development was too attenuated. *Ibid.* And as a legal matter, the EPA concluded that the mandatory nature of CWA § 402(b)—which directs that the EPA "shall approve" a transfer request if that section's nine statutory criteria are met—stripped it of authority to disapprove a transfer based on any other considerations. *Id.*, at 564–565.

Pursuant to procedures set forth in a memorandum of understanding between the agencies, the dispute was referred to the agencies' national offices for resolution. In December 2002, the FWS issued its biological opinion, which concluded that the requested transfer would not cause jeopardy to listed species. The opinion reasoned that "the loss of section 7-related conservation benefits . . . is not an indirect effect of the authorization action," *id.*, at 117, because

> "loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of [section] 402(b) of the Clean Water Act." *Id.*, at 114.

In addition, the FWS opined that the EPA's continuing oversight of Arizona's permitting program, along with other statutory protections, would adequately protect listed species and their habitats following the transfer. *Id.*, at 101–107.

The EPA concluded that Arizona had met each of the nine statutory criteria listed in § 402(b) and approved the transfer of permitting authority. In the notice announcing the approval of the transfer, the EPA noted that the issuance of the FWS' biological opinion had "conclude[d] the consultation process required by ESA section 7(a)(2) and reflects the

[FWS'] agreement with EPA that the approval of the State program meets the substantive requirements of the ESA." *Id.*, at 73.

2

On April 2, 2003, respondents filed a petition in the United States Court of Appeals for the Ninth Circuit seeking review of the transfer pursuant to 33 U. S. C. § 1369(b)(1)(D), which allows private parties to seek direct review of the EPA's determinations regarding state permitting programs in the federal courts of appeals. The court granted petitioner National Association of Home Builders leave to intervene as a respondent in that case. Respondent Defenders of Wildlife also filed a separate action in the United States District Court for the District of Arizona, alleging, among other things, that the biological opinion issued by the FWS in support of the proposed transfer did not comply with the ESA's standards. The District Court severed that claim and transferred it to the Court of Appeals for the Ninth Circuit, which consolidated the case with the suit challenging the EPA transfer. See 420 F. 3d 946 (2005).

A divided panel of the Ninth Circuit held that the EPA's approval of the transfer was arbitrary and capricious because the EPA "relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations." *Id.*, at 959. The court concluded that the EPA "fail[ed] to understand its own authority under section 7(a)(2) to act on behalf of listed species and their habitat," *id.*, at 977, because "the two propositions that underlie the EPA's action—that (1) it must, under the [ESA], consult concerning transfers of CWA permitting authority, but (2) it is not permitted, as a matter of law, to take into account the impact on listed species in making the transfer decision—cannot both be true," *id.*, at 961. The court therefore concluded that it was required to "remand to the agency for a plausible explanation of its decision, based on a single, coherent interpretation of the statute." *Id.*, at 962.

The panel majority, however, did not follow this course of action. Rather, the panel went on to review the EPA's substantive construction of the statutes at issue and held that the ESA granted the EPA both the power and the duty to determine whether its transfer decision would jeopardize threatened or endangered species. The panel did not dispute that Arizona had met the nine criteria set forth in § 402(b) of the CWA, but the panel nevertheless concluded that § 7(a)(2) of the ESA provided an "affirmative grant of authority to attend to [the] protection of listed species," *id.*, at 965, in effect adding a tenth criterion to those specified in § 402(b). The panel dismissed the argument that the EPA's approval of the transfer application was not subject to § 7(a)(2) because it was not a "discretionary action" within the meaning of 50 CFR § 402.03 (interpreting § 7(a)(2) to apply only to agency actions "in which there is discretionary Federal involvement or control"). 420 F. 3d, at 967–969. It viewed the FWS' regulation as merely "coterminous" with the express statutory language encompassing all agency actions that are "'authorized, funded, or carried out'" by the agency. *Id.*, at 969 (quoting 16 U. S. C. § 1536(a)(2)). On these grounds, the court granted the petition and vacated the EPA's transfer decision.

In dissent, Judge Thompson explained that the transfer decision was not a "discretionary action" under 50 CFR § 402.03 because "[t]he Clean Water Act, by its very terms, permits the EPA to consider only the nine specified factors. If a state's proposed permitting program meets the enumerated requirements," he reasoned, "the EPA administrator 'shall approve' the program. 33 U. S. C. § 1342(b). This [c]ongressional directive does not permit the EPA to impose additional conditions." 420 F. 3d, at 980.

The Ninth Circuit denied rehearing and rehearing en banc. 450 F. 3d 394 (2006). Writing for the six judges who dissented from the denial of rehearing en banc, Judge Kozinski disagreed with the panel's conclusion that the EPA's analysis

was so internally inconsistent as to be arbitrary and capricious. He further noted that, if the panel was correct on this point, the proper resolution would have been to remand to the EPA for further explanation. *Id.*, at 396–398. On the statutory question, Judge Kozinski echoed Judge Thompson's conclusion that once the nine criteria set forth in § 402(b) of the CWA are satisfied, a transfer is mandatory and nondiscretionary. *Id.*, at 397–399. He rejected the panel majority's broad construction of ESA § 7(a)(2), concluding that "[i]f the ESA were as powerful as the majority contends, it would modify not only the EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." *Id.*, at 399, n. 4.

The Ninth Circuit's construction of § 7(a)(2) is at odds with that of other Courts of Appeals. Compare 420 F. 3d 946 (case below) with *Platte River Whooping Crane Critical Habitat Maintenance Trust* v. *FERC*, 962 F. 2d 27, 33–34 (CADC 1992), and *American Forest & Paper Assn.* v. *EPA*, 137 F. 3d 291, 298–299 (CA5 1998). We granted certiorari to resolve this conflict, 549 U. S. 1105 (2007), and we now reverse.

II

Before addressing this question of statutory interpretation, however, we first consider whether the Court of Appeals erred in holding that the EPA's transfer decision was arbitrary and capricious because, in that court's words, the agencies involved in the decision "relied . . . on legally contradictory positions regarding [their] section 7 obligations." App. to Pet. for Cert. in No. 06–340, at 23.

As an initial matter, we note that if the EPA's action was arbitrary and capricious, as the Ninth Circuit held, the proper course would have been to remand to the Agency for clarification of its reasons. See *Gonzales* v. *Thomas*, 547 U. S. 183 (2006) *(per curiam)*. Indeed, the court below expressly recognized that this finding required it to "remand to the Agency for a plausible explanation of its decision,

based on a single, coherent interpretation of the statute." App. to Pet. for Cert. in No. 06–340, at 28. But the Ninth Circuit did not take this course; instead, it jumped ahead to resolve the merits of the dispute. In so doing, it erroneously deprived the Agency of its usual administrative avenue for explaining and reconciling the arguably contradictory rationales that sometimes appear in the course of lengthy and complex administrative decisions. We need not examine this question further, however, because we conclude that the Ninth Circuit's determination that the EPA's action was arbitrary and capricious is not fairly supported by the record.

Review under the arbitrary and capricious standard is deferential; we will not vacate an agency's decision unless it

> "has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983).

"We will, however, 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.' " *Ibid.* (quoting *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 286 (1974)).

The Court of Appeals concluded that the EPA's decision was "internally inconsistent" because, in its view, the Agency stated—both during preliminary review of Arizona's transfer application and in the Federal Register notice memorializing its final action—"that section 7 requires consultation regarding the effect of a permitting transfer on listed species." App. to Pet. for Cert. in No. 06–340, at 23.

With regard to the various statements made by the involved agencies' regional offices during the early stages of consideration, the only "inconsistency" respondents can point

to is the fact that the agencies changed their minds—something that, as long as the proper procedures were followed, they were fully entitled to do. The federal courts ordinarily are empowered to review only an agency's *final* action, see 5 U. S. C. § 704, and the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious.

Respondents also point to the final Federal Register notice memorializing the EPA's approval of Arizona's transfer application. This notice stated that the FWS' issuance of its biological opinion had "conclude[d] the consultation process required by ESA section 7(a)(2)." App. to Pet. for Cert. in No. 06–340, at 73. Respondents contend that this statement is inconsistent with the EPA's previously expressed position—and their position throughout this litigation—that § 7(a)(2)'s consultation requirement is not triggered by a transfer application under § 402 of the CWA.

We are not persuaded that this statement constitutes the type of error that requires a remand. By the time the Federal Register statement was issued, the EPA had already consulted with the FWS about the Arizona application, and the question whether that consultation had been *required*, as opposed to voluntarily undertaken by the Agency, was simply not germane to the final agency transfer decision. The Federal Register statement, in short, was dictum, and it had no bearing on the final agency action that respondents challenge. Mindful of Congress' admonition that in reviewing agency action, "due account shall be taken of the rule of prejudicial error," 5 U. S. C. § 706, we do not believe that this stray statement, which could have had no effect on the underlying agency action being challenged, requires that we further delay the transfer of permitting authority to Arizona by remanding to the Agency for clarification. See also *PDK Labs. Inc.* v. *United States Drug Enforcement Admin.*, 362 F. 3d 786, 799 (CADC 2004) ("In administrative law, as in

federal civil and criminal litigation, there is a harmless error rule").[5]

We further disagree with respondents' suggestion that, by allegedly altering its legal position while the Arizona transfer decision and its associated litigation was pending, the "EPA is effectively nullifying respondents' rights to participate in administrative proceedings concerning Arizona's application, and particularly respondents' rights under EPA's own regulations to comment on NPDES transfer applications." Brief for Respondents 28 (citing 40 CFR § 123.61(b); emphasis deleted). Consistent with EPA regulations, the Agency made available "a comment period of not less than 45 days during which interested members of the public [could] express their views on the State program." § 123.61(a)(1). Respondents do not suggest that they were deprived of their right to comment during this period.[6]

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[5] We also note that the agencies involved have resolved any ambiguity in their positions going forward. Following the issuance of the panel's opinion below, the EPA—in connection with the State of Alaska's pending application for transfer of NPDES permitting authority—requested confirmation from the FWS and the NMFS of the EPA's position that "the no-jeopardy and consultation duties of ESA Section 7(a)(2) do not apply to approval of a State's application to administer the NPDES program," in the apparent hope that obtaining those agencies' views "in advance of processing Alaska's application may avoid a repetition of" the confusion that occurred during the Arizona permitting process. App. to Pet. for Cert. in No. 06–549, pp. 96a, 95a. In response, both the FWS and the NMFS confirmed their understanding that "there is no need to conduct Section 7 consultations on proposed actions to approve State NPDES programs because such actions are not the cause of any impact on listed species and do not constitute discretionary federal agency actions to which Section 7 applies." *Id.*, at 107a; see also *id.*, at 116a (NMFS "concur[s] with EPA's conclusion that EPA is not required to engage in section 7 consultation on applications to approve State programs in situations under Section 402(b) of the CWA").

[6] Nor is there any independent right to public comment with regard to consultations conducted under § 7(a)(2)—a consultation process that we conclude, in any case, was not required here. See 51 Fed. Reg. 19928 (1986) ("Nothing in section 7 authorizes or requires the Service to provide

Respondents also contend that if the case were remanded to the EPA, they would raise additional challenges—including, for example, a challenge to the EPA's provision of financial assistance to Arizona for the administration of its NPDES program. However, as explained below, any such agency action is separate and independent of the agency's decision to authorize the transfer of permitting authority pursuant to § 402(b). See n. 11, *infra*. We express no opinion as to the viability of a separate administrative or legal challenge to such actions.

III

A

We turn now to the substantive statutory question raised by the petitions, a question that requires us to mediate a clash of seemingly categorical—and, at first glance, irreconcilable—legislative commands. Section 402(b) of the CWA provides, without qualification, that the EPA "shall approve" a transfer application unless it determines that the State lacks adequate authority to perform the nine functions specified in the section. 33 U. S. C. § 1342(b). By its terms, the statutory language is mandatory and the list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application. Cf. *Lopez* v. *Davis*, 531 U. S. 230, 241 (2001) (noting Congress' "use of a mandatory 'shall' . . . to impose discretionless obligations"); *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion"); *Association of Civil Technicians* v. *FLRA*, 22 F. 3d 1150, 1153 (CADC 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"); Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes . . . this word is

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for public involvement (other than that of the applicant) in the 'interagency' consultation process").

generally imperative or mandatory"). Neither respondents nor the Ninth Circuit has ever disputed that Arizona satisfied each of these nine criteria. See 420 F. 3d, at 963, n. 11; Brief for Respondents 19, n. 8.

The language of § 7(a)(2) of the ESA is similarly imperative: It provides that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize" endangered or threatened species or their habitats. 16 U. S. C. § 1536(a)(2). This mandate is to be carried out through consultation and may require the agency to adopt an alternative course of action. As the author of the panel opinion below recognized, applying this language literally would "*ad[d]* one [additional] requirement to the list of considerations under the Clean Water Act permitting transfer provision." 450 F. 3d, at 404, n. 2 (Berzon, J., concurring in denial of rehearing en banc) (emphasis in original). That is, it would effectively repeal the mandatory and exclusive list of criteria set forth in § 402(b), and replace it with a new, expanded list that includes § 7(a)(2)'s no-jeopardy requirement.

B

While a later enacted statute (such as the ESA) can sometimes operate to amend or even repeal an earlier statutory provision (such as the CWA), "repeals by implication are not favored" and will not be presumed unless the "intention of the legislature to repeal [is] clear and manifest." *Watt* v. *Alaska*, 451 U. S. 259, 267 (1981) (internal quotation marks omitted). We will not infer a statutory repeal "unless the later statute '"expressly contradict[s] the original act"' or unless such a construction '"is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all."'" *Traynor* v. *Turnage*, 485 U. S. 535, 548 (1988) (quoting *Radzanower* v. *Touche Ross & Co.*, 426 U. S.

148, 153 (1976), in turn quoting T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874)); see also *Branch* v. *Smith*, 538 U. S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute' "); *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936) ("[T]he intention of the legislature to repeal must be clear and manifest"). Outside these limited circumstances, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower*, *supra*, at 153.

Here, reading § 7(a)(2) as the Court of Appeals did would effectively repeal § 402(b)'s statutory mandate by engrafting a tenth criterion onto the CWA.[7] Section 402(b) of the CWA commands that the EPA "shall" issue a permit whenever all nine exclusive statutory prerequisites are met. Thus, § 402(b) does not just set forth *minimum* requirements for the transfer of permitting authority; it affirmatively mandates that the transfer "shall" be approved if the specified criteria are met. The provision operates as a ceiling as well as a floor. By adding an additional criterion, the Ninth Cir-

[7] Justice Stevens' dissenting opinion (hereinafter dissent) attempts to paper over this conflict by suggesting that the EPA and the agencies designated by the Secretary of the Interior could reconcile the commands of the CWA and the ESA by "generat[ing] an alternative course of action whereby the transfer could still take place . . . but in such a way that would honor the mandatory requirements of § 7(a)(2)." *Post*, at 687. For example, it suggests that the EPA could condition transfers of permitting authority on the State's acceptance of additional continuing oversight by the EPA (presumably beyond that oversight already contemplated by the CWA's statutory language). *Post*, at 688–690. But such a take-it-or-leave-it approach, no less than a straightforward rejection of a transfer application, would impose conditions on an NPDES transfer beyond those set forth in § 402(b), and thus alter the CWA's statutory command.

cuit's construction of § 7(a)(2) raises that floor and alters § 402(b)'s statutory command.[8]

The Ninth Circuit's reading of § 7(a)(2) would not only abrogate § 402(b)'s statutory mandate, but also result in the implicit repeal of many additional otherwise categorical statutory commands. Section 7(a)(2) by its terms applies to "any action authorized, funded, or carried out by" a federal agency—covering, in effect, almost anything that an agency might do. Reading the provision broadly would thus partially override every federal statute mandating agency action by subjecting such action to the further condition that it pose no jeopardy to endangered species. See, *e. g.*, *Platte River Whooping Crane Critical Habitat Maintenance Trust* v. *FERC*, 962 F. 2d, at 33–34 (considering whether § 7(a)(2) overrides the Federal Power Act's prohibition on amending annual power licenses). While the language of § 7(a)(2) does not explicitly repeal any provision of the CWA (or any other statute), reading it for all that it might be worth runs foursquare into our presumption against implied repeals.

C

1

The agencies charged with implementing the ESA have attempted to resolve this tension through regulations imple-

[8] It does not matter whether this alteration is characterized as an amendment or a partial repeal. Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands, and we have repeatedly recognized that implied amendments are no more favored than implied repeals. See, *e. g.*, *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 134 (1974) ("'A new statute will not be read as wholly or even partially amending a prior one unless there exists a "positive repugnancy" between the provisions of the new and those of the old that cannot be reconciled'" (quoting *In re Penn Central Transp. Co.*, 384 F. Supp. 895, 943 (Sp. Ct. R. R. R. A. 1974))); *United States* v. *Welden*, 377 U. S. 95, 103, n. 12 (1964) ("Amendments by implication . . . are not favored"); *United States* v. *Madigan*, 300 U. S. 500, 506 (1937) ("[T]he modification by implication of the settled construction of an earlier and different section is not favored").

menting § 7(a)(2). The NMFS and the FWS, acting jointly on behalf of the Secretaries of Commerce and the Interior and following notice-and-comment rulemaking procedures, have promulgated a regulation stating that "Section 7 and the requirements of this part apply to all actions in which there is *discretionary* Federal involvement or control." 50 CFR § 402.03 (emphasis added). Pursuant to this regulation, § 7(a)(2) would not be read as impliedly repealing nondiscretionary statutory mandates, even when they might result in some agency action. Rather, the ESA's requirements would come into play only when an action results from the exercise of agency discretion. This interpretation harmonizes the statutes by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but not when the agency is prohibited from considering such extrastatutory factors.

We have recognized that "[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation" of the statutory scheme. *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 703 (1995). But such deference is appropriate only where "Congress has not directly addressed the precise question at issue" through the statutory text. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984).

> "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [However,] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*, at 842–843.

In making the threshold determination under *Chevron*, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 132 (2000). Rather, "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. . . . It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Id.*, at 132–133 (quoting *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989)).

We must therefore read § 7(a)(2) of the ESA against the statutory backdrop of the many mandatory agency directives whose operation it would implicitly abrogate or repeal if it were construed as broadly as the Ninth Circuit did below. When § 7(a)(2) is read this way, we are left with a fundamental ambiguity that is not resolved by the statutory text. An agency cannot simultaneously obey the differing mandates set forth in § 7(a)(2) of the ESA and § 402(b) of the CWA, and consequently the statutory language—read in light of the canon against implied repeals—does not itself provide clear guidance as to which command must give way.

In this situation, it is appropriate to look to the implementing agency's expert interpretation, which cabins § 7(a)(2)'s application to "actions in which there is discretionary Federal involvement or control." 50 CFR § 402.03. This reading harmonizes the statutes by applying § 7(a)(2) to guide agencies' existing discretionary authority, but not reading it to override express statutory mandates.

2

We conclude that this interpretation is reasonable in light of the statute's text and the overall statutory scheme, and that it is therefore entitled to deference under *Chevron*. Section 7(a)(2) requires that an agency "insure" that the ac-

tions it authorizes, funds, or carries out are not likely to jeopardize listed species or their habitats. To "insure" something—as the court below recognized—means "'[t]o make certain, to secure, to guarantee (some thing, event, etc.).'" 420 F. 3d, at 963 (quoting 7 Oxford English Dictionary 1059 (2d ed. 1989)). The regulation's focus on "discretionary" actions accords with the commonsense conclusion that, when an agency is *required* to do something by statute, it simply lacks the power to "insure" that such action will not jeopardize endangered species.

This reasoning is supported by our decision in *Department of Transportation* v. *Public Citizen*, 541 U. S. 752 (2004). That case concerned safety regulations that were promulgated by the Federal Motor Carrier Safety Administration (FMCSA) and had the effect of triggering a Presidential directive allowing Mexican trucks to ply their trade on United States roads. The Court held that the National Environmental Policy Act (NEPA) did not require the agency to assess the environmental effects of allowing the trucks entry because "the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion." *Id.*, at 769 (emphasis in original). The Court concluded that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Id.*, at 770.

We do not suggest that *Public Citizen* controls the outcome here; § 7(a)(2), unlike NEPA, imposes a substantive (and not just a procedural) statutory requirement, and these cases involve agency action more directly related to environmental concerns than the FMCSA's truck safety regulations. But the basic principle announced in *Public Citizen*—that an

agency cannot be considered the legal "cause" of an action that it has no statutory discretion *not* to take—supports the reasonableness of the FWS' interpretation of § 7(a)(2) as reaching only discretionary agency actions. See also *California* v. *United States*, 438 U. S. 645, 668, n. 21 (1978) (holding that a statutory requirement that federal operating agencies conform to state water usage rules applied only to the extent that it was not "inconsistent with other congressional directives").

3

The court below simply disregarded § 402.03's interpretation of the ESA's reach, dismissing "the regulation's reference to 'discretionary . . . involvement' " as merely "congruent with the statutory reference to actions 'authorized, funded, or carried out' by the agency." 420 F. 3d, at 968. But this reading cannot be right. Agency discretion presumes that an agency can exercise "judgment" in connection with a particular action. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 415–416 (1971); see also Random House Dictionary of the English Language 411 (unabridged ed. 1967) ("discretion" defined as "the power or right to decide or act according to one's own judgment; freedom of judgment or choice"). As the mandatory language of § 402(b) itself illustrates, not every action authorized, funded, or carried out by a federal agency is a product of that agency's exercise of discretion.

The dissent's interpretation of § 402.03 is similarly implausible. The dissent would read the regulation as simply clarifying that discretionary agency actions are included within the scope of § 7(a)(2), but not confining the statute's reach to such actions. See *post*, at 679–682. But this reading would render the regulation entirely superfluous. Nothing in either § 7(a)(2) or the other agency regulations interpreting that section, see § 402.02, suggests that discretionary actions are *excluded* from the scope of the ESA, and there is thus

no need for a separate regulation to bring them within the statute's scope. On the dissent's reading, § 402.03's reference to "discretionary" federal involvement is mere surplusage, and we have cautioned against reading a text in a way that makes part of it redundant. See, *e. g.*, *TRW Inc.* v. *Andrews*, 534 U. S. 19, 31 (2001).

This history of the regulation also supports the reading to which we defer today. As the dissent itself points out, the proposed version of § 402.03 initially stated that "Section 7 and the requirements of this Part apply to *all actions in which there is Federal involvement or control*," 48 Fed. Reg. 29999 (1983) (emphasis added); the Secretary of the Interior modified this language to provide (as adopted in the final rule now at issue) that the statuory requirements apply to "all actions in which there is *discretionary* Federal involvement or control," 51 Fed. Reg. 19958 (1986) (emphasis added). The dissent's reading would rob the word "discretionary" of any effect, and substitute the earlier, proposed version of the regulation for the text that was actually adopted.

In short, we read § 402.03 to mean what it says: that § 7(a)(2)'s no-jeopardy duty covers only discretionary agency actions and does not attach to actions (like the NPDES permitting transfer authorization) that an agency is *required* by statute to undertake once certain specified triggering events have occurred. This reading not only is reasonable, inasmuch as it gives effect to the ESA's provision, but also comports with the canon against implied repeals because it stays § 7(a)(2)'s mandate where it would effectively override otherwise mandatory statutory duties.

D

Respondents argue that our opinion in *TVA* v. *Hill*, 437 U. S. 153 (1978), supports their contrary position. In that case, we held that the ESA prohibited the Tennessee Valley Authority (TVA) from putting into operation the Tellico

Dam—despite the fact that the agency had already spent over $100 million on the nearly completed project—because doing so would have threatened the critical habitat of the endangered snail darter. In language on which respondents rely, the Court concluded that "the ordinary meaning" of § 7 of the ESA contained "no exemptions" and reflected "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id.*, at 173, 185, 188.

TVA v. *Hill*, however, had no occasion to answer the question presented in these cases. That case was decided almost a decade before the adoption in 1986 of the regulations contained in 50 CFR § 402.03. And in any event, the construction project at issue in *TVA* v. *Hill*, while expensive, was also discretionary. The TVA argued that by continuing to make lump-sum appropriations to the TVA, some of which were informally earmarked for the Tellico Dam project, Congress had implicitly repealed § 7's no-jeopardy requirement as it applied to that project. See 437 U. S., at 189–193. The Court rejected this argument, concluding that "[t]he Appropriations Acts did not themselves identify the projects for which the sums had been appropriated" and that reports by congressional committees allegedly directing the TVA to complete the project lacked the force of law. *Id.*, at 189, n. 35. Central to the Court's decision was the conclusion that Congress did not *mandate* that the TVA put the dam into operation; there was no statutory command to that effect; and there was therefore no basis for contending that applying the ESA's no-jeopardy requirement would implicitly repeal another affirmative congressional directive.[9]

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[9] The dissent is incorrect in suggesting that "if the Secretary of the Interior had not declared the snail darter an endangered species . . . the TVA surely would have been obligated to spend the additional funds that Congress appropriated to complete the project." *Post*, at 676. To the contrary, the Court in *TVA* v. *Hill* found that there was no clear repug-

TVA v. *Hill* thus supports the position, expressed in § 402.03, that the ESA's no-jeopardy mandate applies to every *discretionary* agency action—regardless of the expense or burden its application might impose. But that case did not speak to the question whether § 7(a)(2) applies to *non*-discretionary actions, like the one at issue here. The regulation set forth in 50 CFR § 402.03 addressed that question, and we defer to its reasonable interpretation.

IV

Finally, respondents and their *amici* argue that, even if § 7(a)(2) is read to apply only to "discretionary" agency actions, the decision to transfer NPDES permitting authority to Arizona represented such an exercise of discretion. They contend that the EPA's decision to authorize a transfer is not entirely mechanical; that it involves some exercise of judgment as to whether a State has met the criteria set forth in § 402(b); and that these criteria incorporate references to wildlife conservation that bring consideration of § 7(a)(2)'s no-jeopardy mandate properly within the Agency's discretion.

The argument is unavailing. While the EPA may exercise some judgment in determining whether a State has demonstrated that it has the authority to carry out § 402(b)'s enumerated statutory criteria, the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list. Nothing in the text of § 402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application. And to the extent that some of the § 402(b) criteria may result in environmental benefits to ma-

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nancy between the ESA and the Acts appropriating funds to the TVA because the latter simply did not *require* the agency to use any of the generally appropriated funds to complete the Tellico Dam project. 437 U. S., at 189–193.

rine species,[10] there is no dispute that Arizona has satisfied each of those statutory criteria.

Respondents' argument has been disclaimed not only by the EPA, but also by the FWS and the NMFS, the two agencies primarily charged with administering § 7(a)(2) and the drafters of the regulations implementing that section. Each agency recently issued a formal letter concluding that the authorization of an NPDES permitting transfer is not the kind of discretionary agency action that is covered by § 402.03. See App. to Pet. for Cert. in No. 06–549, at 103a–116a. An agency's interpretation of the meaning of its own regulations is entitled to deference "unless plainly erroneous or inconsistent with the regulation," *Auer* v. *Robbins*, 519 U. S. 452, 461 (1997) (internal quotation marks omitted), and that deferential standard is plainly met here.[11]

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[10] For example, § 402(b) requires the EPA to consider whether the State has the legal authority to enforce applicable water quality standards—some of which, in turn, are informed by the "judgment" of the EPA's Administrator. 33 U. S. C. § 1342(b)(1)(A); see also, *e. g.*, § 1312. But the permit transfer process does not itself require scrutiny of the underlying standards or of their effect on marine or wildlife—only of the state applicant's "*authority* . . . [t]o issue permits which . . . apply, and insure compliance with," the applicable standards. § 1342(b)(1)(A) (emphasis added). In any event, respondents do not dispute that, as both the EPA and the FWS determined, the transfer of permitting authority to Arizona officials would have no adverse water quality related impact on any listed species. See App. to Pet. for Cert. in No. 06–340, at 562–563, 615–617.

[11] Respondents also contend that the EPA has taken, or will take, other discretionary actions apart from the transfer authorization that implicate the ESA. For example, they argue that the EPA's alleged provision of funding to Arizona for the administration of its clean water programs is the kind of discretionary agency action that is subject to § 7(a)(2). However, assuming this is true, any such funding decision is a separate agency action that is outside the scope of this lawsuit. Respondents also point to the fact that, following the transfer of permitting authority, the EPA will retain oversight authority over the state permitting process, including the power to object to proposed permits. But the fact that the EPA may exercise discretionary oversight authority—which may trigger § 7(a)(2)'s

* * *

Applying *Chevron,* we defer to the Agency's reasonable interpretation of ESA § 7(a)(2) as applying only to "actions in which there is discretionary Federal involvement or control." 50 CFR § 402.03. Since the transfer of NPDES permitting authority is not discretionary, but rather is mandated once a State has met the criteria set forth in § 402(b) of the CWA, it follows that a transfer of NPDES permitting authority does not trigger § 7(a)(2)'s consultation and no-jeopardy requirements. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and these cases are 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.

These cases present a problem of conflicting "shalls." On the one hand, § 402(b) of the Clean Water Act (CWA) provides that the Environmental Protection Agency (EPA) "shall" approve a State's application to administer a National Pollution Discharge Elimination System (NPDES) permitting program unless it determines that nine criteria are not satisfied. 33 U. S. C. § 1342(b). On the other hand, shortly after the passage of the CWA, Congress enacted § 7(a)(2) of the Endangered Species Act of 1973 (ESA), which commands that federal agencies "shall" ensure that their actions do not jeopardize endangered species. 16 U. S. C. § 1536(a)(2).

When faced with competing statutory mandates, it is our duty to give full effect to both if at all possible. See, *e. g.*, *Morton* v. *Mancari,* 417 U. S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the

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consultation and no-jeopardy obligations—*after* the transfer does not mean that the decision authorizing the transfer is itself discretionary.

courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective"). The Court fails at this task. Its opinion unsuccessfully tries to reconcile the CWA and the ESA by relying on a federal regulation, 50 CFR § 402.03 (2006), which it reads as limiting the reach of § 7(a)(2) to *only* discretionary federal actions, see *ante*, at 664–666. Not only is this reading inconsistent with the text and history of § 402.03, but it is fundamentally inconsistent with the ESA itself.

In the celebrated "snail darter" case, *TVA* v. *Hill*, 437 U. S. 153 (1978), we held that the ESA "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies," *id.*, at 185. Consistent with that intent, Chief Justice Burger's exceptionally thorough and admirable opinion explained that § 7 "admits of no exception." *Id.*, at 173. Creating precisely such an exception by exempting nondiscretionary federal actions from the ESA's coverage, the Court whittles away at Congress' comprehensive effort to protect endangered species from the risk of extinction and fails to give the ESA its intended effect. After first giving *Hill* the attention it deserves, I will comment further on the irrelevance of § 402.03 to these cases and offer other available ways to give effect to both the CWA and the ESA. Having done so, I conclude by explaining why these cases should be remanded to EPA for further proceedings.

I

In *Hill*, we were presented with two separate questions: (1) whether the ESA required a court to enjoin the operation of the nearly completed Tellico Dam and Reservoir Project because the Secretary of the Interior had determined that its operation would eradicate a small endangered fish known as a snail darter; and (2) whether post-1973 congressional appropriations for the completion of the Tellico Dam constituted an implied repeal of the ESA, at least insofar as it

applied to the dam. *Id.*, at 156. More than 30 pages of our opinion explain our affirmative answer to the first question, see *id.*, at 156–188, but just over four pages sufficed to explain our negative answer to the second, see *id.*, at 189–193. While it is our ruling on the first question that is relevant to the cases before us, it is our refusal to hold that the ESA itself had been impliedly repealed that the majority strangely deems most significant. See *ante*, at 670.

In answering *Hill*'s first question, we did not discuss implied repeals. On the contrary, that portion of the opinion contained our definitive interpretation of the ESA, in which we concluded that "the language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." 437 U. S., at 174; see also *id.*, at 177 ("'The dominant theme pervading all Congressional discussion of the proposed [ESA] was the overriding need *to devote whatever effort and resources were necessary* to avoid further diminution of national and worldwide wildlife resources'" (quoting Coggins, Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973, 51 N. D. L. Rev. 315, 321 (1975); emphasis added in *Hill*)). With respect to § 7 in particular, our opinion could not have been any clearer. We plainly held that it "admits of *no exception*." 437 U. S., at 173 (emphasis added).[1]

Our opinion in *Hill* explained at length why § 7 imposed obligations on "all federal agencies" to ensure that "actions authorized, funded, or carried out by them do not jeopardize the continued existence of endangered species." 437 U. S.,

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[1] See also *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 692 (1995) ("Section 7 requires federal agencies to ensure that *none of their activities*, including the granting of licenses and permits, will jeopardize the continued existence of endangered species 'or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical'" (emphasis added)).

at 173 (emphasis deleted; internal quotation marks omitted). Not a word in the opinion stated or suggested that § 7 obligations are inapplicable to mandatory agency actions that would threaten the eradication of an endangered species. Nor did the opinion describe the Tennessee Valley Authority's (TVA) attempted completion of the Tellico Dam as a discretionary act. How could it? After all, if the Secretary of the Interior had not declared the snail darter an endangered species whose critical habitat would be destroyed by operation of the Tellico Dam, the TVA surely would have been obligated to spend the additional funds that Congress appropriated to complete the project.[2] Unconcerned with whether an agency action was mandatory or discretionary, we simply held that § 7 of the ESA

> "reveals an explicit congressional decision to require agencies to afford *first priority* to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species *priority over the 'primary missions' of federal agencies.*" *Id.*, at 185 (emphasis added).[3]

[2] The Court misreads this sentence and, in so doing, overreads our decision in *Hill*. The Court maintains that *Hill* held that the "[a]cts appropriating funds to the TVA . . . did not *require* the agency to use any of the generally appropriated funds to complete the Tellico Dam project." *Ante*, at 671, n. 9. But *Hill* said no such thing. That case only held that the *subsequent* appropriation of funds for the Tellico Dam Project could not overcome the mandatory requirements of § 7 of the ESA; it did not hold that the TVA would not have been required to spend any and all appropriated funds if the ESA had never been passed. See *Hill*, 437 U. S., at 189–190. If the ESA had never been enacted and did not stand in the way of the completion of the Tellico Dam, there is no doubt that the TVA would have finished the project that Congress had funded.

[3] The road not taken in *Hill* also helps to clarify our interpretation that § 7 was not limited to discretionary agency action. Throughout the course of the litigation, the TVA insisted that § 7 did not refer to "all the actions that an agency can ever take." Brief for Petitioner in *Tennessee Valley*

The fact that we also concluded that the post-1973 congressional appropriations did not impliedly repeal the ESA provides no support for the majority's contention that the obligations imposed by § 7(a)(2) may be limited to discretionary acts. A few passages from the relevant parts of *Hill* belie that suggestion. After noting the oddity of holding that the interest in protecting the survival of a relatively small number of 3-inch fish "would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million," we found "that the explicit provisions of the [ESA] require precisely that result." *Id.*, at 172, 173. We then continued:

> "One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the [ESA]. Its very words affirmatively command all federal agencies 'to *insure* that actions *authorized, funded,* or *carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species . . . .'" *Id.*, at 173 (quoting 16 U. S. C. § 1536 (1976 ed.); emphasis added in *Hill*).

We also reviewed the ESA's history to identify a variety of exceptions that had been included in earlier legislation and unenacted proposals but were omitted from the final version of the 1973 statute. We explained that earlier endangered species legislation "qualified the obligation of federal agencies," but the 1973 Act purposefully omitted "all phrases which might have qualified an agency's responsibilities." 437 U. S., at 181, 182. Moreover, after observing that the

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Authority v. *Hill*, O. T. 1977, No. 76–1701, p. 26. Instead, the TVA sought to restrict § 7 to only those actions for "which the agency has reasonable decision-making alternatives before it." *Ibid.* We rejected that narrow interpretation, stating that the only way to sustain the TVA's position would be to "ignore the ordinary meaning of plain language." *Hill*, 437 U. S., at 173.

ESA creates only a limited number of "hardship exemptions," see 16 U. S. C. § 1539—none of which would apply to federal agencies—we applied the maxim *expressio unius est exclusio alterius* to conclude that "there are no exemptions in the [ESA] for federal agencies," 437 U. S., at 188.

Today, however, the Court countenances such an exemption. It erroneously concludes that the ESA contains an unmentioned exception for nondiscretionary agency action and that the statute's command to enjoin the completion of the Tellico Dam depended on the unmentioned fact that the TVA was attempting to perform a discretionary act. But both the text of the ESA and our opinion in *Hill* compel the contrary determination that Congress intended the ESA to apply to "all federal agencies" and to all "actions authorized, funded, or carried out by them." *Id.*, at 173 (emphasis deleted).

A transfer of NPDES permitting authority under § 402(b) of the CWA is undoubtedly one of those "actions" that is "authorized" or "carried out" by a federal agency. See 16 U. S. C. § 1536(b); 50 CFR § 402.02 (defining "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to . . . actions directly or indirectly causing modifications to the land, water, or air"). It follows from *Hill* that § 7(a)(2) applies to such NPDES transfers—whether they are mandatory or discretionary.

II

Given our unequivocal holding in *Hill* that the ESA has "first priority" over all other federal action, 437 U. S., at 185, if any statute should yield, it should be the CWA. But no statute must yield unless it is truly incapable of coexistence. See, *e. g.*, *Morton*, 417 U. S., at 551. Therefore, assuming that § 402(b) of the CWA contains its own mandatory com-

mand, we should first try to harmonize that provision with the mandatory requirements of § 7(a)(2) of the ESA.

The Court's solution is to rely on 50 CFR § 402.03, which states that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." The Court explains that this regulation "harmonizes the statutes by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but by lifting that mandate when the agency is prohibited from considering such extrastatutory factors." *Ante*, at 665. This is not harmony, and it certainly is not effect. Rather than giving genuine effect to § 7(a)(2), the Court permits a wholesale limitation on the reach of the ESA. Its interpretation of § 402.03 conflicts with the text and history of the regulation, as well as our interpretation of § 7 in the "snail darter" case.

To begin with, the plain language of § 402.03 does not state that its coverage is limited to discretionary actions. Quite the opposite, the most natural reading of the text is that it confirms the broad construction of § 7 endorsed by our opinion in *Hill*. Indeed, the only way to read § 402.03 in accordance with the facts of the case and our holding that § 7 "admits of no exception[s]," 437 U. S., at 173, is that it eliminates any possible argument that the ESA does not extend to situations in which the discretionary federal involvement is only marginal.

The Court is simply mistaken when it says that it reads § 402.03 "to mean what it says: that § 7(a)(2)'s no-jeopardy duty covers *only* discretionary agency actions . . . ." *Ante*, at 669 (emphasis added). That is not, in fact, what § 402.03 "says." The word "only" is the Court's addition to the text, not the Agency's. Moreover, that text surely does not go on to say (as the Court does) that the duty "does not attach to actions (like the NPDES permitting transfer authorization) that an agency is *required* by statute to undertake once cer-

tain specified triggering events have occurred." *Ibid.* If the drafters of the regulation had intended such a far-reaching change in the law, surely they would have said so by using language similar to that which the Court uses today.

Nothing in the proceedings that led to the promulgation of the regulation suggests any reason for limiting the pre-existing understanding of the scope of § 7's coverage. EPA codified the current version of § 402.03 in 1986 as part of a general redrafting of ESA regulations. In the 1983 Notice of Proposed Rulemaking, the proposed version of § 402.03 stated that "§ 7 and the requirements of this Part apply to all actions in which there is Federal involvement or control." 48 Fed. Reg. 29999 (1983). Without any explanation, the final rule inserted the word "discretionary" before "Federal involvement or control." 51 Fed. Reg. 19958 (1986).[4] Clearly, if the Secretary of the Interior meant to limit the pre-existing understanding of the scope of the coverage of § 7(a)(2) by promulgating this regulation, that intent would have been mentioned somewhere in the text of the regulations or in contemporaneous comment about them. See *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 1001 (2005) (holding that an agency is free within "the limits of reasoned interpretation to change course" only if it "adequately justifies the change"); *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 48 (1983) ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner"). Yet, the final rule said nothing about limiting the reach of

[4] See also Kilbourne, The Endangered Species Act Under the Microscope: A Closeup Look From A Litigator's Perspective, 21 Env. L. 499, 529 (1991) (noting that the Agency did not explain the addition of the word "discretionary"); Weller, Limiting the Scope of the Endangered Species Act: Discretionary Federal Involvement or Control Under Section 402.03, 5 Hastings W.-Nw. J. Env. L. & Pol'y 309, 311, 334 (Spring 1999) (same).

§ 7 or our decision in *Hill*. Nor did it mention the change from the notice of proposed rulemaking. I can only assume, then, that the regulation does mean what both it and the notice of proposed rulemaking says: Section 7(a)(2) applies to discretionary federal action, but not *only* to discretionary action.

The only explanation the Agency provided for § 402.03 was the following:

> "This section, which explains the applicability of section 7, implicitly covers Federal activities within the territorial jurisdiction of the United States and upon the high seas as a result of the definition of 'action' in § 402.02. The explanation for the scope of the term 'action' is provided in the discussion under § 402.01 above." 51 Fed. Reg. 19937.

This statement directs us to two sources: the definition of "action" in § 402.02 and the "explanation for the scope of the term 'action' " in § 402.01. 51 Fed. Reg. 19937. Both confirm that there was no intent to draw a distinction between discretionary and nondiscretionary actions.

Section 402.02 provides in relevant part:

> "*Action* means *all* activities or programs *of any kind* authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:
>
> "(a) actions intended to conserve listed species or their habitat;
>
> "(b) the promulgation of regulations . . . ." (Second and third emphases added.)

Actions in either of the described subcategories are sometimes mandatory and sometimes discretionary. Likewise, as the italicized portions indicate, the term "action" expressly refers to "all" agency activities or programs "of any kind," regardless of whether they are discretionary or mandatory. By reading the term "discretionary" as a limitation on "ac-

tion," the Court creates a contradiction in EPA's own regulation.[5]

As for the final rule's explanation for the scope of the term "action" in § 402.01, that too is fully consistent with my interpretation of § 402.03. That explanation plainly states that "*all* Federal actions including 'conservations programs' are subject to the consultation requirements of section 7(a)(2) if they 'may affect' listed species or their critical habitats." 51 Fed. Reg. 19929 (emphasis added). The regulation does not say all "discretionary" federal actions, nor does it evince an intent to limit the scope of § 7(a)(2) in any way. Rather, it just restates that the ESA applies to "all" federal actions, just as the notice of proposed rulemaking did. This explanation of the scope of the word "action" is therefore a strong indication that the Court's reading of "discretionary" is contrary to its intended meaning.

An even stronger indication is the fact that at no point in the administrative proceedings in these cases did EPA even mention it.[6] As an initial matter, it is worth emphasizing

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[5] Petitioner National Association of Home Builders (NAHB) points to the following language from the final rule as an indication that § 7 only applies to discretionary action: "'[A] Federal agency's responsibility under section 7(a)(2) permeates the full range of discretionary authority held by that agency.'" Brief for Petitioners NAHB et al. 32 (quoting 51 Fed. Reg. 19937). However, that language is found in a different section of the final rule—the section describing the definition of "'[r]easonable and prudent alternatives'" under 50 CFR § 402.02. When put in its proper context, the cited language simply indicates that any "reasonable and prudent alternative" may involve the "maximum exercise of Federal agency authority when to do so is necessary, in the opinion of the Service, to avoid jeopardy." 51 Fed. Reg. 19937. If that is not enough, the quoted text supports my reading of § 402.03 even on NAHB's reading. By indicating that an agency's § 7(a)(2) responsibility "permeates the full range" of its discretionary authority, EPA confirmed that the ESA covers all discretionary actions. *Ibid.*

[6] EPA also did not rely on § 402.03 in the Court of Appeals. See 420 F. 3d 946, 968 (CA9 2005) ("EPA makes no argument that its transfer decision was not a 'discretionary' one within the meaning of 50 CFR

that even if EPA had relied on § 402.03, its interpretation of the ESA would not be entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), because it is not charged with administering that statute, *id.*, at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme *it is entrusted to administer*" (emphasis added)); *Department of Treasury* v. *FLRA*, 837 F. 2d 1163, 1167 (CADC 1988) ("[W]hen an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference"). The Departments of the Interior and Commerce, not EPA, are charged with administering the ESA. See *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 703–704 (1995). And EPA has conceded that the Department of the Interior's biological opinion "did not discuss 50 C. F. R. 402.03, and it did not address the question whether the consultation that produced the [biological opinion] was required by the ESA." Pet. for Cert. in No. 06–549, p. 24; see App. 77–124 (never mentioning § 402.03). Left with this unfavorable administrative record, EPA can only lean on the fact that the Department of the Interior has recently "clarified" its position regarding § 402.03 in a *different* administrative proceeding. See Pet. for Cert. in No. 06–549, at 24–25; *id.*, at 26 ("The recent F[ish and Wildlife Service (FWS)] and N[ational Marine Fisheries Service] communications regarding Alaska's pending transfer application reflect those agencies' considered interpretations . . . of [50 CFR §] 402.03"); App. to Pet. for Cert. in No. 06–340, pp. 103–116; see also *ante*, at 660, n. 5. We have long held, however, that courts may not affirm an agency action on grounds other than those adopted by the agency in

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§ 402.03. . . . We may not affirm the EPA's transfer decision on grounds not relied upon by the agency. . . . As the EPA evidently does not regard § 402.03 as excluding the transfer decision, we should not so interpret the regulations").

the administrative proceedings. See *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87 (1943). The majority ignores this hoary principle of administrative law and substitutes a *post hoc* interpretation of § 7(a)(2) and § 402.03 for that of the relevant agency. For that reason alone, these cases should be remanded to the Agency. And for the other reasons I have given, § 402.03 cannot be used to harmonize the CWA and the ESA.

III

There are at least two ways in which the CWA and the ESA can be given full effect without privileging one statute over the other.

A

The text of § 7(a)(2) itself provides the first possible way of reconciling that provision with § 402(b) of the CWA. The subsection reads:

> "Each Federal agency shall, *in consultation with and with the assistance of the Secretary*, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section." 16 U. S. C. § 1536(a)(2) (emphasis added).

The Court is certainly correct that the use of the word "shall" in § 7(a)(2) imposes a mandatory requirement on the federal agencies. See *ante*, at 662. It is also correct that the ESA's "mandate is to be carried out through consultation and may require the agency to adopt an alternative course of action." *Ibid.* The Court is too quick to conclude, however,

that this consultation requirement creates an irreconcilable conflict between this provision and § 402(b) of the CWA. It rushes to this flawed judgment because of a basic conceptual error—an error that is revealed as early as the first paragraph of its opinion. Rather than attempting to find a way to give effect to § 7(a)(2)'s consultation requirement, the Court frames the question presented as "whether § 7(a)(2) effectively operates as a tenth criterion on which the transfer of permitting power under the first statute must be conditioned. " *Ante,* at 649. The Court is not alone in this. The author of the Ninth Circuit opinion below also stated that the ESA "*adds* one requirement to the list of considerations under the Clean Water Act permitting transfer provision." 450 F. 3d 394, 404, n. 2 (2006) (Berzon, J., concurring in denial of rehearing en banc) (emphasis in original). But while the ESA does mandate that the relevant agencies "consul[t]" with the Interior Department, that consultation process also provides a way for the agencies to give effect to both statutes.

The first step in the statutory consultation process is to identify whether any endangered species will be affected by an agency action. An agency proposing a particular action, such as an NPDES transfer, will typically ask the Secretary of the Interior whether any listed species may be present in the area of the proposed action and whether that action will "affect" those species. See 16 U. S. C. § 1536(c). It is entirely possible that no listed species will be affected, and any anticipated conflict between the ESA and another statute will have been avoided at this threshold stage. If, however, the Secretary determines that a proposed action may affect an endangered species or its critical habitat, the agency must formally consult with the Secretary. This consultation culminates in the issuance of a "biological opinion," which "detail[s] how the agency action affects the species or its critical habitat." § 1536(b)(3)(A); see also 50 CFR § 402.14(h). Even at this stage, it is still possible that formal consultation

will reveal that the agency action will not jeopardize any species. See, *e. g.*, 63 Fed. Reg. 51198 (1998) (noting that FWS rendered a "'no jeopardy'" finding with respect to the transfer of permitting authority to Texas).

If the biological opinion concludes that the agency action would put a listed species in jeopardy, however, the ESA contains a process for resolving the competing demands of agency action and species protection. The ESA provides that "the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action." 16 U. S. C. § 1536(b)(3)(A); see also 50 CFR § 402.14(h)(3). EPA's regulations define "[r]easonable and prudent alternatives" as

> "alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director [of FWS] believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat." § 402.02.

Thus, in the face of any conflict between the ESA and another federal statute, the ESA and its implementing regulations encourage federal agencies to work out a reasonable alternative that would let the proposed action move forward "consistent with [its] intended purpose" and the agency's "legal authority," while also avoiding any violation of § 7(a)(2).

When applied to the NPDES transfer program, the "reasonable and prudent alternatives" process would enable EPA and the Department of the Interior to develop a substitute that would allow a transfer of permitting authority *and* would not jeopardize endangered species. Stated differ-

ently, the consultation process would generate an alternative course of action whereby the transfer could still take place—as required by § 402(b) of the CWA—but in such a way that would honor the mandatory requirements of § 7(a)(2) of the ESA. This should come as no surprise to EPA, as it has engaged in pretransfer consultations at least six times in the past and has stated that it is not barred from doing so by the CWA.[7]

Finally, for the rare case in which no "reasonable and prudent alternative" can be found, Congress has provided yet another mechanism for resolving any conflicts between the ESA and a proposed agency action. In 1978, shortly after our decision in *Hill*, Congress amended the ESA to create the "Endangered Species Committee," which it authorized to grant exemptions from § 7(a)(2). 16 U. S. C. § 1536(e). Because it has the authority to approve the extinction of an endangered species, the Endangered Species Committee is colloquially described as the "God Squad" or "God Committee." In light of this weighty responsibility, Congress carefully laid out requirements for the God Committee's membership,[8] procedures,[9] and the factors it must consider in deciding whether to grant an exemption.[10]

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[7] See, *e. g.*, 63 Fed. Reg. 51198 (1998) (approving Texas' application to administer the NPDES program after consultation with FWS and stating that "EPA believes that section 7 does apply" to EPA's action); 61 Fed. Reg. 65053 (1996) (approving Oklahoma's NPDES application after consultation with FWS and stating that "EPA's approval of the State permitting program under section 402 of the Clear Water Act is a federal action subject to [§ 7's consultation] requirement"); see also Tr. of Oral Arg. 5 (conceding that EPA conducted six pretransfer consultations in the past).

[8] The Endangered Species Committee is composed of six high-ranking federal officials and a representative from each affected State appointed by the President. See 16 U. S. C. § 1536(e)(3).

[9] See §§ 1536(e)–(*l*).

[10] Section 1536(h)(1) provides:

"The Committee shall grant an exemption from the requirements of subsection (a)(2) of this section for an agency action if, by a vote of not less than five of its members voting in person—

As the final arbiter in situations in which the ESA conflicts with a proposed agency action, the God Committee embodies the primacy of the ESA's mandate and serves as the final mechanism for harmonizing that Act with other federal statutes. By creating this Committee, Congress recognized that some conflicts with the ESA may not be capable of resolution without having to forever sacrifice some endangered species. At the same time, the creation of this last line of defense reflects Congress' view that the ESA should not yield to another federal action except as a final resort and except when authorized by high-level officials after serious consideration. In short, when all else has failed and two federal statutes are incapable of resolution, Congress left the choice to the Committee—not to this Court; it did not limit the ESA in the way the majority does today.

B

EPA's regulations offer a second way to harmonize the CWA with the ESA. After EPA has transferred NPDES permitting authority to a State, the Agency continues to

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"(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) and on such other testimony or evidence as it may receive, that—

"(i) there are no reasonable and prudent alternatives to the agency action;

"(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

"(iii) the action is of regional or national significance; and

"(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

"(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned."

oversee the State's permitting program. See *Arkansas* v. *Oklahoma*, 503 U. S. 91, 105 (1992) ("Congress preserved for the Administrator broad authority to oversee state permit programs"). If a state permit is "outside the guidelines and the requirements" of the CWA, EPA may object to it and block its issuance. See 33 U. S. C. § 1342(d)(2); 66 Fed. Reg. 11206 (2001). Given these ongoing responsibilities, EPA has enacted a regulation that requires a State to enter into a Memorandum of Agreement (MOA) that sets forth the particulars of the Agency's oversight duties. See 40 CFR § 123.24(a) (2006).

The regulation governing MOAs contains several detailed requirements. For instance, the regulation states that an MOA must contain "[p]rovisions specifying classes and categories of permit applications, draft permits and proposed permits that the State will send to the [EPA] Regional Administrator for review, comment and, where applicable, objection," § 123.24(b)(2); "[p]rovisions specifying the frequency and content of reports, documents and other information which the State is required to submit to the EPA," § 123.24(b)(3); and "[p]rovisions for coordination of compliance monitoring activities by the State and by EPA," § 123.24(b)(4)(i). More generally, the regulation provides that an MOA "may include other terms, conditions, or agreements" that are "relevant to the administration and enforcement of the State's regulatory program." § 123.24(a). Under the MOA regulation, furthermore, EPA will not approve any MOA that restricts its statutory oversight responsibility. *Ibid.*

Like the § 7(a)(2) consultation process described above, MOAs provide a potential mechanism for giving effect to § 7 of the ESA while also allowing the transfer of permitting authority to a State. It is important to remember that EPA must approve an MOA *prior to* the transfer of NPDES authority. As such, EPA can use—and in fact has used—the MOA process to structure its later oversight in a way that

will allow it to protect endangered species in accordance with § 7(a)(2) of the ESA. EPA might negotiate a provision in the MOA that would require a State to abide by the ESA requirements when issuing pollution permits. See Brief for American Fisheries Society et al. as *Amici Curiae* 28 ("In the Maine MOA, for example, EPA and the state agree that state permits would protect ESA-listed species by ensuring compliance with state water quality standards"). Alternatively, "EPA could require the state to provide copies of draft permits for discharges in particularly sensitive habitats such as those of ESA-listed species or for discharges that contain a pollutant that threatens ESA-listed wildlife." *Id.*, at 10. Or the MOA might be drafted in a way that would allow the agency to object to state permits that would jeopardize any and all endangered species. See *id.*, at 28 (explaining that the Maine MOA includes a provision allowing EPA to "object to any state permit that risks harm to a listed species by threatening water quality"). These are just three of many possibilities. I need not identify other ways EPA could use the MOA process to comply with the ESA; it is enough to observe that MOAs provide a straightforward way to give the ESA its full effect without restricting § 7(a)(2) in the way the Court does.

IV

As discussed above, I believe that the Court incorrectly restricts the reach of § 7(a)(2) to discretionary federal actions. See Part II, *supra.* Even if such a limitation were permissible, however, it is clear that EPA's authority to transfer permitting authority under § 402(b) *is* discretionary.[11]

The EPA Administrator's authority to approve state permit programs pursuant to § 402(b) of the CWA does not even fit within the Court's description of the category of manda-

[11] Because it is quite lengthy, I include the full text of § 402(b) in an appendix to this dissent.

tory actions that the Court holds are covered by the ESA. In the Court's words, that category includes actions "that an agency is *required* by statute to undertake once certain specified triggering events have occurred." *Ante*, at 669. The "triggering event" for EPA's approval is simply the filing of a satisfactory description of the State's proposed program. See 33 U. S. C. § 1342(b). The statute then commands that the EPA Administrator "shall approve" the submitted program unless he determines that state law does not satisfy nine specified conditions. Those conditions are not "triggering events"; they are potential objections to the exercise of the Administrator's authority.

What is more, § 402(b) is a perfect example of why our analysis should not end simply because a statute uses the word "shall." Instead, we must look more closely at its listed criteria to determine whether they allow for discretion, despite the use of "shall." After all, as then-Justice Rehnquist's dissenting opinion in the "snail darter" case explains, a federal statute using the word "shall" will sometimes allow room for discretion. See *Hill*, 437 U. S., at 211–212.[12] In these cases, there is significant room for discretion in EPA's evaluation of § 402(b)'s nine conditions. The first criterion, for example, requires the EPA Administrator to examine five other statutes and ensure that the State has adequate authority to comply with each. 33 U. S. C. § 1342(b)(1)(A). One of those five statutes, in turn, expressly directs the Administrator to exercise his "judgment." § 1312. Even the Court acknowledges that EPA must exer-

[12] See *Gutierrez de Martinez* v. *Lamagno*, 515 U. S. 417, 432–433, n. 9 (1995) ("Though 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.' See D. Mellinkoff, Mellinkoff's Dictionary of American Legal Usage 402–403 (1992) ('shall' and 'may' are 'frequently treated as synonyms' and their meaning depends on context); B. Garner, Dictionary of Modern Legal Usage 939 (2d ed. 1995) ('Courts in virtually every English-speaking jurisdiction have held—by necessity—that shall means may in some contexts, and vice versa')").

cise "some judgment in determining whether a State has demonstrated that it has the authority to carry out § 402(b)'s enumerated statutory criteria." *Ante*, at 671. However, in the very same breath, the Court states that the dispositive fact is that "the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list." *Ibid.* This reasoning flouts the Court's own logic. Under the Court's reading of § 402.03, § 7(a)(2) applies to discretionary federal actions of any kind. The Court plainly acknowledges that EPA exercises discretion when deciding whether to transfer permitting authority to a State. If we are to take the Court's approach seriously, once *any* discretion has been identified—as it has here—§ 7(a)(2) must apply.[13]

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[13] The Court also claims that the "basic principle announced in" *Department of Transportation* v. *Public Citizen*, 541 U. S. 752 (2004)—"that an agency cannot be considered the legal 'cause' of an action that it has no statutory discretion *not* to take"—supports its reliance on § 402.03. *Ante*, at 667–668. First of all, the Court itself recognizes that it must distance itself from that case, *ante*, at 667, because *Public Citizen* dealt with a procedural requirement under the National Environmental Policy Act (NEPA), not a substantive requirement like that imposed by § 7(a)(2) of the ESA, see *TVA* v. *Hill*, 437 U. S. 153, 188, n. 34 (1978) (holding that NEPA cases are "completely inapposite" to the ESA context). What the Court does not recognize, however, is that what it views as the "basic principle" of *Public Citizen* is stated too broadly and therefore inapplicable to these cases. *Ante*, at 667–668.

Our decision in *Public Citizen* turned on what we called "a critical feature of the case": that the Federal Motor Carrier Safety Administration (FMCSA) had "no ability to countermand" the President's lifting a moratorium that prohibited certain motor carriers from obtaining authority to operate within the United States. 541 U. S., at 766. Once the President decided to lift that moratorium, and once the relevant vehicles had entered the United States, FMCSA was required by statute to register the vehicles if certain conditions were met. *Ibid.* ("Under FMCSA's entirely reasonable reading of this provision, it must certify any motor carrier that can show that it is willing and able to comply with the various substantive requirements for safety and financial responsibility contained in Depart-

The MOA regulation described in Part III–B, *supra*, also demonstrates that an NPDES transfer is not as ministerial a task as the Court would suggest. The Agency retains significant discretion under § 123.24 over the content of an MOA, which of course must be approved prior to a transfer. For instance, EPA may require a State to file reports on a weekly basis or a monthly basis. It may require a State to submit only certain classes and categories of permit applications. And it may include any additional terms and conditions that are relevant to the enforcement of the NPDES program. There is ample room for judgment in all of these areas, and EPA has exercised such judgment in the past when approving MOAs from many States. See, *e. g.*, Approval of Application by Maine to Administer the NPDES Program, 66 Fed. Reg. 12791 (2001); Approval of Application to Administer the NPDES Program; Texas, 63 Fed. Reg. 51164 (1998).

In fact, in an earlier case raising a question similar to this one, see *American Forest & Paper Assn.* v. *EPA*, 137 F. 3d 291, 298–299 (CA5 1998), EPA itself explained how 40 CFR § 123.24 gives it discretion over the approval of a state pollution control program, see Brief for EPA in No. 96–60874 (CA5). Arguing that "[i]ndicia of discretionary involvement or control abound in [its] regulations," the Agency listed

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ment of Transportation regulations; only the moratorium prevented it from doing so for Mexican motor carriers before 2001" (emphasis deleted)). Therefore, any potential NEPA concerns were generated by another decisionmaker, the President, and not FMCSA. Here, by contrast, EPA is not required to act ministerially once another person or agency has made a decision. Instead, EPA must exercise *its own* judgment when considering the transfer of NPDES authority to a State; it also has *its own* authority to deny such a transfer. Any effect on endangered species will be caused, even if indirectly, by the Agency's own decision to transfer NPDES authority. Cf. 50 CFR § 402.02(d) (providing that the ESA will apply to all agency activities that "directly *or indirectly* caus[e] modifications to the land, water, or air" (emphasis added)).

its MOA regulation as a prime example.[14] Again, because EPA's approval of a state application to administer an NPDES program entails significant—indeed, abounding—discretion, I would find that § 7(a)(2) of the ESA applies even under the Court's own flawed theory of these cases.

V

Mindful that judges must always remain faithful to the intent of the legislature, Chief Justice Burger closed his opinion in the "snail darter" case with a reminder that "[o]nce the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end." *Hill*, 437 U. S., at 194. This Court offered a definitive interpretation of the ESA nearly 30 years ago in that very case. Today the Court turns its back on our decision in *Hill* and places a great number of endangered species in jeopardy, including the cactus ferruginous pygmy-owl and Pima pineapple cactus at issue here. At the risk of plagiarizing Chief Justice Burger's fine opinion, I think it is appropriate to end my opinion just as he did—with a quotation attributed to Sir Thomas More that has as much relevance today as it did three decades ago. This quotation illustrates not only the fundamental character of the rule of law embodied in § 7 of the ESA but also the pernicious consequences of official disobedience of such a rule. Repetition of that literary allusion is especially appropriate today:

> "The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm *not* God. The currents and eddies of right and wrong,

[14] EPA also discussed several other regulations that give it discretion. For example, under 40 CFR § 123.61(b), EPA is required to solicit public comments on a State's transfer application, and it must "approve or disapprove the program" after "taking into consideration all comments received." As EPA explained in its Fifth Circuit brief, if it "were simply acting in a ministerial fashion, such weighing of the merits of public comments would be unnecessary." Brief for EPA in No. 96–60874 (CA5).

> which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake." R. Bolt, A Man for All Seasons, Act I, p. 147 (Three Plays, Heinemann ed. 1967) (quoted in *Hill*, 437 U. S., at 195).

Although its reasons have shifted over time, at both the administrative level and in the federal courts, EPA has insisted that the requirements of § 7(a)(2) of the ESA do not apply to its decision to transfer permitting authority under § 402(b) of the CWA. See App. 114; Brief for Petitioner EPA 16, 42. As I have explained above, that conclusion is contrary to the text of § 7(a)(2), our decision in *TVA* v. *Hill*, and the regulation on which the Agency has since relied and upon which the Court relies today. Accordingly, I would hold that EPA's decision was arbitrary and capricious under the Administrative Procedure Act, see 5 U. S. C. § 706(2)(A), and would remand to the Agency for further proceedings consistent with this opinion.

I respectfully dissent.

APPENDIX

33 U. S. C. § 1342(b)

"(b) State permit programs

"At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit

program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

"(1) To issue permits which—

"(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

"(B) are for fixed terms not exceeding five years; and

"(C) can be terminated or modified for cause including, but not limited to, the following:

"(i) violation of any condition of the permit;

"(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

"(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

"(D) control the disposal of pollutants into wells;

"(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

"(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

"(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

"(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

"(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

"(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

"(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

"(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at

the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

"(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title."

JUSTICE BREYER, dissenting.

I join JUSTICE STEVENS' dissent, while reserving judgment as to whether § 7(a)(2) of the Endangered Species Act of 1973, 16 U. S. C. § 1536(a)(2), really covers every possible agency action even of totally unrelated agencies—such as, say, a discretionary determination by the Internal Revenue Service whether to prosecute or settle a particular tax liability, see 26 U. S. C. § 7121.

At the same time I add one additional consideration in support of his (and my own) dissenting views. The Court emphasizes that "[b]y its terms, the statutory language [of § 402(b) of the Clean Water Act, 33 U. S. C. § 1342(b),] is mandatory and *the list exclusive;* if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application." *Ante,* at 661 (emphasis added). My own understanding of agency action leads me to believe that the majority cannot possibly be correct in concluding that the structure of § 402(b) precludes application of § 7(a)(2) to the EPA's discretionary action. See *ante,* at 690–692 (STEVENS, J., dissenting). That is because grants of discretionary authority always come with *some* implicit limits attached. See L. Jaffe, Judicial Control of Administrative Action 359 (1965) (discretion is "a power to make a choice" from a "permissible class of actions"). And there are likely numerous instances in which, prior to, but not after, the enactment of § 7(a)(2), the statute might have implicitly placed "species preservation" outside those limits.

To take one example, consider the statute that once granted the old Federal Power Commission (FPC) the authority to grant a "certificate of public convenience and necessity" to permit a natural gas company to operate a new pipeline. See 15 U. S. C. § 717f(c)(1)(A). It says that "a certificate shall be issued to any qualified applicant therefor . . . if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed . . . and that the proposed service . . . is or will be required by the present or future public convenience and necessity." § 717f(e).

Before enactment of the Endangered Species Act of 1973, 87 Stat. 884, it is at least uncertain whether the FPC could have withheld a certificate simply because a natural gas pipeline might threaten an endangered animal, for given the Act's language and history, species preservation does not naturally fall within its terms. But we have held that the Endangered Species Act changed the regulatory landscape, "indicat[ing] beyond doubt that Congress intended endangered species to be afforded the *highest* of priorities." *TVA* v. *Hill*, 437 U. S. 153, 174 (1978) (emphasis added). Indeed, the Endangered Species Act demonstrated "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id.*, at 185. And given a new pipeline's potential effect upon habitat and landscape, it seems reasonable to believe, once Congress enacted the new law, the FPC's successor (the Federal Energy Regulatory Commission) would act within its authority in taking species-endangering effects into account.

To take another example, the Food and Drug Administration (FDA) has, by statute, an "exclusive" list of criteria to consider in reviewing applications for approval of a new drug. See 21 U. S. C. § 355(d) ("If the Secretary finds . . . *[e. g.,]* the investigations . . . do not include adequate tests by all methods reasonably applicable to show whether or not such drug is safe . . . he shall issue an order refusing to

approve the application"). Preservation of endangered species is not on this "exclusive" list of criteria. Yet I imagine that the FDA *now* should take account, when it grants or denies drug approval, of the effect of manufacture and marketing of a new drug upon the preservation or destruction of an endangered species.

The only meaningful difference between the provision now before us, § 402(b) of the Clean Water Act, and the energy- and drug-related statutes that I have mentioned is that the very purpose of the former is to preserve the state of our natural environment—a purpose that the Endangered Species Act shares. That shared purpose shows that § 7(a)(2) must apply to the Clean Water Act *a fortiori*.

Syllabus

PARENTS INVOLVED IN COMMUNITY SCHOOLS *v.* SEATTLE SCHOOL DISTRICT NO. 1 ET AL.

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

No. 05–908. Argued December 4, 2006—Decided June 28, 2007*

Respondent school districts voluntarily adopted student assignment plans that rely on race to determine which schools certain children may attend. The Seattle district, which has never operated legally segregated schools or been subject to court-ordered desegregation, classified children as white or nonwhite, and used the racial classifications as a "tiebreaker" to allocate slots in particular high schools. The Jefferson County, Ky., district was subject to a desegregation decree until 2000, when the District Court dissolved the decree after finding that the district had eliminated the vestiges of prior segregation to the greatest extent practicable. In 2001, the district adopted its plan classifying students as black or "other" in order to make certain elementary school assignments and to rule on transfer requests.

Petitioners, an organization of Seattle parents (Parents Involved) and the mother of a Jefferson County student (Joshua), whose children were or could be assigned under the foregoing plans, filed these suits contending, *inter alia,* that allocating children to different public schools based solely on their race violates the Fourteenth Amendment's equal protection guarantee. In the Seattle case, the District Court granted the school district summary judgment, finding, *inter alia,* that its plan survived strict scrutiny on the federal constitutional claim because it was narrowly tailored to serve a compelling government interest. The Ninth Circuit affirmed. In the Jefferson County case, the District Court found that the school district had asserted a compelling interest in maintaining racially diverse schools, and that its plan was, in all relevant respects, narrowly tailored to serve that interest. The Sixth Circuit affirmed.

Held: The judgments are reversed, and the cases are remanded.

No. 05–908, 426 F. 3d 1162; No. 05–915, 416 F. 3d 513, reversed and remanded.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, concluding:

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*Together with No. 05–915, *Meredith, Custodial Parent and Next Friend of McDonald* v. *Jefferson County Board of Education et al.,* on certiorari to the United States Court of Appeals for the Sixth Circuit.

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1. The Court has jurisdiction in these cases. Seattle argues that Parents Involved lacks standing because its current members' claimed injuries are not imminent and are too speculative in that, even if the district maintains its current plan and reinstitutes the racial tiebreaker, those members will only be affected if their children seek to enroll in a high school that is oversubscribed and integration positive. This argument is unavailing; the group's members have children in all levels of the district's schools, and the complaint sought declaratory and injunctive relief on behalf of members whose elementary and middle school children may be denied admission to the high schools of their choice in the future. The fact that those children may not be denied such admission based on their race because of undersubscription or oversubscription that benefits them does not eliminate the injury claimed. The group also asserted an interest in not being forced to compete in a race-based system that might prejudice its members' children, an actionable form of injury under the Equal Protection Clause, see, *e. g., Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 211. The fact that Seattle has ceased using the racial tiebreaker pending the outcome here is not dispositive, since the district vigorously defends its program's constitutionality, and nowhere suggests that it will not resume using race to assign students if it prevails. See *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 189. Similarly, the fact that Joshua has been granted a transfer does not eliminate the Court's jurisdiction; Jefferson County's racial guidelines apply at all grade levels, and he may again be subject to race-based assignment in middle school. Pp. 718–720.

2. The school districts have not carried their heavy burden of showing that the interest they seek to achieve justifies the extreme means they have chosen—discriminating among individual students based on race by relying upon racial classifications in making school assignments. Pp. 720–725, 733–735.

(a) Because "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *Fullilove* v. *Klutznick*, 448 U. S. 448, 537 (STEVENS, J., dissenting), governmental distributions of burdens or benefits based on individual racial classifications are reviewed under strict scrutiny, *e. g., Johnson* v. *California*, 543 U. S. 499, 505–506. Thus, the school districts must demonstrate that their use of such classifications is "narrowly tailored" to achieve a "compelling" government interest. *Adarand, supra*, at 227.

Although remedying the effects of past intentional discrimination is a compelling interest under the strict scrutiny test, see *Freeman* v. *Pitts*, 503 U. S. 467, 494, that interest is not involved here because the

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Seattle schools were never segregated by law nor subject to court-ordered desegregation, and the desegregation decree to which the Jefferson County schools were previously subject has been dissolved. Moreover, these cases are not governed by *Grutter* v. *Bollinger*, 539 U. S. 306, 328, in which the Court held that, for strict scrutiny purposes, a government interest in student body diversity "in the context of higher education" is compelling. That interest was not focused on race alone but encompassed "all factors that may contribute to student body diversity," *id.*, at 337, including, *e. g.*, having "overcome personal adversity and family hardship," *id.*, at 338. Quoting Justice Powell's articulation of diversity in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 314–315, the *Grutter* Court noted that "'it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups,' that can justify the use of race," 539 U. S., at 324–325, but "'a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element,'" *id.*, at 325. In the present cases, by contrast, race is not considered as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints," *id.*, at 330; race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter*; it is *the* factor. See *Gratz* v. *Bollinger*, 539 U. S. 244, 275. Even as to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/"other" terms in Jefferson County. The *Grutter* Court expressly limited its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to the sort of classifications at issue here. Pp. 720–725.

(b) Despite the districts' assertion that they employed individual racial classifications in a way necessary to achieve their stated ends, the minimal effect these classifications have on student assignments suggests that other means would be effective. Seattle's racial tiebreaker results, in the end, only in shifting a small number of students between schools. Similarly, Jefferson County admits that its use of racial classifications has had a minimal effect, and claims only that its guidelines provide a firm definition of the goal of racially integrated schools, thereby providing administrators with authority to collaborate with principals and staff to maintain schools within the desired range. Classifying and assigning schoolchildren according to a binary conception of

race is an extreme approach in light of this Court's precedents and the Nation's history of using race in public schools, and requires more than such an amorphous end to justify it. In *Grutter*, in contrast, the consideration of race was viewed as indispensable in more than tripling minority representation at the law school there at issue. See 539 U. S., at 320. While the Court does not suggest that *greater* use of race would be preferable, the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using such classifications. The districts have also failed to show they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," *id.*, at 339, and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration. Jefferson County has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications. Pp. 733–735.

THE CHIEF JUSTICE, joined by JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO, concluded for additional reasons in Parts III–B and IV that the plans at issue are unconstitutional under this Court's precedents. Pp. 725–733, 735–748.

1. The Court need not resolve the parties' dispute over whether racial diversity in schools has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits because it is clear that the racial classifications at issue are not narrowly tailored to the asserted goal. In design and operation, the plans are directed only to racial balance, an objective this Court has repeatedly condemned as illegitimate. They are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits. Whatever those demographics happen to be drives the required "diversity" number in each district. The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective districts, or rather the districts' white/nonwhite or black/"other" balance, since that is the only diversity addressed by the plans. In *Grutter*, the number of minority students the school sought to admit was an undefined "meaningful number" necessary to achieve a genuinely diverse student body, 539 U. S., at 316, 335–336, and the Court concluded that the law school did not count back from its applicant pool to arrive at that number, *id.*, at 335–336. Here, in contrast, the schools worked backward to achieve a

particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits. This is a fatal flaw under the Court's existing precedent. See, *e. g., Freeman*, 503 U. S., at 494. Accepting racial balancing as a compelling state interest would justify imposing racial proportionality throughout American society, contrary to the Court's repeated admonitions that this is unconstitutional. While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition suggesting that their interest differs from racial balancing. Pp. 725–733.

2. If the need for the racial classifications embraced by the school districts is unclear, even on the districts' own terms, the costs are undeniable. Government action dividing people by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493, "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw* v. *Reno*, 509 U. S. 630, 657, and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict," *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 603 (O'Connor, J., dissenting). When it comes to using race to assign children to schools, history will be heard. In *Brown* v. *Board of Education*, 347 U. S. 483, the Court held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because the classification and separation themselves denoted inferiority. *Id.*, at 493–494. It was not the inequality of the facilities but the fact of legally separating children based on race on which the Court relied to find a constitutional violation in that case. *Id.*, at 494. The districts here invoke the ultimate goal of those who filed *Brown* and subsequent cases to support their argument, but the argument of the plaintiff in *Brown* was that the Equal Protection Clause "prevents states from according differential treatment to American children on the basis of their color or race," and that view prevailed—this Court ruled in its remedial opinion that *Brown* required school districts "to achieve a system of determining admission to the public schools *on a nonracial basis.*" *Brown* v. *Board of Education*, 349 U. S. 294, 300–301 (emphasis added). Pp. 735–748.

JUSTICE KENNEDY agreed that the Court has jurisdiction to decide these cases and that respondents' student assignment plans are not narrowly tailored to achieve the compelling goal of diversity properly defined, but concluded that some parts of the plurality opinion imply an

unyielding insistence that race cannot be a factor in instances when it may be taken into account. Pp. 782–798.

(a) As part of its burden of proving that racial classifications are narrowly tailored to further compelling interests, the government must establish, in detail, how decisions based on an individual student's race are made in a challenged program. The Jefferson County Board of Education fails to meet this threshold mandate when it concedes it denied Joshua's requested kindergarten transfer on the basis of his race under its guidelines, yet also maintains that the guidelines do not apply to kindergartners. This discrepancy is not some simple and straightforward error that touches only upon the peripheries of the district's use of individual racial classifications. As becomes clearer when the district's plan is further considered, Jefferson County has explained how and when it employs these classifications only in terms so broad and imprecise that they cannot withstand strict scrutiny. In its briefing it fails to make clear—even in the limited respects implicated by Joshua's initial assignment and transfer denial—whether in fact it relies on racial classifications in a manner narrowly tailored to the interest in question, rather than in the far-reaching, inconsistent, and ad hoc manner that a less forgiving reading of the record would suggest. When a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the government. In the Seattle case, the school district has gone further in describing the methods and criteria used to determine assignment decisions based on individual racial classifications, but it has nevertheless failed to explain why, in a district composed of a diversity of races, with only a minority of the students classified as "white," it has employed the crude racial categories of "white" and "non-white" as the basis for its assignment decisions. Far from being narrowly tailored, this system threatens to defeat its own ends, and the district has provided no convincing explanation for its design. Pp. 783–787.

(b) The plurality opinion is too dismissive of government's legitimate interest in ensuring that all people have equal opportunity regardless of their race. In administering public schools, it is permissible to consider the schools' racial makeup and adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. Cf. *Grutter* v. *Bollinger, supra.* School authorities concerned that their student bodies' racial compositions interfere with offering an equal educational opportunity to all are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion based solely on a systematic, individual typing by race. Such measures may include strategic site selection of new schools; drawing attendance zones with general recognition of neighbor-

hood demographics; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.

Each respondent has failed to provide the necessary support for the proposition that there is no other way than individual racial classifications to avoid racial isolation in their school districts. Cf. *Croson*, *supra*, at 501. In these cases, the fact that the number of students whose assignment depends on express racial classifications is small suggests that the schools could have achieved their stated ends through different means, including the facially race-neutral means set forth above or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component. The latter approach would be informed by *Grutter*, though the criteria relevant to student placement would differ based on the students' age, the parents' needs, and the schools' role. Pp. 787–790.

ROBERTS, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Parts III–B and IV, in which SCALIA, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 748. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 782. STEVENS, J., filed a dissenting opinion, *post*, p. 798. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 803.

Harry J. F. Korrell argued the cause for petitioner in No. 05–908. With him on the briefs were *Daniel B. Ritter* and *Eric B. Martin*. *Teddy B. Gordon* argued the cause and filed briefs for petitioner in No. 05–915.

Solicitor General Clement argued the cause for the United States as *amicus curiae* urging reversal in both cases. With him on the briefs were *Assistant Attorney General Kim*, *Deputy Solicitor General Garre*, *David B. Salmons*, *David K. Flynn*, *Angela M. Miller*, and *Kent D. Talbert*.

Michael Madden argued the cause for respondents in No. 05–908. With him on the brief were *Carol Sue Janes*, *Maree F. Sneed*, *John W. Borkowski*, *Audrey J. Anderson*, *Gary L. Ikeda*, *Shannon McMinimee*, and *Eric Schnapper*. *Francis J. Mellen, Jr.*, argued the cause for respondents in

No. 05–915. With him on the brief were *Byron E. Leet* and *Rosemary Miller.*†

CHIEF JUSTICE ROBERTS announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, and an opinion with respect

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†Briefs of *amici curiae* urging reversal in both cases were filed for the Pacific Legal Foundation et al. by *Sharon L. Browne* and *Paul J. Beard II;* for the Project on Fair Representation et al. by *Bert W. Rein;* for Various School Children from Lynn, Massachusetts, by *Michael Williams* and *Chester Darling;* for David J. Armor et al. by *Robert N. Driscoll;* and for Governor John Ellis "Jeb" Bush et al. by *Daniel J. Woodring, Raquel A. Rodriguez,* and *Nathan A. Adams IV.*

Briefs of *amici curiae* urging reversal in No. 05–908 were filed for the Center for Individual Rights by *Michael E. Rosman* and *Erik S. Jaffe;* for the Competitive Enterprise Institute by *Hans Bader;* for the Mountain States Legal Foundation by *William Perry Pendley;* and for Dr. John Murphy et al. by *John R. Munich.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the Commonwealth of Massachusetts by *Thomas F. Reilly,* Attorney General of Massachusetts, and *Richard W. Cole* and *John R. Hitt,* Assistant Attorneys General; for the State of New York et al. by *Eliot Spitzer,* Attorney General of New York, *Caitlin J. Halligan,* Solicitor General, *Michelle Aronowitz,* Deputy Solicitor General, and *Laura R. Johnson* and *Diana R. H. Winters,* Assistant Solicitors General, by *Roberto J. Sánchez Ramos,* Secretary of Justice of Puerto Rico, and by the Attorneys General for their respective jurisdictions as follows: *Richard Blumenthal* of Connecticut, *Robert J. Spagnoletti* of the District of Columbia, *Lisa Madigan* of Illinois, *Thomas Miller* of Iowa, *Greg Stumbo* of Kentucky, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.,* of Maryland, *Jeremiah W. (Jay) Nixon* of Missouri, *Stuart Rabner* of New Jersey, *Patricia A. Madrid* of New Mexico, *Roy Cooper* of North Carolina, *Hardy Myers* of Oregon, *Patrick Lynch* of Rhode Island, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Rob McKenna* of Washington, and *Peggy A. Lautenschlager* of Wisconsin; for the American Civil Liberties Union et al. by *Dennis D. Parker, Reginald T. Shuford, Christopher A. Hansen,* and *Steven R. Shapiro;* for the American Council on Education et al. by *Michael P. Boudett, Dean Richlin,* and *Robert E. Toone;* for the American Educational Research Association by *Angelo N. Ancheta;* for the American Psychological Association et al. by *John Payton, David W. Ogden, Nathalie F. P. Gilfoyle,* and *Lindsay Childress-Beatty;* for the Anti-Defamation League by

to Parts III–B and IV, in which JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO join.

The school districts in these cases voluntarily adopted student assignment plans that rely upon race to determine

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Martin E. Karlinsky, *Erwin Chemerinsky*, *Frederick M. Lawrence*, *Jonathan K. Baum*, *Steven M. Freeman*, *Howard W. Goldstein*, and *Steven C. Sheinberg;* for the Asian American Justice Center et al. by *Mark A. Packman*, *Jonathan M. Cohen*, *Karen Narasaki*, and *Vincent Eng;* for the Asian American Legal Defense and Education Fund et al. by *Marc Wolinsky* and *Kenneth Kimerling;* for the Association of the Bar of the City of New York by *Jonathan I. Blackman* and *David Rush;* for the Black Women Lawyers' Association of Greater Chicago, Inc., by *Sharon E. Jones;* for the Brennan Center for Justice et al. by *Warrington S. Parker III*, *Deborah Goldberg*, and *David J. Harth;* for the Caucus for Structural Equity by *Daniel R. Shulman;* for the Civil Rights Clinic at Howard University School of Law by *Aderson Bellegarde François;* for the Coalition to Defend Affirmative Action, Integration, & Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN) et al. by *George B. Washington;* for the Collaborative of Catholic Leaders et al. by *Terrence J. Fleming;* for the Council of the Great City Schools et al. by *Julie Wright Halbert* and *Pamela Harris;* for Historians by *Jack Greenberg;* for Historians of the Civil Rights Era by *Theodore V. Wells, Jr.*, and *David W. Brown;* for Housing Scholars et al. by *Michael B. de Leeuw;* for Interested Human Rights Clinics et al. by *Cynthia J. Larsen* and *Martha F. Davis;* for Latino Organizations by *John D. Trasviña* and *Diana S. Sen;* for the Lawyers' Committee for Civil Rights of the San Francisco Bay Area by *Steven A. Hirsch* and *Robert Rubin;* for the Leadership Conference on Civil Rights et al. by *Andrew J. Pincus*, *Carolyn P. Osolinik*, and *William L. Taylor;* for the Massachusetts Association of School Superintendents et al. by *Joseph Leghorn;* for the NAACP by *Dennis Courtland Hayes* and *Preeta D. Bansal;* for the NAACP Legal Defense & Educational Fund, Inc., by *Theodore M. Shaw*, *Jacqueline A. Berrien*, *Norman J. Chachkin*, *Victor A. Bolden*, *Chinh Q. Le*, and *David T. Goldberg;* for the National Collegiate Athletic Association et al. by *Margaret A. Keane;* for the National Education Association et al. by *Robert H. Chanin*, *Jonathan P. Hiatt*, *Harold Craig Becker*, *David Strom*, *Elliot Mincberg*, *Alice O'Brien*, and *Larry Weinberg;* for the National Parent Teacher Association by *Rachel D. Godsil* and *Michelle Adams;* for the National School Boards Association et al. by *Thomas C. Goldstein*, *Francisco M. Negrón*, and *Michael C. Small;* for the National Women's Law Center et al. by *Walter Dellinger*, *Mark S. Davies*, *Nicole A. Saharsky*, *Marcia D. Green-*

which public schools certain children may attend. The Seattle school district classifies children as white or nonwhite; the Jefferson County school district as black or "other." In Seattle, this racial classification is used to allocate slots in oversubscribed high schools. In Jefferson County, it is used to make certain elementary school assignments and to rule on transfer requests. In each case, the school district relies upon an individual student's race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole. Parents of students denied assignment to particular schools under these

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berger, *Jocelyn Samuels*, *Dina R. Lassow*, and *Judith L. Lichtman;* for Religious Organizations et al. by *William T. Russell, Jr.;* for the Swann Fellowship et al. by *Anita S. Earls*, *Julius L. Chambers*, *Charles E. Daye*, and *John Charles Boger;* for Former United States Secretaries of Education et al. by *Drew S. Days III*, *Beth S. Brinkmann*, and *Seth M. Galanter;* for the Urban League of Metropolitan Seattle et al. by *Rebecca J. Roe;* for the Honorable Clifford L. Alexander, Jr., et al. by *Jonathan S. Franklin;* for Senator Edward M. Kennedy et al. by *Andy Liu*, *David L. Haga*, *Laurel Pyke Malson*, and *Beth Nolan;* for Representative Jim McDermott et al. by *William R. Weissman;* for Amy Stuart Wells et al. by *Kenneth D. Heath;* for 19 Former Chancellors of the University of California by *Goodwin Liu;* for 553 Social Scientists by *Liliana M. Garces;* and for Walt Sherlin by *Martha Melinda Lawrence*.

Briefs of *amici curiae* urging affirmance in No. 05–908 were filed for the Alliance for Education et al. by *David J. Burman*, *Michael W. Hoge*, and *J. Shan Mullin;* for the Los Angeles Unified School District by *Peter W. James;* and for the National Lawyers Guild by *David Gespass* and *Zachary Wolfe*.

Briefs of *amici curiae* urging affirmance in No. 05–915 were filed for Human Rights Advocacy Groups et al. by *David Weissbrodt;* for the Louisville Area Chamber of Commerce, Inc. (d/b/a Greater Louisville Inc.), et al. by *John K. Bush;* and for the Prichard Committee for Academic Excellence by *Sheryl G. Snyder*, *Amy D. Cubbage*, and *Phillip J. Shepherd*.

Briefs of *amici curiae* were filed in both cases for the Asian American Legal Foundation by *Gordon M. Fauth, Jr.;* for Media & Telecommunication Cos. by *Elizabeth G. Taylor;* and for Joseph E. Brann et al. by *Robert N. Weiner* and *Richard Jerome*.

plans solely because of their race brought suit, contending that allocating children to different public schools on the basis of race violated the Fourteenth Amendment guarantee of equal protection. The Courts of Appeals below upheld the plans. We granted certiorari, and now reverse.

I

Both cases present the same underlying legal question—whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments. Although we examine the plans under the same legal framework, the specifics of the two plans, and the circumstances surrounding their adoption, are in some respects quite different.

A

Seattle School District No. 1 operates 10 regular public high schools. In 1998, it adopted the plan at issue in this case for assigning students to these schools. App. in No. 05–908, pp. 90a–92a.[1] The plan allows incoming ninth graders to choose from among any of the district's high schools, ranking however many schools they wish in order of preference.

Some schools are more popular than others. If too many students list the same school as their first choice, the district employs a series of "tiebreakers" to determine who will fill the open slots at the oversubscribed school. The first tiebreaker selects for admission students who have a sibling

[1] The plan was in effect from 1999–2002, for three school years. This litigation was commenced in July 2000, and the record in the District Court was closed before assignments for the 2001–2002 school year were made. See Brief for Respondents in No. 05–908, p. 9, n. 9. We rely, as did the lower courts, largely on data from the 2000–2001 school year in evaluating the plan. See 426 F. 3d 1162, 1169–1171 (CA9 2005) (en banc) (*Parents Involved VII*).

currently enrolled in the chosen school. The next tiebreaker depends upon the racial composition of the particular school and the race of the individual student. In the district's public schools approximately 41 percent of enrolled students are white; the remaining 59 percent, comprising all other racial groups, are classified by Seattle for assignment purposes as nonwhite. *Id.*, at 38a, 103a.[2] If an oversubscribed school is not within 10 percentage points of the district's overall white/nonwhite racial balance, it is what the district calls "integration positive," and the district employs a tiebreaker that selects for assignment students whose race "will serve to bring the school into balance." *Id.*, at 38a. See *Parents Involved VII*, 426 F. 3d 1162, 1169–1170 (CA9 2005) (en banc).[3] If it is still necessary to select students for the school after using the racial tiebreaker, the next tiebreaker is the geographic proximity of the school to the student's residence. App. in No. 05–908, at 38a.

Seattle has never operated segregated schools—legally separate schools for students of different races—nor has it ever been subject to court-ordered desegregation. It nonetheless employs the racial tiebreaker in an attempt to address the effects of racially identifiable housing patterns on school assignments. Most white students live in the northern part of Seattle, most students of other racial backgrounds in the southern part. *Parents Involved VII*, *supra*, at 1166. Four of Seattle's high schools are located in the north—Ballard, Nathan Hale, Ingraham, and Roosevelt—and five in the south—Rainier Beach, Cleveland, West Seat-

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[2] The racial breakdown of this nonwhite group is approximately 23.8 percent Asian-American, 23.1 percent African-American, 10.3 percent Latino, and 2.8 percent Native-American. See 377 F. 3d 949, 1005–1006 (CA9 2004) (*Parents Involved VI*) (Graber, J., dissenting).

[3] For the 2001–2002 school year, the deviation permitted from the desired racial composition was increased from 10 to 15 percent. App. in No. 05–908, p. 38a. The bulk of the data in the record was collected using the 10 percent band, see n. 1, *supra*.

tle, Chief Sealth, and Franklin. One school—Garfield—is more or less in the center of Seattle. App. in No. 05–908, at 38a–39a, 45a.

For the 2000–2001 school year, five of these schools were oversubscribed—Ballard, Nathan Hale, Roosevelt, Garfield, and Franklin—so much so that 82 percent of incoming ninth graders ranked one of these schools as their first choice. *Id.*, at 38a. Three of the oversubscribed schools were "integration positive" because the school's white enrollment the previous school year was greater than 51 percent—Ballard, Nathan Hale, and Roosevelt. Thus, more nonwhite students (107, 27, and 82, respectively) who selected one of these three schools as a top choice received placement at the school than would have been the case had race not been considered, and proximity been the next tiebreaker. *Id.*, at 39a–40a. Franklin was "integration positive" because its nonwhite enrollment the previous school year was greater than 69 percent; 89 more white students were assigned to Franklin by operation of the racial tiebreaker in the 2000–2001 school year than otherwise would have been. *Ibid.* Garfield was the only oversubscribed school whose composition during the 1999–2000 school year was within the racial guidelines, although in previous years Garfield's enrollment had been predominantly nonwhite, and the racial tiebreaker had been used to give preference to white students. *Id.*, at 39a.

Petitioner Parents Involved in Community Schools (Parents Involved) is a nonprofit corporation comprising the parents of children who have been or may be denied assignment to their chosen high school in the district because of their race. The concerns of Parents Involved are illustrated by Jill Kurfirst, who sought to enroll her ninth-grade son, Andy Meeks, in Ballard High School's special Biotechnology Career Academy. Andy suffered from attention deficit hyperactivity disorder and dyslexia, but had made good progress with hands-on instruction, and his mother and middle school teachers thought that the smaller biotechnology program

held the most promise for his continued success. Andy was accepted into this selective program but, because of the racial tiebreaker, was denied assignment to Ballard High School. *Id.*, at 143a–146a, 152a–160a. Parents Involved commenced this suit in the Western District of Washington, alleging that Seattle's use of race in assignments violated the Equal Protection Clause of the Fourteenth Amendment,[4] Title VI of the Civil Rights Act of 1964,[5] and the Washington Civil Rights Act.[6] *Id.*, at 28a–35a.

The District Court granted summary judgment to the school district, finding that state law did not bar the district's use of the racial tiebreaker and that the plan survived strict scrutiny on the federal constitutional claim because it was narrowly tailored to serve a compelling government interest. 137 F. Supp. 2d 1224, 1240 (WD Wash. 2001) (*Parents Involved I*). The Ninth Circuit initially reversed based on its interpretation of the Washington Civil Rights Act, 285 F. 3d 1236, 1253 (2002) (*Parents Involved II*), and enjoined the district's use of the integration tiebreaker, *id.*, at 1257. Upon realizing that the litigation would not be resolved in time for assignment decisions for the 2002–2003 school year, the Ninth Circuit withdrew its opinion, 294 F. 3d 1084 (2002) (*Parents Involved III*), vacated the injunction, and, pursuant to Wash. Rev. Code § 2.60.020 (2006), certified the state-law question to the Washington Supreme Court, 294 F. 3d 1085, 1087 (2002) (*Parents Involved IV*).

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[4] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1.

[5] "No person in the United States shall, on the ground of race . . . be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 78 Stat. 252, 42 U. S. C. § 2000d.

[6] "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Wash. Rev. Code § 49.60.400(1) (2006).

The Washington Supreme Court determined that the State Civil Rights Act bars only preferential treatment programs "where race or gender is used by government to select a less qualified applicant over a more qualified applicant," and not "[p]rograms which are racially neutral, such as the [district's] open choice plan." *Parents Involved in Community Schools* v. *Seattle School Dist., No. 1*, 149 Wash. 2d 660, 689–690, 663, 72 P. 3d 151, 166, 153 (2003) (en banc) (*Parents Involved V*). The state court returned the case to the Ninth Circuit for further proceedings. *Id.*, at 690, 72 P. 3d, at 167.

A panel of the Ninth Circuit then again reversed the District Court, this time ruling on the federal constitutional question. *Parents Involved VI*, 377 F. 3d 949 (2004). The panel determined that while achieving racial diversity and avoiding racial isolation are compelling government interests, *id.*, at 964, Seattle's use of the racial tiebreaker was not narrowly tailored to achieve these interests, *id.*, at 980. The Ninth Circuit granted rehearing en banc, 395 F. 3d 1168 (2005), and overruled the panel decision, affirming the District Court's determination that Seattle's plan was narrowly tailored to serve a compelling government interest, *Parents Involved VII*, 426 F. 3d, at 1192–1193. We granted certiorari. 547 U. S. 1177 (2006).

B

Jefferson County Public Schools operates the public school system in metropolitan Louisville, Kentucky. In 1973 a federal court found that Jefferson County had maintained a segregated school system, *Newburg Area Council, Inc.* v. *Board of Ed. of Jefferson Cty.*, 489 F. 2d 925, 932 (CA6), vacated and remanded, 418 U. S. 918, reinstated with modifications, 510 F. 2d 1358, 1359 (CA6 1974), and in 1975 the District Court entered a desegregation decree. See *Hampton* v. *Jefferson Cty. Bd. of Ed.*, 72 F. Supp. 2d 753, 762–764 (WD Ky. 1999). Jefferson County operated under this decree until 2000, when the District Court dissolved the decree after

finding that the district had achieved unitary status by eliminating "[t]o the greatest extent practicable" the vestiges of its prior policy of segregation. *Hampton* v. *Jefferson Cty. Bd. of Ed.*, 102 F. Supp. 2d 358, 360 (2000). See *Board of Ed. of Oklahoma City Public Schools* v. *Dowell*, 498 U. S. 237, 249–250 (1991); *Green* v. *School Bd. of New Kent Cty.*, 391 U. S. 430, 435–436 (1968).

In 2001, after the decree had been dissolved, Jefferson County adopted the voluntary student assignment plan at issue in this case. App. in No. 05–915, p. 77. Approximately 34 percent of the district's 97,000 students are black; most of the remaining 66 percent are white. *McFarland* v. *Jefferson Cty. Public Schools*, 330 F. Supp. 2d 834, 839–840, and n. 6 (WD Ky. 2004) (*McFarland I*). The plan requires all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent. App. in No. 05–915, at 81; *McFarland I*, *supra*, at 842.

At the elementary school level, based on his or her address, each student is designated a "resides" school to which students within a specific geographic area are assigned; elementary resides schools are "grouped into clusters in order to facilitate integration." App. in No. 05–915, at 82. The district assigns students to nonmagnet schools in one of two ways: Parents of kindergartners, first graders, and students new to the district may submit an application indicating a first and second choice among the schools within their cluster; students who do not submit such an application are assigned within the cluster by the district. "Decisions to assign students to schools within each cluster are based on available space within the schools and the racial guidelines in the District's current student assignment plan." *Id.*, at 38. If a school has reached the "extremes of the racial guidelines," a student whose race would contribute to the school's racial imbalance will not be assigned there. *Id.*, at 38–39, 82. After assignment, students at all grade levels

are permitted to apply to transfer between nonmagnet schools in the district. Transfers may be requested for any number of reasons, and may be denied because of lack of available space or on the basis of the racial guidelines. *Id.*, at 43.[7]

When petitioner Crystal Meredith moved into the school district in August 2002, she sought to enroll her son, Joshua McDonald, in kindergarten for the 2002–2003 school year. His resides school was only a mile from his new home, but it had no available space—assignments had been made in May, and the class was full. Jefferson County assigned Joshua to another elementary school in his cluster, Young Elementary. This school was 10 miles from home, and Meredith sought to transfer Joshua to a school in a different cluster, Bloom Elementary, which—like his resides school—was only a mile from home. See Tr. in *McFarland I*, pp. 1–49 through 1–54 (Dec. 8, 2003). Space was available at Bloom, and intercluster transfers are allowed, but Joshua's transfer was nonetheless denied because, in the words of Jefferson County, "[t]he transfer would have an adverse effect on desegregation compliance" of Young. App. in No. 05–915, at 97.[8]

Meredith brought suit in the Western District of Kentucky, alleging violations of the Equal Protection Clause of the Fourteenth Amendment. The District Court found that Jefferson County had asserted a compelling interest in main-

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[7] Middle and high school students are designated a single resides school and assigned to that school unless it is at the extremes of the racial guidelines. Students may also apply to a magnet school or program, or, at the high school level, take advantage of an open enrollment plan that allows ninth-grade students to apply for admission to any nonmagnet high school. App. in No. 05–915, pp. 39–41, 82–83.

[8] It is not clear why the racial guidelines were even applied to Joshua's transfer application—the guidelines supposedly do not apply at the kindergarten level. *Id.*, at 43. Neither party disputes, however, that Joshua's transfer application was denied under the racial guidelines, and Meredith's objection is not that the guidelines were misapplied but rather that race was used at all.

taining racially diverse schools, and that the assignment plan was (in all relevant respects) narrowly tailored to serve that compelling interest. *McFarland I*, *supra*, at 837.[9] The Sixth Circuit affirmed in a *per curiam* opinion relying upon the reasoning of the District Court, concluding that a written opinion "would serve no useful purpose." *McFarland* v. *Jefferson Cty. Public Schools*, 416 F. 3d 513, 514 (2005) (*McFarland II*). We granted certiorari. 547 U. S. 1178 (2006).

II

As a threshold matter, we must assure ourselves of our jurisdiction. Seattle argues that Parents Involved lacks standing because none of its current members can claim an imminent injury. Even if the district maintains the current plan and reinstitutes the racial tiebreaker, Seattle argues, Parents Involved members will only be affected if their children seek to enroll in a Seattle public high school and choose an oversubscribed school that is integration positive—too speculative a harm to maintain standing. Brief for Respondents in No. 05–908, pp. 16–17.

This argument is unavailing. The group's members have children in the district's elementary, middle, and high schools, App. in No. 05–908, at 299a–301a; Affidavit of Kathleen Brose Pursuant to this Court's Rule 32.3 (Lodging of Petitioner Parents Involved), and the complaint sought declaratory and injunctive relief on behalf of Parents Involved members whose elementary and middle school children may be "denied admission to the high schools of their choice when they apply for those schools in the future," App. in No. 05–908, at 30a. The fact that it is possible that children of group members will not be denied admission to a school

[9] Meredith joined a pending lawsuit filed by several other plaintiffs. See *id.*, at 7–11. The other plaintiffs all challenged assignments to certain specialized schools, and the District Court found these assignments, which are no longer at issue in this case, unconstitutional. *McFarland I*, 330 F. Supp. 2d 834, 837, 864 (WD Ky. 2004).

based on their race—because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage—does not eliminate the injury claimed. Moreover, Parents Involved also asserted an interest in not being "forced to compete for seats at certain high schools in a system that uses race as a deciding factor in many of its admissions decisions." *Ibid.* As we have held, one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff, *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 211 (1995); *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656, 666 (1993), an injury that the members of Parents Involved can validly claim on behalf of their children.

In challenging standing, Seattle also notes that it has ceased using the racial tiebreaker pending the outcome of this litigation. Brief for Respondents in No. 05–908, at 16–17. But the district vigorously defends the constitutionality of its race-based program, and nowhere suggests that if this litigation is resolved in its favor it will not resume using race to assign students. Voluntary cessation does not moot a case or controversy unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 189 (2000) (quoting *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U. S. 199, 203 (1968); internal quotation marks omitted), a heavy burden that Seattle has clearly not met.

Jefferson County does not challenge our jurisdiction, Tr. of Oral Arg. in No. 05–915, p. 48, but we are nonetheless obliged to ensure that it exists, *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 514 (2006). Although apparently Joshua has now been granted a transfer to Bloom, the school to which transfer was denied under the racial guidelines, Tr. of Oral Arg. in No. 05–915, at 45, the racial guidelines apply at all grade

levels. Upon Joshua's enrollment in middle school, he may again be subject to assignment based on his race. In addition, Meredith sought damages in her complaint, which is sufficient to preserve our ability to consider the question. *Los Angeles* v. *Lyons*, 461 U. S. 95, 109 (1983).

III

A

It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. *Johnson* v. *California*, 543 U. S. 499, 505–506 (2005); *Grutter* v. *Bollinger*, 539 U. S. 306, 326 (2003); *Adarand*, *supra*, at 224. As the Court recently reaffirmed, "'racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" *Gratz* v. *Bollinger*, 539 U. S. 244, 270 (2003) (quoting *Fullilove* v. *Klutznick*, 448 U. S. 448, 537 (1980) (STEVENS, J., dissenting); brackets omitted). In order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is "narrowly tailored" to achieve a "compelling" government interest. *Adarand*, *supra*, at 227.

Without attempting in these cases to set forth all the interests a school district might assert, it suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination. See *Freeman* v. *Pitts*, 503 U. S. 467, 494 (1992). Yet the Seattle public schools have not shown that they were ever segregated by law, and were not subject to court-ordered desegregation decrees. The Jefferson County public schools were previously segregated by law and were subject to a desegregation decree entered in 1975. In 2000, the District Court that entered that decree dissolved it, finding that Jefferson

County had "eliminated the vestiges associated with the former policy of segregation and its pernicious effects," and thus had achieved "unitary" status. *Hampton*, 102 F. Supp. 2d, at 360. Jefferson County accordingly does not rely upon an interest in remedying the effects of past intentional discrimination in defending its present use of race in assigning students. See Tr. of Oral Arg. in No. 05–915, at 38.

Nor could it. We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that "the Constitution is not violated by racial imbalance in the schools, without more." *Milliken* v. *Bradley*, 433 U. S. 267, 280, n. 14 (1977). See also *Freeman*, *supra*, at 495–496; *Dowell*, 498 U. S., at 248; *Milliken* v. *Bradley*, 418 U. S. 717, 746 (1974). Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.[10]

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[10] The districts point to dicta in a prior opinion in which the Court suggested that, while not constitutionally mandated, it would be constitutionally permissible for a school district to seek racially balanced schools as a matter of "educational policy." See *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 16 (1971). The districts also quote with approval an in-chambers opinion in which then-Justice Rehnquist made a suggestion to the same effect. See *Bustop, Inc.* v. *Los Angeles Bd. of Ed.*, 439 U. S. 1380, 1383 (1978). The citations do not carry the significance the districts would ascribe to them. *Swann*, evaluating a school district engaged in court-ordered desegregation, had no occasion to consider whether a district's voluntary adoption of race-based assignments in the absence of a finding of prior *de jure* segregation was constitutionally permissible, an issue that was again expressly reserved in *Washington* v. *Seattle School Dist. No. 1*, 458 U. S. 457, 472, n. 15 (1982). *Bustop*, addressing in the context of an emergency injunction application a busing plan imposed by the Superior Court of Los Angeles County, is similarly unavailing. Then-Justice Rehnquist, in denying emergency relief, stressed that "equitable consideration[s]" counseled against preliminary relief. 439 U. S., at 1383. The propriety of preliminary relief and resolution of the merits are of course "significantly different" issues. *University of Texas* v. *Camenisch*, 451 U. S. 390, 393 (1981).

The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter*, 539 U. S., at 328. The specific interest found compelling in *Grutter* was student body diversity "in the context of higher education." *Ibid.* The diversity interest was not focused on race alone but encompassed "all factors that may contribute to student body diversity." *Id.*, at 337. We described the various types of diversity that the law school sought:

> "[The law school's] policy makes clear there are many possible bases for diversity admissions, and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields." *Id.*, at 338 (brackets and internal quotation marks omitted).

The Court quoted the articulation of diversity from Justice Powell's opinion in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978), noting that "it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, that can justify the use of race." *Grutter*, *supra*, at 324–325 (citing and quoting *Bakke*, *supra*, at 314–315 (opinion of Powell, J.); brackets and internal quotation marks omitted). Instead, what was upheld in *Grutter* was consideration of "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." 539 U. S., at 325 (quoting *Bakke*, *supra*, at 315 (opinion of Powell, J.); internal quotation marks omitted).

The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group. The classification of applicants by race upheld

in *Grutter* was only as part of a "highly individualized, holistic review," 539 U. S., at 337. As the Court explained, "[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount." *Ibid.* The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be "patently unconstitutional." *Id.*, at 330.

In the present cases, by contrast, race is not considered as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints," *ibid.*; race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter*; it is *the* factor. Like the University of Michigan undergraduate plan struck down in *Gratz*, 539 U. S., at 275, the plans here "do not provide for a meaningful individualized review of applicants" but instead rely on racial classifications in a "nonindividualized, mechanical" way, *id.*, at 276, 280 (O'Connor, J., concurring).

Even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/"other" terms in Jefferson County.[11] But see *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 610 (1990) (O'Connor, J., dissenting) ("We are a Nation not of black and white alone, but one teeming with di-

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[11] The way Seattle classifies its students bears this out. Upon enrolling their child with the district, parents are required to identify their child as a member of a particular racial group. If a parent identifies more than one race on the form, "[t]he application will not be accepted and, if necessary, the enrollment service person taking the application will indicate one box." App. in No. 05–908, at 303a.

vergent communities knitted together by various traditions and carried forth, above all, by individuals"). The Seattle "Board Statement Reaffirming Diversity Rationale" speaks of the "inherent educational value" in "[p]roviding students the opportunity to attend schools with diverse student enrollment," App. in No. 05–908, at 128a, 129a. But under the Seattle plan, a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not. It is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is "'broadly diverse,'" *Grutter*, *supra*, at 329.

Prior to *Grutter*, the courts of appeals rejected as unconstitutional attempts to implement race-based assignment plans—such as the plans at issue here—in primary and secondary schools. See, *e. g.*, *Eisenberg* v. *Montgomery Cty. Public Schools*, 197 F. 3d 123, 133 (CA4 1999); *Tuttle* v. *Arlington Cty. School Bd.*, 195 F. 3d 698, 701 (CA4 1999) (*per curiam*); *Wessmann* v. *Gittens*, 160 F. 3d 790, 809 (CA1 1998). See also *Ho* v. *San Francisco Unified School Dist.*, 147 F. 3d 854, 865 (CA9 1998). After *Grutter*, however, the two Courts of Appeals in these cases, and one other, found that race-based assignments were permissible at the elementary and secondary level, largely in reliance on that case. See *Parents Involved VII*, 426 F. 3d, at 1166; *McFarland II*, 416 F. 3d, at 514; *Comfort* v. *Lynn School Comm.*, 418 F. 3d 1, 13 (CA1 2005) (en banc).

In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education, noting that in light of "the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." 539 U. S., at 329. See also *Bakke*,

438 U. S., at 312, 313 (opinion of Powell, J.). The Court explained that "[c]ontext matters" in applying strict scrutiny, and repeatedly noted that it was addressing the use of race "in the context of higher education." *Grutter*, *supra*, at 327, 328, 334. The Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.

B

Perhaps recognizing that reliance on *Grutter* cannot sustain their plans, both school districts assert additional interests, distinct from the interest upheld in *Grutter*, to justify their race-based assignments. In briefing and argument before this Court, Seattle contends that its use of race helps to reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools. Brief for Respondents in No. 05–908, at 19. Jefferson County has articulated a similar goal, phrasing its interest in terms of educating its students "in a racially integrated environment." App. in No. 05–915, at 22.[12] Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment, and each contends that because the diversity they seek

[12] Jefferson County also argues that it would be incongruous to hold that what was constitutionally required of it one day—race-based assignments pursuant to the desegregation decree—can be constitutionally prohibited the next. But what was constitutionally required of the district prior to 2000 was the elimination of the vestiges of prior segregation—not racial proportionality in its own right. See *Freeman* v. *Pitts*, 503 U. S. 467, 494–496 (1992). Once those vestiges were eliminated, Jefferson County was on the same footing as any other school district, and its use of race must be justified on other grounds.

is racial diversity—not the broader diversity at issue in *Grutter*—it makes sense to promote that interest directly by relying on race alone.

The parties and their *amici* dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.

The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits. In Seattle, the district seeks white enrollment of between 31 and 51 percent (within 10 percent of "the district white average" of 41 percent), and nonwhite enrollment of between 49 and 69 percent (within 10 percent of "the district minority average" of 59 percent). App. in No. 05–908, at 103a. In Jefferson County, by contrast, the district seeks black enrollment of no less than 15 or more than 50 percent, a range designed to be "equally above and below Black student enrollment systemwide," *McFarland I*, 330 F. Supp. 2d, at 842, based on the objective of achieving at "all schools . . . an African-American enrollment equivalent to the average district-wide African-American enrollment" of 34 percent, App. in No. 05–915, at 81. In Seattle, then, the benefits of racial diversity require enrollment of at least 31 percent white students; in Jefferson County, at least 50 percent. There must be at least 15 percent nonwhite students under Jefferson County's plan; in Seattle, more than three times that figure. This comparison makes clear that the racial demographics in each district—whatever they happen to be—

drive the required "diversity" numbers. The plans here are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits; instead the plans are tailored, in the words of Seattle's Manager of Enrollment Planning, Technical Support, and Demographics, to "the goal established by the school board of attaining a level of diversity within the schools that approximates the district's overall demographics." App. in No. 05–908, at 42a.

The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts—or rather the white/nonwhite or black/"other" balance of the districts, since that is the only diversity addressed by the plans. Indeed, in its brief Seattle simply assumes that the educational benefits track the racial breakdown of the district. See Brief for Respondents in No. 05–908, at 36 ("For Seattle, 'racial balance' is clearly not an end in itself but rather a measure of the extent to which the educational goals the plan was designed to foster are likely to be achieved"). When asked for "a range of percentage that would be diverse," however, Seattle's expert said it was important to have "sufficient numbers so as to avoid students feeling any kind of specter of exceptionality." App. in No. 05–908, at 276a. The district did not attempt to defend the proposition that anything outside its range posed the "specter of exceptionality." Nor did it demonstrate in any way how the educational and social benefits of racial diversity or avoidance of racial isolation are more likely to be achieved at a school that is 50 percent white and 50 percent Asian-American, which would qualify as diverse under Seattle's plan, than at a school that is 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white, which under Seattle's definition would be racially concentrated.

Similarly, Jefferson County's expert referred to the importance of having "at least 20 percent" minority group repre-

sentation for the group "to be visible enough to make a difference," and noted that "small isolated minority groups in a school are not likely to have a strong effect on the overall school." App. in No. 05–915, at 159, 147. The Jefferson County plan, however, is based on a goal of replicating at each school "an African-American enrollment equivalent to the average district-wide African-American enrollment." *Id.*, at 81. Joshua McDonald's requested transfer was denied because his race was listed as "other" rather than black, and allowing the transfer would have had an adverse effect on the racial guideline compliance of Young Elementary, the school he sought to leave. *Id.*, at 21. At the time, however, Young Elementary was 46.8 percent black. *Id.*, at 73. The transfer might have had an adverse effect on the effort to approach districtwide racial proportionality at Young, but it had nothing to do with preventing either the black or "other" group from becoming "small" or "isolated" at Young.

In fact, in each case the extreme measure of relying on race in assignments is unnecessary to achieve the stated goals, even as defined by the districts. For example, at Franklin High School in Seattle, the racial tiebreaker was applied because nonwhite enrollment exceeded 69 percent, and resulted in an incoming ninth-grade class in 2000–2001 that was 30.3 percent Asian-American, 21.9 percent African-American, 6.8 percent Latino, 0.5 percent Native-American, and 40.5 percent Caucasian. Without the racial tiebreaker, the class would have been 39.6 percent Asian-American, 30.2 percent African-American, 8.3 percent Latino, 1.1 percent Native-American, and 20.8 percent Caucasian. See App. in No. 05–908, at 308a. When the actual racial breakdown is considered, enrolling students without regard to their race yields a substantially diverse student body under any definition of diversity.[13]

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[13] Data for the Seattle schools in the several years since this litigation was commenced further demonstrate the minimal role that the racial tiebreaker in fact played. At Ballard, in 2005–2006—when no class at the

In *Grutter*, the number of minority students the school sought to admit was an undefined "meaningful number" necessary to achieve a genuinely diverse student body. 539 U. S., at 316, 335–336. Although the matter was the subject of disagreement on the Court, see *id.*, at 346–347 (SCALIA, J., concurring in part and dissenting in part); *id.*, at 382–383 (Rehnquist, C. J., dissenting); *id.*, at 388–392 (KENNEDY, J., dissenting), the majority concluded that the law school did not count back from its applicant pool to arrive at the "meaningful number" it regarded as necessary to diversify its student body. *Id.*, at 335–336. Here the racial balance the districts seek is a defined range set solely by reference to the demographics of the respective school districts.

This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent. We have many times over reaffirmed that "[r]acial balance is not

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school was subject to the racial tiebreaker—the student body was 14.2 percent Asian-American, 9 percent African-American, 11.7 percent Latino, 62.3 percent Caucasian, and 2.8 percent Native-American. Reply Brief for Petitioner in No. 05–908, p. 7. In 2000–2001, when the racial tiebreaker was last used, Ballard's total enrollment was 17.5 percent Asian-American, 10.8 percent African-American, 10.7 percent Latino, 56.4 percent Caucasian, and 4.6 percent Native-American. App. in No. 05–908, at 283a. Franklin in 2005–2006 was 48.9 percent Asian-American, 33.5 percent African-American, 6.6 percent Latino, 10.2 percent Caucasian, and 0.8 percent Native-American. Reply Brief for Petitioner in No. 05–908, at 7. With the racial tiebreaker in 2000–2001, total enrollment was 36.8 percent Asian-American, 32.2 percent African-American, 5.2 percent Latino, 25.1 percent Caucasian, and 0.7 percent Native-American. App. in No. 05–908, at 284a. Nathan Hale's 2005–2006 enrollment was 17.3 percent Asian-American, 10.7 percent African-American, 8 percent Latino, 61.5 percent Caucasian, and 2.5 percent Native-American. Reply Brief for Petitioner in No. 05–908, at 7. In 2000–2001, with the racial tiebreaker, it was 17.9 percent Asian-American, 13.3 percent African-American, 7 percent Latino, 58.4 percent Caucasian, and 3.4 percent Native-American. App. in No. 05–908, at 286a.

to be achieved for its own sake." *Freeman*, 503 U. S., at 494. See also *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 507 (1989); *Bakke*, 438 U. S., at 307 (opinion of Powell, J.) ("If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid"). *Grutter* itself reiterated that "outright racial balancing" is "patently unconstitutional." 539 U. S., at 330.

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller* v. *Johnson*, 515 U. S. 900, 911 (1995) (quoting *Metro Broadcasting*, 497 U. S., at 602 (O'Connor, J., dissenting); internal quotation marks omitted).[14] Allowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." *Croson*, *supra*, at 495 (plurality opinion of O'Connor, J.) (quoting *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 320 (1986) (STEVENS, J., dissenting), in turn quoting *Fullilove*, 448 U. S., at 547 (STEVENS, J.,

[14] In contrast, Seattle's Web site formerly described "emphasizing individualism as opposed to a more collective ideology" as a form of "cultural racism," and currently states that the district has no intention "'to hold onto unsuccessful concepts such as [a] . . . colorblind mentality.'" Harrell, School Web Site Removed: Examples of Racism Sparked Controversy, Seattle Post-Intelligencer, June 2, 2006, pp. B1, B5. Compare *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law").

dissenting); brackets and citation omitted). An interest "linked to nothing other than proportional representation of various races . . . would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture." *Metro Broadcasting*, *supra*, at 614 (O'Connor, J., dissenting).

The validity of our concern that racial balancing has "no logical stopping point," *Croson*, *supra*, at 498 (quoting *Wygant*, *supra*, at 275 (plurality opinion); internal quotation marks omitted); see also *Grutter*, *supra*, at 343, is demonstrated here by the degree to which the districts tie their racial guidelines to their demographics. As the districts' demographics shift, so too will their definition of racial diversity. See App. in No. 05–908, at 103a (describing application of racial tiebreaker based on "*current* white percentage" of 41 percent and "*current* minority percentage" of 59 percent (emphasis added)).

The Ninth Circuit below stated that it "share[d] in the hope" expressed in *Grutter* that in 25 years racial preferences would no longer be necessary to further the interest identified in that case. *Parents Involved VII*, 426 F. 3d, at 1192. But in Seattle the plans are defended as necessary to address the consequences of racially identifiable housing patterns. The sweep of the mandate claimed by the district is contrary to our rulings that remedying past societal discrimination does not justify race-conscious government action. See, *e. g.*, *Shaw* v. *Hunt*, 517 U. S. 899, 909–910 (1996) ("[A]n effort to alleviate the effects of societal discrimination is not a compelling interest"); *Croson*, *supra*, at 498–499; *Wygant*, 476 U. S., at 276 (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy"); *id.*, at 288 (O'Connor, J., concurring in part and concurring in judgment) ("[A] governmental agency's interest in remedying 'societal' discrimina-

tion, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster").

The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity." While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance. See, *e. g.*, App. in No. 05–908, at 257a ("Q. What's your understanding of when a school suffers from racial isolation?" "A. I don't have a definition for that"); *id.*, at 228a–229a ("I don't think we've ever sat down and said, 'Define racially concentrated school exactly on point in quantitative terms.' I don't think we've ever had that conversation"); Tr. in *McFarland I*, at 1–90 (Dec. 8, 2003) ("Q." "How does the Jefferson County School Board define diversity . . . ?" "A. Well, we want to have the schools that make up the percentage of students of the population").

Jefferson County phrases its interest as "racial integration," but integration certainly does not require the sort of racial proportionality reflected in its plan. Even in the context of mandatory desegregation, we have stressed that racial proportionality is not required, see *Milliken*, 433 U. S., at 280, n. 14 ("[A desegregation] order contemplating the substantive constitutional right [to a] particular degree of racial balance or mixing is . . . infirm as a matter of law" (internal quotation marks omitted)); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 24 (1971) ("The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole"), and here Jefferson County has already been found to have eliminated the vestiges of its prior segregated school system.

The en banc Ninth Circuit declared that "when a racially diverse school system is the goal (or racial concentration or isolation is the problem), there is no more effective means than a consideration of race to achieve the solution." *Parents Involved VII*, *supra*, at 1191. For the foregoing reasons, this conclusory argument cannot sustain the plans. However closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled "racial diversity" or anything else. To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end.

C

The districts assert, as they must, that the way in which they have employed individual racial classifications is necessary to achieve their stated ends. The minimal effect these classifications have on student assignments, however, suggests that other means would be effective. Seattle's racial tiebreaker results, in the end, only in shifting a small number of students between schools. Approximately 307 student assignments were affected by the racial tiebreaker in 2000–2001; the district was able to track the enrollment status of 293 of these students. App. in No. 05–908, at 162a. Of these, 209 were assigned to a school that was one of their choices, 87 of whom were assigned to the same school to which they would have been assigned without the racial tiebreaker. Eighty-four students were assigned to schools that they did not list as a choice, but 29 of those students would have been assigned to their respective school without the racial tiebreaker, and 3 were able to attend one of the oversubscribed schools due to waitlist and capacity adjustments. *Id.*, at 162a–163a. In over one-third of the assignments affected by the racial tiebreaker, then, the use of race in the end made no difference, and the district could identify

only 52 students who were ultimately affected adversely by the racial tiebreaker in that it resulted in assignment to a school they had not listed as a preference and to which they would not otherwise have been assigned.

As the panel majority in *Parents Involved VI* concluded:

> "[T]he tiebreaker's annual effect is thus merely to shuffle a few handfuls of different minority students between a few schools—about a dozen additional Latinos into Ballard, a dozen black students into Nathan Hale, perhaps two dozen Asians into Roosevelt, and so on. The District has not met its burden of proving these marginal changes . . . outweigh the cost of subjecting hundreds of students to disparate treatment based solely upon the color of their skin." 377 F. 3d, at 984–985.

Similarly, Jefferson County's use of racial classifications has only a minimal effect on the assignment of students. Elementary school students are assigned to their first- or second-choice school 95 percent of the time, and transfers, which account for roughly 5 percent of assignments, are only denied 35 percent of the time—and presumably an even smaller percentage are denied on the basis of the racial guidelines, given that other factors may lead to a denial. *McFarland I*, 330 F. Supp. 2d, at 844–845, nn. 16, 18. Jefferson County estimates that the racial guidelines account for only 3 percent of assignments. Brief in Opposition in No. 05–915, p. 7, n. 4; Tr. of Oral Arg. in No. 05–915, at 46. As Jefferson County explains, "the racial guidelines have minimal impact in this process, because they 'mostly influence student assignment in subtle and indirect ways.'" Brief for Respondents in No. 05–915, pp. 8–9.

While we do not suggest that *greater* use of race would be preferable, the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications. In *Grutter*, the consideration of race was viewed as indispensable in more than tripling mi-

nority representation at the law school—from 4 to 14.5 percent. See 539 U. S., at 320. Here the most Jefferson County itself claims is that "because the guidelines provide a firm definition of the Board's goal of racially integrated schools, they 'provide administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15–50% range.'" Brief in Opposition in No. 05–915, at 7 (quoting *McFarland I*, *supra*, at 842). Classifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation's history of using race in public schools, and requires more than such an amorphous end to justify it.

The districts have also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," *Grutter*, *supra*, at 339, and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration. See, *e. g.*, App. in No. 05–908, at 224a–225a, 253a–259a, 307a. Jefferson County has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications. Brief for Respondents in No. 05–915, at 8–9. Cf. *Croson*, 488 U. S., at 519 (KENNEDY, J., concurring in part and concurring in judgment) (racial classifications permitted only "as a last resort").

IV

JUSTICE BREYER's dissent takes a different approach to these cases, one that fails to ground the result it would reach in law. Instead, it selectively relies on inapplicable precedent and even dicta while dismissing contrary holdings, alters and misapplies our well-established legal framework for assessing equal protection challenges to express racial classi-

fications, and greatly exaggerates the consequences of today's decision.

To begin with, JUSTICE BREYER seeks to justify the plans at issue under our precedents recognizing the compelling interest in remedying past intentional discrimination. See *post*, at 819–825. Not even the school districts go this far, and for good reason. The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations. See, *e. g.*, *Milliken*, 433 U. S., at 280, n. 14; *Freeman*, 503 U. S., at 495–496 ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications"). The dissent elides this distinction between *de jure* and *de facto* segregation, casually intimates that Seattle's school attendance patterns reflect illegal segregation, *post*, at 806, 819–820, 824,[15] and fails to credit the judicial determination—under the most rigorous standard—that Jefferson County had eliminated the vestiges of prior segregation. The dissent thus alters in fundamental ways not only the facts presented here but the established law.

JUSTICE BREYER's reliance on *McDaniel* v. *Barresi*, 402 U. S. 39 (1971), *post*, at 824–825, 830, highlights how far removed the discussion in the dissent is from the question actually presented in these cases. *McDaniel* concerned a Georgia school system that had been segregated by law. There was no doubt that the county had operated a "dual school

[15] JUSTICE BREYER makes much of the fact that in 1978 Seattle "settled" an NAACP complaint alleging illegal segregation with the federal Office for Civil Rights (OCR). See *post*, at 807, 810, 819, 824. The memorandum of agreement between Seattle and OCR, of course, contains no admission by Seattle that such segregation ever existed or was ongoing at the time of the agreement, and simply reflects a "desire to avoid the incovenience [*sic*] and expense of a formal OCR investigation," which OCR was obligated under law to initiate upon the filing of such a complaint. Memorandum of Agreement between Seattle School District No. 1 of King County, Washington, and the OCR, U. S. Dept. of Health, Education, and Welfare 2 (June 9, 1978); see also 45 CFR §80.7(c) (2006).

system," 402 U. S., at 41, and no one questions that the obligation to disestablish a school system segregated by law can include race-conscious remedies—whether or not a court had issued an order to that effect. See *supra*, at 720–721. The present cases are before us, however, because the Seattle school district was never segregated by law, and the Jefferson County district has been found to be unitary, having eliminated the vestiges of its prior dual status. The justification for race-conscious remedies in *McDaniel* is therefore not applicable here. The dissent's persistent refusal to accept this distinction—its insistence on viewing the racial classifications here as if they were just like the ones in *McDaniel*, "devised to overcome a history of segregated public schools," *post*, at 848—explains its inability to understand why the remedial justification for racial classifications cannot decide these cases.

JUSTICE BREYER's dissent next relies heavily on dicta from *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S., at 16—far more heavily than the school districts themselves. Compare *post*, at 804–805, 823–829, with Brief for Respondents in No. 05–908, at 19–20; Brief for Respondents in No. 05–915, at 31. The dissent acknowledges that the two-sentence discussion in *Swann* was pure dicta, *post*, at 823, but nonetheless asserts that it demonstrates a "basic principle of constitutional law" that provides "authoritative legal guidance," *post*, at 823, 831. Initially, as the Court explained just last Term, "we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." *Central Va. Community College* v. *Katz*, 546 U. S. 356, 363 (2006). That is particularly true given that, when *Swann* was decided, this Court had not yet confirmed that strict scrutiny applies to racial classifications like those before us. See n. 16, *infra*. There is nothing "technical" or "theoretical," *post*, at 831, about our approach to such dicta. See, *e. g.*, *Cohens* v. *Virginia*, 6 Wheat. 264, 399–400 (1821) (Marshall, C. J.) (explaining why dicta is not binding).

JUSTICE BREYER would not only put such extraordinary weight on admitted dicta, but relies on the statement for something it does not remotely say. *Swann* addresses only a possible state objective; it says nothing of the permissible *means*—race conscious or otherwise—that a school district might employ to achieve that objective. The reason for this omission is clear enough, since the case did not involve any voluntary means adopted by a school district. The dissent's characterization of *Swann* as recognizing that "the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals" is—at best—a dubious inference. *Post*, at 823. Even if the dicta from *Swann* were entitled to the weight the dissent would give it, and no dicta is, it not only did not address the question presented in *Swann*, it also does not address the question presented in these cases—whether the school districts' use of racial classifications to achieve their stated goals is permissible.

Further, for all the lower court cases JUSTICE BREYER cites as evidence of the "prevailing legal assumption," *post*, at 827, embodied by *Swann*, very few are pertinent. Most are not. For example, the dissent features *Tometz* v. *Board of Ed., Waukegan City School Dist. No. 61*, 39 Ill. 2d 593, 597–598, 237 N. E. 2d 498, 501 (1968), as evidence that "state and federal courts had considered the matter settled and uncontroversial." *Post*, at 825. But *Tometz* addressed a challenge to a statute requiring race-consciousness in drawing school attendance boundaries—an issue well beyond the scope of the question presented in these cases. Importantly, it considered that issue only under rational-basis review, 39 Ill. 2d, at 600, 237 N. E. 2d, at 502 ("The test of any legislative classification essentially is one of reasonableness"), which even the dissent grudgingly recognizes is an improper standard for evaluating express racial classifications. Other cases cited are similarly inapplicable. See, *e. g.*, *Citizens for Better Ed.* v. *Goose Creek Consol. Independent School Dist.*,

719 S. W. 2d 350, 352–353 (Tex. App. 1986) (upholding rezoning plan under rational-basis review).[16]

JUSTICE BREYER's dissent next looks for authority to a footnote in *Washington* v. *Seattle School Dist. No. 1*, 458

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[16] In fact, all the cases JUSTICE BREYER's dissent cites as evidence of the "prevailing legal assumption," see *post*, at 825–828, were decided before this Court definitively determined that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227 (1995). Many proceeded under the now-rejected view that classifications seeking to benefit a disadvantaged racial group should be held to a lesser standard of review. See, *e. g.*, *Springfield School Comm.* v. *Barksdale*, 348 F. 2d 261, 266 (CA1 1965). Even if this purported distinction, which JUSTICE STEVENS would adopt, *post*, at 799–800, n. 3 (dissenting opinion), had not been already rejected by this Court, the distinction has no relevance to these cases, in which students of all races are excluded from the schools they wish to attend based solely on the racial classifications. See, *e. g.*, App. in No. 05–908, at 202a (noting that 89 nonwhite students were denied assignment to a particular school by operation of Seattle's racial tiebreaker).

JUSTICE STEVENS's reliance on *School Comm. of Boston* v. *Board of Ed.*, 352 Mass. 693, 227 N. E. 2d 729 (1967), appeal dism'd, 389 U. S. 572 (1968) (*per curiam*), *post*, at 800–803, is inapposite for the same reason that many of the cases cited by JUSTICE BREYER are inapposite; the case involved a Massachusetts law that required school districts to avoid racial imbalance in schools but did not specify how to achieve this goal—and certainly did not require express racial classifications as the means to do so. The law was upheld under rational-basis review, with the state court explicitly rejecting the suggestion—which is now plainly the law—that "racial group classifications bear a far heavier burden of justification." 352 Mass., at 700, 227 N. E. 2d, at 734 (internal quotation marks omitted). The passage JUSTICE STEVENS quotes proves our point; all the quoted language says is that the school committee "shall prepare a plan to eliminate imbalance." *Id.*, at 695, 227 N. E. 2d, at 731; see *post*, at 801, n. 5. Nothing in the opinion approves use of racial classifications as the means to address the imbalance. The suggestion that our decision today is somehow inconsistent with our disposition of that appeal is belied by the fact that neither the lower courts, the respondent school districts, nor any of their 51 *amici* saw fit even to cite the case. We raise this fact not to argue that the dismissal should be afforded any different *stare decisis* effect, but rather simply to suggest that perhaps—for the reasons noted above—the dismissal does not mean what JUSTICE STEVENS believes it does.

U. S. 457, 472, n. 15 (1982), *post,* at 857, but there this Court expressly noted that it was *not* passing on the propriety of race-conscious student assignments in the absence of a finding of *de jure* segregation. Similarly, the citation of *Crawford* v. *Board of Ed. of Los Angeles,* 458 U. S. 527 (1982), *post,* at 825, in which a state referendum prohibiting a race-based assignment plan was challenged, is inapposite—in *Crawford* the Court again expressly reserved the question presented by these cases. 458 U. S., at 535, n. 11. Such reservations and preliminary analyses of course did not decide the merits of this question—as evidenced by the disagreement among the lower courts on this issue. Compare *Eisenberg,* 197 F. 3d, at 133, with *Comfort,* 418 F. 3d, at 13.

JUSTICE BREYER's dissent also asserts that these cases are controlled by *Grutter,* claiming that the existence of a compelling interest in these cases "follows *a fortiori*" from *Grutter, post,* at 842, 864–866, and accusing us of tacitly overruling that case, see *post,* at 864–866. The dissent overreads *Grutter,* however, in suggesting that it renders pure racial balancing a constitutionally compelling interest; *Grutter* itself recognized that using race simply to achieve racial balance would be "patently unconstitutional," 539 U. S., at 330. The Court was exceedingly careful in describing the interest furthered in *Grutter* as "not an interest in simple ethnic diversity" but rather a "far broader array of qualifications and characteristics" in which race was but a single element. *Id.,* at 324–325 (internal quotation marks omitted). We take the *Grutter* Court at its word. We simply do not understand how JUSTICE BREYER can maintain that classifying every schoolchild as black or white, and using that classification as a determinative factor in assigning children to achieve pure racial balance, can be regarded as "less burdensome, and hence more narrowly tailored" than the consideration of race in *Grutter, post,* at 847, when the Court in *Grutter* stated that "[t]he importance of . . . individualized consideration" in the program was "paramount," and consid-

eration of race was one factor in a "highly individualized, holistic review," 539 U. S., at 337. Certainly if the constitutionality of the stark use of race in these cases were as established as the dissent would have it, there would have been no need for the extensive analysis undertaken in *Grutter*. In light of the foregoing, JUSTICE BREYER's appeal to *stare decisis* rings particularly hollow. See *post*, at 866.

At the same time it relies on inapplicable desegregation cases, misstatements of admitted dicta, and other noncontrolling pronouncements, JUSTICE BREYER's dissent candidly dismisses the significance of this Court's repeated *holdings* that all racial classifications must be reviewed under strict scrutiny, see *post*, at 831–834, 836–837, arguing that a different standard of review should be applied because the districts use race for beneficent rather than malicious purposes, see *post*, at 832–837.

This Court has recently reiterated, however, that "'*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.'" *Johnson*, 543 U. S., at 505 (quoting *Adarand*, 515 U. S., at 227; emphasis added by *Johnson* Court). See also *Grutter*, *supra*, at 326 ("[G]overnmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry" (internal quotation marks and emphasis omitted)). JUSTICE BREYER nonetheless relies on the good intentions and motives of the school districts, stating that he has found "no case that . . . repudiated this constitutional asymmetry between that which seeks to *exclude* and that which seeks to *include* members of minority races." *Post*, at 830 (emphasis in original). We have found many. Our cases clearly reject the argument that motives affect the strict scrutiny analysis. See *Johnson*, *supra*, at 505 ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"); *Adarand*, *supra*, at 227 (rejecting idea that "'benign'" racial classifications may

be held to "different standards"); *Croson*, 488 U. S., at 500 ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice").

This argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past, see, *e. g.*, *Gratz*, 539 U. S., at 282 (BREYER, J., concurring in judgment); *id.*, at 301 (GINSBURG, J., dissenting); *Adarand*, *supra*, at 243 (STEVENS, J., dissenting); *Wygant*, 476 U. S., at 316–317 (STEVENS, J., dissenting), and has been repeatedly rejected. See also *Bakke*, 438 U. S., at 289–291 (opinion of Powell, J.) (rejecting argument that strict scrutiny should be applied only to classifications that disadvantage minorities, stating "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination").

The reasons for rejecting a motives test for racial classifications are clear enough. "The Court's emphasis on 'benign racial classifications' suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility. . . . '[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." *Metro Broadcasting*, 497 U. S., at 609–610 (O'Connor, J., dissenting). See also *Adarand*, *supra*, at 226 ("'[I]t may not always be clear that a so-called preference is in fact benign'" (quoting *Bakke*, *supra*, at 298 (opinion of Powell, J.))). Accepting JUSTICE BREYER's approach would "do no more than move us from 'separate but equal' to 'unequal but benign.'" *Metro Broadcasting*, *supra*, at 638 (KENNEDY, J., dissenting).

JUSTICE BREYER speaks of bringing "the races" together (putting aside the purely black-and-white nature of the plans) as the justification for excluding individuals on the basis of their race. See *post*, at 829–830. Again, this ap-

proach to racial classifications is fundamentally at odds with our precedent, which makes clear that the Equal Protection Clause "protect[s] *persons*, not *groups*," *Adarand*, 515 U. S., at 227 (emphasis in original). See *ibid.* ("[A]ll governmental action based on race—a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited,' *Hirabayashi* [v. *United States*, 320 U. S. 81, 100 (1943)]—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed" (emphasis in original)); *Metro Broadcasting*, *supra*, at 636 (KENNEDY, J., dissenting) ("[O]ur Constitution protects each citizen as an individual, not as a member of a group"); *Bakke*, *supra*, at 289 (opinion of Powell, J.) (The Fourteenth Amendment creates rights "'guaranteed to the individual. The rights established are personal rights'"). This fundamental principle goes back, in this context, to *Brown* itself. See *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955) (*Brown II*) ("At stake is the *personal* interest of the plaintiffs in admission to public schools . . . on a non-discriminatory basis" (emphasis added)). For the dissent, in contrast, "'individualized scrutiny' is simply beside the point." *Post*, at 855.

JUSTICE BREYER's position comes down to a familiar claim: The end justifies the means. He admits that "there is a cost in applying 'a state-mandated racial label,'" *post*, at 867, but he is confident that the cost is worth paying. Our established strict scrutiny test for racial classifications, however, insists on "detailed examination, both as to ends *and* as to means." *Adarand*, *supra*, at 236 (emphasis added). Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.

Despite his argument that these cases should be evaluated under a "standard of review that is not 'strict' in the traditional sense of that word," JUSTICE BREYER still purports

to apply strict scrutiny to these cases. See *post*, at 837. It is evident, however, that JUSTICE BREYER's brand of narrow tailoring is quite unlike anything found in our precedents. Without any detailed discussion of the operation of the plans, the students who are affected, or the districts' failure to consider race-neutral alternatives, the dissent concludes that the districts have shown that these racial classifications are necessary to achieve the districts' stated goals. This conclusion is divorced from any evaluation of the actual impact of the plans at issue in these cases—other than to note that the plans "often have no effect." *Post*, at 846.[17] Instead, the dissent suggests that some combination of the development of these plans over time, the difficulty of the endeavor, and the good faith of the districts suffices to demonstrate that these stark and controlling racial classifications are constitutional. The Constitution and our precedents require more.

In keeping with his view that strict scrutiny should not apply, JUSTICE BREYER repeatedly urges deference to local school boards on these issues. See, *e. g.*, *post*, at 822, 848–849, 866. Such deference "is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified." *Johnson*, 543 U. S., at 506, n. 1. See *Croson*, *supra*, at 501 ("The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in

[17] JUSTICE BREYER also tries to downplay the impact of the racial assignments by stating that in Seattle "students can decide voluntarily to transfer to a preferred district high school (without any consideration of race-conscious criteria)." *Post*, at 846. This presumably refers to the district's decision to cease, for 2001–2002 school year assignments, applying the racial tiebreaker to students seeking to transfer to a different school after ninth grade. See App. in No. 05–908, at 137a–139a. There are obvious disincentives for students to transfer to a different school after a full quarter of their high school experience has passed, and the record sheds no light on how transfers to the oversubscribed high schools are handled.

equal protection analysis"); *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 637 (1943) ("The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted").

JUSTICE BREYER's dissent ends on an unjustified note of alarm. It predicts that today's decision "threaten[s]" the validity of "[h]undreds of state and federal statutes and regulations." *Post*, at 861; see also *post*, at 828–829. But the examples the dissent mentions—for example, a provision of the No Child Left Behind Act of 2001 that requires States to set measurable objectives to track the achievement of students from major racial and ethnic groups, 20 U. S. C. § 6311(b)(2)(C)(v) (2000 ed., Supp. IV)—have nothing to do with the pertinent issues in these cases.

JUSTICE BREYER also suggests that other means for achieving greater racial diversity in schools are necessarily unconstitutional if the racial classifications at issue in these cases cannot survive strict scrutiny. *Post*, at 858–862. These other means—*e. g.*, where to construct new schools, how to allocate resources among schools, and which academic offerings to provide to attract students to certain schools—implicate different considerations than the explicit racial classifications at issue in these cases, and we express no opinion on their validity—not even in dicta. Rather, we employ the familiar and well-established analytic approach of strict scrutiny to evaluate the plans at issue today, an approach that in no way warrants the dissent's cataclysmic concerns. Under that approach, the school districts have not carried their burden of showing that the ends they seek justify the particular extreme means they have chosen—classifying individual students on the basis of their race and discriminating among them on that basis.

* * *

If the need for the racial classifications embraced by the school districts is unclear, even on the districts' own terms, the costs are undeniable. "[D]istinctions between citizens

solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand*, 515 U. S., at 214 (internal quotation marks omitted). Government action dividing us by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," *Croson*, 488 U. S., at 493 (plurality opinion), "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw* v. *Reno*, 509 U. S. 630, 657 (1993), and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict." *Metro Broadcasting*, 497 U. S., at 603 (O'Connor, J., dissenting). As the Court explained in *Rice* v. *Cayetano*, 528 U. S. 495, 517 (2000), "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."

All this is true enough in the contexts in which these statements were made—government contracting, voting districts, allocation of broadcast licenses, and electing state officers—but when it comes to using race to assign children to schools, history will be heard. In *Brown* v. *Board of Education*, 347 U. S. 483 (1954) (*Brown I*), we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. *Id.*, at 493–494. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954. See *id.*, at 494 ("'The impact [of segregation] is greater when it has the sanction of the law'"). The next Term, we accordingly stated that "full compliance" with *Brown I* required school districts "to achieve a system of

determining admission to the public schools *on a nonracial basis*." *Brown II*, 349 U. S., at 300–301 (emphasis added).

The parties and their *amici* debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: "[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race." Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument in *Brown I*, O. T. 1953, p. 15 (Summary of Argument). What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before this Court for the plaintiffs in *Brown* put it: "We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown I*, O. T. 1952, No. 8, p. 7 (Robert L. Carter, Dec. 9, 1952). There is no ambiguity in that statement. And it was that position that prevailed in this Court, which emphasized in its remedial opinion that what was "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable *on a nondiscriminatory basis*," and what was required was "determining admission to the public schools *on a nonracial basis*." *Brown II*, *supra*, at 300–301 (emphasis added). What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as

Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis," *Brown II*, *supra*, at 300–301, is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

The judgments of the Courts of Appeals for the Sixth and Ninth Circuits are reversed, and the cases are remanded for further proceedings.

It is so ordered.

JUSTICE THOMAS, concurring.

Today, the Court holds that state entities may not experiment with race-based means to achieve ends they deem socially desirable. I wholly concur in THE CHIEF JUSTICE's opinion. I write separately to address several of the contentions in JUSTICE BREYER's dissent (hereinafter dissent). Contrary to the dissent's arguments, resegregation is not occurring in Seattle or Louisville; these school boards have no present interest in remedying past segregation; and these race-based student-assignment programs do not serve any compelling state interest. Accordingly, the plans are unconstitutional. Disfavoring a colorblind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown* v. *Board of Education*, 347 U. S. 483 (1954). This approach is just as wrong today as it was a half century ago. The Constitution and our cases require us to be much more demanding before permitting local school boards to make decisions based on race.

I

The dissent repeatedly claims that the school districts are threatened with resegregation and that they will succumb to that threat if these plans are declared unconstitutional. It also argues that these plans can be justified as part of the school boards' attempts to "eradicat[e] earlier school segre-

gation." See, *e. g.*, *post*, at 806. Contrary to the dissent's rhetoric, neither of these school districts is threatened with resegregation, and neither is constitutionally compelled or permitted to undertake race-based remediation. Racial imbalance is not segregation, and the mere incantation of terms like resegregation and remediation cannot make up the difference.

A

Because this Court has authorized and required race-based remedial measures to address *de jure* segregation, it is important to define segregation clearly and to distinguish it from racial imbalance. In the context of public schooling, segregation is the deliberate operation of a school system to "carry out a governmental policy to separate pupils in schools solely on the basis of race." *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 6 (1971); see also *Monroe* v. *Board of Comm'rs of Jackson*, 391 U. S. 450, 452 (1968). In *Brown*, this Court declared that segregation was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Swann*, *supra*, at 6; see also *Green* v. *School Bd. of New Kent Cty.*, 391 U. S. 430, 435 (1968) ("[T]he State, acting through the local school board and school officials, organized and operated a dual system, part 'white' and part 'Negro.' It was such dual systems that 14 years ago *Brown*[, 347 U. S. 483,] held unconstitutional and a year later *Brown* [v. *Board of Education*, 349 U. S. 294 (1955),] held must be abolished").[1]

Racial imbalance is the failure of a school district's individual schools to match or approximate the demographic makeup of the student population at large. Cf. *Washington*

[1] In this Court's paradigmatic segregation cases, there was a local ordinance, state statute, or state constitutional provision requiring racial separation. See, *e. g.*, Brief for Petitioners in *Bolling* v. *Sharpe*, O. T. 1952, No. 413, pp. 28–30 (cataloging state laws requiring separation of the races); *id.*, at App. A (listing "Statutory and Constitutional Provisions in the States Where Segregation in Education is Institutionalized").

v. *Seattle School Dist. No. 1*, 458 U. S. 457, 460 (1982). Racial imbalance is not segregation.[2] Although presently observed racial imbalance might result from past *de jure* segregation, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices. See *Swann*, *supra*, at 25–26; *Missouri* v. *Jenkins*, 515 U. S. 70, 116 (1995) (THOMAS, J., concurring). Because racial imbalance is not inevitably linked to unconstitutional segregation, it is not unconstitutional in and of itself. *Dayton Bd. of Ed.* v. *Brinkman*, 433 U. S. 406, 413 (1977); *Dayton Bd. of Ed.* v. *Brinkman*, 443 U. S. 526, 531, n. 5 (1979) ("Racial imbalance . . . is not *per se* a constitutional violation"); *Freeman* v. *Pitts*, 503 U. S. 467, 494 (1992); see also *Swann*, *supra*, at 31–32; cf. *Milliken* v. *Bradley*, 418 U. S. 717, 740–741, and n. 19 (1974).

Although there is arguably a danger of racial imbalance in schools in Seattle and Louisville, there is no danger of resegregation. No one contends that Seattle has established or that Louisville has reestablished a dual school system that separates students on the basis of race. The statistics cited in Appendix A to the dissent are not to the contrary. See *post*, at 869–872. At most, those statistics show a national trend toward classroom racial imbalance. However, racial imbalance without intentional state action to separate the races does not amount to segregation. To raise the specter of resegregation to defend these programs is to ignore the meaning of the word and the nature of the cases before us.[3]

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[2] The dissent refers repeatedly and reverently to "'integration.'" However, outside of the context of remediation for past *de jure* segregation, "integration" is simply racial balancing. See *post*, at 838. Therefore, the school districts' attempts to further "integrate" are properly thought of as little more than attempts to achieve a particular racial balance.

[3] The dissent's assertion that these plans are necessary for the school districts to maintain their "hard-won gains" reveals its conflation of segregation and racial imbalance. *Ibid.* For the dissent's purposes, the relevant hard-won gains are the present racial compositions in the individ-

B

Just as the school districts lack an interest in preventing resegregation, they also have no present interest in remedying past segregation. The Constitution generally prohibits government race-based decisionmaking, but this Court has authorized the use of race-based measures for remedial purposes in two narrowly defined circumstances. First, in schools that were formerly segregated by law, race-based measures are sometimes constitutionally compelled to remedy prior school segregation. Second, in *Croson*, the Court appeared willing to authorize a government unit to remedy past discrimination for which it was responsible. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 504 (1989). Without explicitly resting on either of these strands of doctrine, the dissent repeatedly invokes the school districts' supposed interests in remedying past segregation. Properly analyzed, though, these plans do not fall within either existing category of permissible race-based remediation.

1

The Constitution does not permit race-based government decisionmaking simply because a school district claims a remedial purpose and proceeds in good faith with arguably pure motives. *Grutter* v. *Bollinger*, 539 U. S. 306, 371 (2003)

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ual schools in Seattle and Louisville. However, the actual hard-won gain in these cases is the elimination of the vestiges of the system of state-enforced racial separation that once existed in Louisville. To equate the achievement of a certain statistical mix in several schools with the elimination of the system of systematic *de jure* segregation trivializes the latter accomplishment. Nothing but an interest in classroom aesthetics and a hypersensitivity to elite sensibilities justifies the school districts' racial balancing programs. See Part II–B, *infra*. But "the principle of inherent equality that underlies and infuses our Constitution" required the disestablishment of *de jure* segregation. See *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 240 (1995) (THOMAS, J., concurring in part and concurring in judgment). Assessed in any objective manner, there is no comparison between the two.

(THOMAS, J., concurring in part and dissenting in part) (citing *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 239 (1995) (SCALIA, J., concurring in part and concurring in judgment)). Rather, race-based government decisionmaking is categorically prohibited unless narrowly tailored to serve a compelling interest. *Grutter*, *supra*, at 326; see also Part II–A, *infra*. This exacting scrutiny "has proven automatically fatal" in most cases. *Jenkins*, *supra*, at 121 (THOMAS, J., concurring); cf. *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943) ("[R]acial discriminations are in most circumstances irrelevant and therefore prohibited"). And appropriately so. "The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter*, *supra*, at 353 (opinion of THOMAS, J.). Therefore, as a general rule, all race-based government decisionmaking—regardless of context—is unconstitutional.

2

This Court has carved out a narrow exception to that general rule for cases in which a school district has a "history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race."[4] *Swann*, 402 U. S., at 5–6. In such cases, race-based reme-

[4] The dissent makes much of the supposed difficulty of determining whether prior segregation was *de jure* or *de facto*. See, *e. g.*, *post*, at 820–821. That determination typically will not be nearly as difficult as the dissent makes it seem. In most cases, there either will or will not have been a state constitutional amendment, state statute, local ordinance, or local administrative policy explicitly requiring separation of the races. See, *e. g.*, n. 1, *supra*. And even if the determination is difficult, it is one the dissent acknowledges must be made to determine what remedies school districts are required to adopt. *Post*, at 843–844.

dial measures are sometimes required.[5] *Green*, 391 U. S., at 437–438; cf. *United States* v. *Fordice*, 505 U. S. 717, 745 (1992) (THOMAS, J., concurring).[6] But without a history of state-enforced racial separation, a school district has no affirmative legal obligation to take race-based remedial measures to eliminate segregation and its vestiges.

Neither of the programs before us today is compelled as a remedial measure, and no one makes such a claim. Seattle has no history of *de jure* segregation; therefore, the Constitution did not require Seattle's plan.[7] Although Louisville

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[5] This Court's opinion in *McDaniel* v. *Barresi*, 402 U. S. 39 (1971), fits comfortably within this framework. There, a Georgia school board voluntarily adopted a desegregation plan. At the time of *Brown* v. *Board of Education*, 347 U. S. 483 (1954), Georgia's Constitution required that "[s]eparate schools shall be provided for the white and colored races." Ga. Const., Art. VIII, § 2–6401 (1945). Given that state law had previously required the school board to maintain a dual school system, the county was obligated to take measures to remedy its prior *de jure* segregation. This Court recognized as much in its opinion, which stated that the school board had an "affirmative duty to disestablish the dual school system." *McDaniel*, *supra*, at 41.

[6] As I have explained elsewhere, the remedies this Court authorized lower courts to compel in early desegregation cases like *Green* and *Swann* were exceptional. See *Missouri* v. *Jenkins*, 515 U. S. 70, 124–125 (1995) (concurring opinion). Sustained resistance to *Brown* prompted the Court to authorize extraordinary race-conscious remedial measures (like compelled racial mixing) to turn the Constitution's dictate to desegregate into reality. 515 U. S., at 125 (THOMAS, J., concurring). Even if these measures were appropriate as remedies in the face of widespread resistance to *Brown*'s mandate, they are not forever insulated from constitutional scrutiny. Rather, "such powers should have been temporary and used only to overcome the widespread resistance to the dictates of the Constitution." 515 U. S., at 125 (THOMAS, J., concurring).

[7] Though the dissent cites every manner of complaint, record material, and scholarly article relating to Seattle's race-based student-assignment efforts, *post*, at 873–875, it cites no law or official policy that required separation of the races in Seattle's schools. Nevertheless, the dissent tries to cast doubt on the historical fact that the Seattle schools were never segregated by law by citing allegations that the National Association for the Advancement of Colored People and other organizations made

once operated a segregated school system and was subject to a Federal District Court's desegregation decree, see *ante*, at 715–716; *Hampton* v. *Jefferson Cty. Bd. of Ed.*, 102 F. Supp. 2d 358, 376–377 (WD Ky. 2000), that decree was dissolved in 2000, *id.*, at 360. Since then, no race-based remedial measures have been required in Louisville. Thus, the race-based student-assignment plan at issue here, which was instituted the year after the dissolution of the desegregation decree, was not even arguably required by the Constitution.

3

Aside from constitutionally compelled remediation in schools, this Court has permitted government units to remedy prior racial discrimination only in narrow circumstances. See *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 277 (1986) (plurality opinion). Regardless of the constitutional validity of such remediation, see *Croson*, 488 U. S., at 524–525 (SCALIA, J., concurring in judgment), it does not apply here. Again, neither school board asserts that its race-based actions were taken to remedy prior discrimination. Seattle provides three forward-looking—as opposed to remedial—justifications for its race-based assignment plan. Brief for Respondents in No. 05–908, pp. 24–34. Louisville asserts several similar forward-looking interests, Brief for Respondents in No. 05–915, pp. 24–29, and at oral argument, counsel for Louisville disavowed any claim that Louisville's argument "depend[ed] in any way on the prior de jure segregation," Tr. of Oral Arg. in No. 05–915, p. 38.

Furthermore, for a government unit to remedy past discrimination for which it was responsible, the Court has required it to demonstrate "a 'strong basis in evidence for its conclusion that remedial action was necessary.'" *Croson*,

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in court filings to the effect that Seattle's schools were once segregated by law. See *post*, at 808–810, 824. These allegations were never proved and were not even made in this case. Indeed, the record before us suggests the contrary. See App. in No. 05–908, pp. 214a, 225a, 257a. Past allegations in another case provide no basis for resolving these cases.

supra, at 500 (quoting *Wygant*, *supra*, at 277 (plurality opinion)). Establishing a "strong basis in evidence" requires proper findings regarding the extent of the government unit's past racial discrimination. *Croson*, 488 U. S., at 504. The findings should "define the scope of any injury [and] the necessary remedy," *id.*, at 505, and must be more than "inherently unmeasurable claims of past wrongs," *id.*, at 506. Assertions of general societal discrimination are plainly insufficient. *Id.*, at 499, 504; *Wygant*, *supra*, at 274 (plurality opinion); cf. *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 310 (1978) (opinion of Powell, J.). Neither school district has made any such specific findings. For Seattle, the dissent attempts to make up for this failing by adverting to allegations made in past complaints filed against the Seattle school district. However, allegations in complaints cannot substitute for specific findings of prior discrimination—even when those allegations lead to settlements with complaining parties. Cf. *Croson*, *supra*, at 505; *Wygant*, *supra*, at 279, n. 5 (plurality opinion). As for Louisville, its slate was cleared by the District Court's 2000 dissolution decree, which effectively declared that there were no longer any effects of *de jure* discrimination in need of remediation.[8]

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[8] Contrary to the dissent's argument, *post*, at 844–845, the Louisville school district's interest in remedying its past *de jure* segregation did vanish the day the District Court found that Louisville had eliminated the vestiges of its historic *de jure* segregation. See *Hampton* v. *Jefferson Cty. Bd. of Ed.*, 102 F. Supp. 2d 358, 360 (WD Ky. 2000). If there were further remediation to be done, the District Court could not logically have reached the conclusion that Louisville "ha[d] eliminated the vestiges associated with the former policy of segregation and its pernicious effects." *Ibid.* Because Louisville could use race-based measures only as a remedy for past *de jure* segregation, it is not "incoherent," *post*, at 856, to say that race-based decisionmaking was allowed to Louisville one day—while it was still remedying—and forbidden to it the next—when remediation was finished. That seemingly odd turnaround is merely a result of the fact that the remediation of *de jure* segregation is a jealously guarded exception to the Equal Protection Clause's general rule against government race-based decisionmaking.

Despite the dissent's repeated intimation of a remedial purpose, neither of the programs in question qualifies as a permissible race-based remedial measure. Thus, the programs are subject to the general rule that government race-based decisionmaking is unconstitutional.

C

As the foregoing demonstrates, racial balancing is sometimes a constitutionally permissible remedy for the discrete legal wrong of *de jure* segregation, and when directed to that end, racial balancing is an exception to the general rule that government race-based decisionmaking is unconstitutional. Perhaps for this reason, the dissent conflates the concepts of segregation and racial imbalance: If racial imbalance equates to segregation, then it must also be constitutionally acceptable to use racial balancing to remedy racial imbalance.

For at least two reasons, however, it is wrong to place the remediation of segregation on the same plane as the remediation of racial imbalance. First, as demonstrated above, the two concepts are distinct. Although racial imbalance can result from *de jure* segregation, it does not necessarily, and the further we get from the era of state-sponsored racial separation, the less likely it is that racial imbalance has a traceable connection to any prior segregation. See *Freeman*, 503 U. S., at 496; *Jenkins*, 515 U. S., at 118 (THOMAS, J., concurring).

Second, a school cannot "remedy" racial imbalance in the same way that it can remedy segregation. Remediation of past *de jure* segregation is a one-time process involving the redress of a discrete legal injury inflicted by an identified entity. At some point, the discrete injury will be remedied, and the school district will be declared unitary. See *Swann*, 402 U. S., at 31. Unlike *de jure* segregation, there is no ultimate remedy for racial imbalance. Individual schools will fall in and out of balance in the natural course, and the appropriate balance itself will shift with a school district's chang-

ing demographics. Thus, racial balancing will have to take place on an indefinite basis—a continuous process with no identifiable culpable party and no discernable end point. In part for those reasons, the Court has never permitted outright racial balancing solely for the purpose of achieving a particular racial balance.

II

Lacking a cognizable interest in remediation, neither of these plans can survive strict scrutiny because neither plan serves a genuinely compelling state interest. The dissent avoids reaching that conclusion by unquestioningly accepting the assertions of selected social scientists while completely ignoring the fact that those assertions are the subject of fervent debate. Ultimately, the dissent's entire analysis is corrupted by the considerations that lead it initially to question whether strict scrutiny should apply at all. What emerges is a version of "strict scrutiny" that combines hollow assurances of harmlessness with reflexive acceptance of conventional wisdom. When it comes to government race-based decisionmaking, the Constitution demands more.

A

The dissent claims that "the law requires application here of a standard of review that is not 'strict' in the traditional sense of that word." *Post*, at 837. This view is informed by dissents in our previous cases and the concurrences of two Court of Appeals judges. *Post*, at 835–836 (citing 426 F. 3d 1162, 1193–1194 (CA9 2005) (Kozinski, J., concurring); *Comfort* v. *Lynn School Comm.*, 418 F. 3d 1, 28–29 (CA1 2005) (Boudin, C. J., concurring)). Those lower court judges reasoned that programs like these are not "aimed at oppressing blacks" and do not "seek to give one racial group an edge over another." *Id.*, at 27; 426 F. 3d, at 1193 (Kozinski, J., concurring). They were further persuaded that these plans differed from other race-based programs this Court has considered because they are "certainly more benign than laws

that favor or disfavor one race, segregate by race, or create quotas for or against a racial group," *Comfort*, 418 F. 3d, at 28 (Boudin, C. J., concurring), and they are "far from the original evils at which the Fourteenth Amendment was addressed," *id.*, at 29; 426 F. 3d, at 1195 (Kozinski, J., concurring). Instead of strict scrutiny, Judge Kozinski would have analyzed the plans under "robust and realistic rational basis review." *Id.*, at 1194.

These arguments are inimical to the Constitution and to this Court's precedents.[9] We have made it unusually clear that strict scrutiny applies to *every* racial classification. *Adarand*, 515 U. S., at 227; *Grutter*, 539 U. S., at 326; *Johnson* v. *California*, 543 U. S. 499, 505 (2005) ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications").[10] There are good reasons not to apply a lesser standard to these cases. The constitutional problems with government race-based decisionmaking are not diminished in the slightest by the presence or absence of an intent to oppress any race or by the real or asserted well-meaning motives for the race-based decisionmaking. *Adarand*, 515 U. S., at 228–229. Purportedly benign race-based decisionmaking suffers the same constitutional infirmity as invidious race-based decisionmaking.

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[9] The dissent's appeal to *stare decisis*, *post*, at 866, is particularly ironic in light of its apparent willingness to depart from these precedents, *post*, at 837.

[10] The idea that government racial classifications must be subjected to strict scrutiny did not originate in *Adarand*. As early as *Loving* v. *Virginia*, 388 U. S. 1 (1967), this Court made clear that government action that "rest[s] solely upon distinctions drawn according to race" had to be "subjected to the 'most rigid scrutiny.'" *Id.*, at 11 (quoting *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944)); see also *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964) (requiring a statute drawing a racial classification to be "necessary, and not merely rationally related, to the accomplishment of a permissible state policy"); *id.*, at 197 (Harlan, J., concurring) ("The necessity test . . . should be equally applicable in a case involving state racial discrimination").

Id., at 240 (THOMAS, J., concurring in part and concurring in judgment) ("As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged").

Even supposing it mattered to the constitutional analysis, the race-based student-assignment programs before us are not as benign as the dissent believes. See *post*, at 834–835. "[R]acial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination." *Adarand*, *supra*, at 241 (opinion of THOMAS, J.). As these programs demonstrate, every time the government uses racial criteria to "bring the races together," *post*, at 829, someone gets excluded, and the person excluded suffers an injury solely because of his or her race. The petitioner in the Louisville case received a letter from the school board informing her that her *kindergartner* would not be allowed to attend the school of petitioner's choosing because of the child's race. App. in No. 05–915, p. 97. Doubtless, hundreds of letters like this went out from both school boards every year these race-based assignment plans were in operation. This type of exclusion, solely on the basis of race, is precisely the sort of government action that pits the races against one another, exacerbates racial tension, and "provoke[s] resentment among those who believe that they have been wronged by the government's use of race." *Adarand*, *supra*, at 241 (opinion of THOMAS, J.). Accordingly, these plans are simply one more variation on the government race-based decisionmaking we have consistently held must be subjected to strict scrutiny. *Grutter*, *supra*, at 326.

B

Though the dissent admits to discomfort in applying strict scrutiny to these plans, it claims to have nonetheless applied that exacting standard. But in its search for a compelling

interest, the dissent casually accepts even the most tenuous interests asserted on behalf of the plans, grouping them all under the term "'integration.'" See *post*, at 838. "'[I]ntegration,'" we are told, has "three essential elements." *Ibid.* None of these elements is compelling. And the combination of the three unsubstantiated elements does not produce an interest any more compelling than that represented by each element independently.

1

According to the dissent, integration involves "an interest in setting right the consequences of prior conditions of segregation." *Ibid.* For the reasons explained above, the records in these cases do not demonstrate that either school board's plan is supported by an interest in remedying past discrimination. Part I–B, *supra.*

Moreover, the school boards have no interest in remedying the sundry consequences of prior segregation unrelated to schooling, such as "housing patterns, employment practices, economic conditions, and social attitudes." *Post*, at 838. General claims that past school segregation affected such varied societal trends are "too amorphous a basis for imposing a racially classified remedy," *Wygant*, 476 U. S., at 276 (plurality opinion), because "[i]t is sheer speculation" how decades-past segregation in the school system might have affected these trends, see *Croson*, 488 U. S., at 499. Consequently, school boards seeking to remedy those societal problems with race-based measures in schools today would have no way to gauge the proper scope of the remedy. *Id.*, at 498. Indeed, remedial measures geared toward such broad and unrelated societal ills have "'no logical stopping point,'" *ibid.*, and threaten to become "ageless in their reach into the past, and timeless in their ability to affect the future," *Wygant*, *supra*, at 276 (plurality opinion). See *Grutter*, *supra*, at 342 (stating the "requirement that all governmental use of race must have a logical end point").

Because the school boards lack any further interest in remedying segregation, this element offers no support for the purported interest in "integration."

2

Next, the dissent argues that the interest in integration has an educational element. The dissent asserts that racially balanced schools improve educational outcomes for black children. In support, the dissent unquestioningly cites certain social science research to support propositions that are hotly disputed among social scientists. In reality, it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement.

Scholars have differing opinions as to whether educational benefits arise from racial balancing. Some have concluded that black students receive genuine educational benefits. See, *e. g.*, Crain & Mahard, Desegregation and Black Achievement: A Review of the Research, 42 Law & Contemp. Prob. 17, 48 (Summer 1978). Others have been more circumspect. See, *e. g.*, Henderson, Greenberg, Schneider, Uribe, & Verdugo, High-Quality Schooling for African American Students, in Beyond Desegregation 162, 166 (M. Shujaa ed. 1996) ("Perhaps desegregation does not have a single effect, positive or negative, on the academic achievement of African American students, but rather some strategies help, some hurt, and still others make no difference whatsoever. It is clear to us that focusing simply on demographic issues detracts from focusing on improving schools"). And some have concluded that there are no demonstrable educational benefits. See, *e. g.*, Armor & Rossell, Desegregation and Resegregation in the Public Schools, in Beyond the Color Line: New Perspectives on Race and Ethnicity in America 219, 239, 251 (A. Thernstrom & S. Thernstrom eds. 2002).

The *amicus* briefs in the cases before us mirror this divergence of opinion. Supporting the school boards, one *amicus*

has assured us that "both early desegregation research and recent statistical and econometric analyses . . . indicate that there are positive effects on minority student achievement scores arising from diverse school settings." Brief for American Educational Research Association 10. Another brief claims that "school desegregation has a modest positive impact on the achievement of African-American students." App. to Brief for 553 Social Scientists as *Amici Curiae* 13–14 (footnote omitted). Yet neither of those briefs contains specific details like the magnitude of the claimed positive effects or the precise demographic mix at which those positive effects begin to be realized. Indeed, the social scientists' brief rather cautiously claims the existence of any benefit at all, describing the "positive impact" as "modest," *id.*, at 13, acknowledging that "there appears to be little or no effect on math scores," *id.*, at 14, and admitting that the "underlying reasons for these gains in achievement are not entirely clear," *id.*, at 15.[11]

Other *amici* dispute these findings. One *amicus* reports that "[i]n study after study, racial composition of a student body, when isolated, proves to be an insignificant determinant of student achievement." Brief for Dr. John Murphy et al. in No. 05–908, p. 8; see also *id.*, at 9 ("[T]here is no evidence that diversity in the K–12 classroom positively af-

[11] At least one of the academic articles the dissent cites to support this proposition fails to establish a causal connection between the supposed educational gains realized by black students and racial mixing. See Hallinan, Diversity Effects on Student Outcomes: Social Science Evidence, 59 Ohio St. L. J. 733 (1998). In the pages following the ones the dissent cites, the author of that article remarks that "the main reason white and minority students perform better academically in majority white schools is likely that these schools provide greater opportunities to learn. In other words, it is not desegregation per se that improves achievement, but rather the learning advantages some desegregated schools provide." *Id.*, at 744. Evidence that race is a good proxy for other factors that might be correlated with educational benefits does not support a compelling interest in the use of race to achieve academic results.

fects student achievement"). Another *amicus* surveys several social science studies and concludes that "a fair and comprehensive analysis of the research shows that there is no clear and consistent evidence of [educational] benefits." Brief for David J. Armor et al. 29.

Add to the inconclusive social science the fact of black achievement in "racially isolated" environments. See T. Sowell, Education: Assumptions Versus History 7–38 (1986). Before *Brown*, the most prominent example of an exemplary black school was Dunbar High School. Sowell, Education: Assumptions Versus History, at 29 ("[I]n the period 1918–1923, Dunbar graduates earned fifteen degrees from Ivy League colleges, and ten degrees from Amherst, Williams, and Wesleyan"). Dunbar is by no means an isolated example. See *id.*, at 10–32 (discussing other successful black schools); Walker, Can Institutions Care? Evidence from the Segregated Schooling of African American Children, in Beyond Desegregation, *supra*, at 209–226; see also T. Sowell, Affirmative Action Around the World: An Empirical Study 141–165 (2004). Even after *Brown*, some schools with predominantly black enrollments have achieved outstanding educational results. See, *e. g.*, S. Carter, No Excuses: Lessons from 21 High-Performing, High-Poverty Schools 49–50, 53–56, 71–73, 81–84, 87–88 (2001); A. Thernstrom & S. Thernstrom, No Excuses: Closing the Racial Gap in Learning 43–64 (2003); see also L. Izumi, They Have Overcome: High-Poverty, High-Performing Schools in California (2002) (chronicling exemplary achievement in predominantly Hispanic schools in California). There is also evidence that black students attending historically black colleges achieve better academic results than those attending predominantly white colleges. *Grutter*, 539 U. S., at 364–365 (THOMAS, J., concurring in part and dissenting in part) (citing sources); see also *Fordice*, 505 U. S., at 748–749 (THOMAS, J., concurring).

The Seattle School Board itself must believe that racial mixing is not necessary to black achievement. Seattle operates a K–8 "African-American Academy," which has a "nonwhite" enrollment of 99%. See App. in No. 05–908, p. 227a; Reply Brief for Petitioner in No. 05–908, p. 13, n. 13. That school was founded in 1990 as part of the school board's effort to "increase academic achievement."[12] See African American Academy History, online at http://www.seattleschools.org/schools/aaa/history.htm (all Internet materials as visited June 26, 2007, and available in Clerk of Court's case file). According to the school's most recent annual report, "[a]cademic excellence" is its "primary goal." See African American Academy 2006 Annual Report, p. 2, online at http://www.seattleschools.org/area/siso/reports/anrep/altern/938.pdf. This racially imbalanced environment has reportedly produced test scores "higher across all grade levels in reading, writing and math." *Ibid.* Contrary to what the dissent would have predicted, see *post*, at 839–840, the children in Seattle's African American Academy have shown gains when placed in a "highly segregated" environment.

Given this tenuous relationship between forced racial mixing and improved educational results for black children, the dissent cannot plausibly maintain that an educational element supports the integration interest, let alone makes it compelling.[13] See *Jenkins*, 515 U. S., at 121–122 (THOMAS,

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[12] Of course, if the Seattle School Board were truly committed to the notion that diversity leads directly to educational benefits, operating a school with such a high "nonwhite" enrollment would be a shocking dereliction of its duty to educate the students enrolled in that school.

[13] In fact, the available data from the Seattle school district appear to undercut the dissent's view. A comparison of the test results of the schools in the last year the racial balancing program operated to the results in the 2004-to-2005 school year (in which student assignments were race neutral) does not indicate the decline in black achievement one would expect to find if black achievement were contingent upon a particular racial mix. See Washington State Report Card, online at http://reportcard.ospi.k12.wa.us/summary.aspx?schoolId=1099&OrgType=4&reportLevel

J., concurring) ("[T]here is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment").

Perhaps recognizing as much, the dissent argues that the social science evidence is "strong enough to permit a democratically elected school board reasonably to determine that this interest is a compelling one." *Post*, at 839. This assertion is inexplicable. It is not up to the school boards—the very government entities whose race-based practices we must strictly scrutinize—to determine what interests qualify as compelling under the Fourteenth Amendment to the United States Constitution. Rather, this Court must assess independently the nature of the interest asserted and the evidence to support it in order to determine whether it qualifies as compelling under our precedents. In making such a determination, we have deferred to state authorities only once, see *Grutter*, 539 U. S., at 328–330, and that deference was prompted by factors uniquely relevant to higher education. *Id.*, at 328 ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions"). The dissent's proposed test—whether sufficient social science evidence supports a government unit's conclusion that the interest it asserts is compelling—calls to mind the rational-basis standard of review the dissent purports not to apply, *post,* at 836–837. See *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955) ("It is enough that there is an evil at hand for correc-

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=School; http://reportcard.ospi.k12.wa.us/summary.aspx?schoolId=1104&reportLevel=School&orgLinkId=1104&yrs=; http://reportcard.ospi.k12.wa.us/summary.aspx?schoolId=1061&reportLevel=School&orgLinkId=1061&yrs=; http://reportcard.ospi.k12.wa.us/summary.aspx?schoolId=1043&reportLevel=School&orgLinkId=1043&yrs= (showing that reading scores went up, not down, when Seattle's race-based assignment program ended at Sealth High School, Ingraham High School, Garfield High School, and Franklin High School—some of the schools most affected by the plan).

tion, and that it might be thought that the particular legislative measure was a rational way to correct it"). Furthermore, it would leave our equal protection jurisprudence at the mercy of elected government officials evaluating the evanescent views of a handful of social scientists. To adopt the dissent's deferential approach would be to abdicate our constitutional responsibilities.[14]

3

Finally, the dissent asserts a "democratic element" to the integration interest. It defines the "democratic element" as "an interest in producing an educational environment that reflects the 'pluralistic society' in which our children will live." *Post*, at 840.[15] Environmental reflection, though, is

[14] The dissent accuses me of "feel[ing] confident that, to end invidious discrimination, one must end *all* governmental use of race-conscious criteria" and chastises me for not deferring to democratically elected majorities. See *post*, at 862. Regardless of what JUSTICE BREYER's goals might be, this Court does not sit to "create a society that includes all Americans" or to solve the problems of "troubled inner-city schooling." *Ibid.* We are not social engineers. The United States Constitution dictates that local governments cannot make decisions on the basis of race. Consequently, regardless of the perceived negative effects of racial imbalance, I will not defer to legislative majorities where the Constitution forbids it.

It should escape no one that behind JUSTICE BREYER's veil of judicial modesty hides an inflated role for the Federal Judiciary. The dissent's approach confers on judges the power to say what sorts of discrimination are benign and which are invidious. Having made that determination (based on no objective measure that I can detect), a judge following the dissent's approach will set the level of scrutiny to achieve the desired result. Only then must the judge defer to a democratic majority. In my view, to defer to one's preferred result is not to defer at all.

[15] The notion that a "democratic" interest qualifies as a compelling interest (or constitutes a part of a compelling interest) is proposed for the first time in today's dissent and has little basis in the Constitution or our precedent, which has narrowly restricted the interests that qualify as compelling. See *Grutter* v. *Bollinger*, 539 U. S. 306, 351–354 (2003) (THOMAS, J., concurring in part and dissenting in part). The Fourteenth Amend-

just another way to say racial balancing. And "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." *Bakke*, 438 U. S., at 307 (opinion of Powell, J.). "This the Constitution forbids." *Ibid.; Grutter*, *supra*, at 329–330; *Freeman*, 503 U. S., at 494.

Navigating around that inconvenient authority, the dissent argues that the racial balancing in these plans is not an end in itself but is instead intended to "teac[h] children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation." *Post*, at 840. These "generic lessons in socialization and good citizenship" are too sweeping to qualify as compelling interests. *Grutter*, 539 U. S., at 348 (SCALIA, J., concurring in part and dissenting in part). And they are not "uniquely relevant" to schools or "uniquely 'teachable' in a formal educational setting." *Id.*, at 347. Therefore, if governments may constitutionally use racial balancing to achieve these aspirational ends in schools, they may use racial balancing to achieve similar goals at every level—from state-sponsored 4–H clubs, see *Bazemore* v. *Friday*, 478 U. S. 385, 388–390 (1986) (Brennan, J., concurring in part), to the state civil service, see *Grutter*, 539 U. S., at 347–348 (opinion of SCALIA, J.).

Moreover, the democratic interest has no durational limit, contrary to *Grutter*'s command. See *id.*, at 342 (opinion of the Court); see also *Croson*, 488 U. S., at 498; *Wygant*, 476 U. S., at 275 (plurality opinion). In other words, it will always be important for students to learn cooperation among the races. If this interest justifies race-conscious measures today, then logically it will justify race-conscious measures forever. Thus, the democratic interest, limitless in scope

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ment does not enact the dissent's newly minted understanding of liberty. See *Lochner* v. *New York*, 198 U. S. 45, 75 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics").

and "timeless in [its] ability to affect the future," *id.*, at 276, cannot justify government race-based decisionmaking.[16]

In addition to these defects, the democratic element of the integration interest fails on the dissent's own terms. The dissent again relies upon social science research to support the proposition that state-compelled racial mixing teaches children to accept cooperation and improves racial attitudes and race relations. Here again, though, the dissent overstates the data that supposedly support the interest.

The dissent points to data that indicate that "black and white students in desegregated schools are less racially prejudiced than those in segregated schools." *Post*, at 841 (internal quotation marks omitted). By the dissent's account, improvements in racial attitudes depend upon the increased contact between black and white students thought to occur in more racially balanced schools. There is no guarantee, however, that students of different races in the same school will actually spend time with one another. Schools frequently group students by academic ability as an aid to efficient instruction, but such groupings often result in classrooms with high concentrations of one race or another. See,

[16] The dissent does not explain how its recognition of an interest in teaching racial understanding and cooperation here is consistent with the Court's rejection of a similar interest in *Wygant*. In *Wygant*, a school district justified its race-based teacher-layoff program in part on the theory that "minority teachers provided 'role models' for minority students and that a racially 'diverse' faculty would improve the education of all students." *Grutter*, *supra*, at 352 (opinion of THOMAS, J.) (citing Brief for Respondents, O. T. 1985, No. 84–1340, pp. 27–28; *Wygant*, 476 U. S., at 315 (STEVENS, J., dissenting)). The Court rejected the interests asserted to justify the layoff program as insufficiently compelling. *Id.*, at 275–276 (plurality opinion); *id.*, at 295 (White, J., concurring in judgment). If a school district has an interest in teaching racial understanding and cooperation, there is no logical reason why that interest should not extend to the composition of the teaching staff as well as the composition of the student body. The dissent's reliance on this interest is, therefore, inconsistent with *Wygant*.

e. g., Yonezawa, Wells, & Serna, Choosing Tracks: "Freedom of Choice" in Detracking Schools, 39 Am. Ed. Research J. 37, 38 (2002); Mickelson, Subverting Swann: First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools, 38 Am. Ed. Research J. 215, 233–234 (2001) (describing this effect in schools in Charlotte, North Carolina). In addition to classroom separation, students of different races within the same school may separate themselves socially. See Hallinan & Williams, Interracial Friendship Choices in Secondary Schools, 54 Am. Sociological Rev. 67, 72–76 (1989); see also Clotfelter, Interracial Contact in High School Extracurricular Activities, 34 Urban Rev. 25, 41–43 (2002). Therefore, even supposing interracial contact leads directly to improvements in racial attitudes and race relations, a program that assigns students of different races to the same schools might not capture those benefits. Simply putting students together under the same roof does not necessarily mean that the students will learn together or even interact.

Furthermore, it is unclear whether increased interracial contact improves racial attitudes and relations.[17] One researcher has stated that "the reviews of desegregation and intergroup relations were unable to come to any conclusion about what the probable effects of desegregation were . . . [;]

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[17] Outside the school context, this Court's cases reflect the fact that racial mixing does not always lead to harmony and understanding. In *Johnson* v. *California*, 543 U. S. 499 (2005), this Court considered a California prison policy that separated inmates racially. *Id.*, at 525–528 (THOMAS, J., dissenting). That policy was necessary because of "numerous incidents of racial violence." *Id.*, at 502 (opinion of the Court); *id.*, at 532–534 (THOMAS, J., dissenting). As a result of this Court's insistence on strict scrutiny of that policy, but see *id.*, at 538–547, inmates in the California prisons were killed. See *Beard* v. *Banks*, 548 U. S. 521, 536–537 (2006) (THOMAS, J., concurring in judgment) (noting that two were killed and hundreds were injured in race rioting subsequent to this Court's decision in *Johnson*).

virtually all of the reviewers determined that few, if any, firm conclusions about the impact of desegregation on intergroup relations could be drawn." Schofield, School Desegregation and Intergroup Relations: A Review of the Literature, in 17 Review of Research in Education 335, 356 (G. Grant ed. 1991). Some studies have even found that a deterioration in racial attitudes seems to result from racial mixing in schools. See N. St. John, School Desegregation Outcomes for Children 67–68 (1975) ("A glance at [the data] shows that for either race positive findings are less common than negative findings"); Stephan, The Effects of School Desegregation: An Evaluation 30 Years After *Brown*, in 3 Advances in Applied Social Psychology 181, 183–186 (M. Saks & L. Saxe eds. 1986). Therefore, it is not nearly as apparent as the dissent suggests that increased interracial exposure automatically leads to improved racial attitudes or race relations.

Given our case law and the paucity of evidence supporting the dissent's belief that these plans improve race relations, no democratic element can support the integration interest.[18]

4

The dissent attempts to buttress the integration interest by claiming that it follows *a fortiori* from the interest this Court recognized as compelling in *Grutter*. *Post*, at 841–842. Regardless of the merit of *Grutter*, the compelling interest recognized in that case cannot support these plans. *Grutter* recognized a compelling interest in a law school's attainment of a diverse student body. 539 U. S., at

[18] After discussing the "democratic element," the dissent repeats its assertion that the social science evidence supporting that interest is "sufficiently strong to permit a school board to determine . . . that this interest is compelling." *Post*, at 841. Again, though, the school boards have no say in deciding whether an interest is compelling. Strict scrutiny of race-based government decisionmaking is more searching than *Chevron*-style administrative review for reasonableness. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 845 (1984).

328. This interest was critically dependent upon features unique to higher education: "the expansive freedoms of speech and thought associated with the university environment," the "special niche in our constitutional tradition" occupied by universities, and "[t]he freedom of a university to make its own judgments as to education[,] includ[ing] the selection of its student body." *Id.*, at 329 (internal quotation marks omitted). None of these features is present in elementary and secondary schools. Those schools do not select their own students, and education in the elementary and secondary environment generally does not involve the free interchange of ideas thought to be an integral part of higher education. See 426 F. 3d, at 1208 (Bea, J., dissenting). Extending *Grutter* to this context would require us to cut that holding loose from its theoretical moorings. Thus, only by ignoring *Grutter*'s reasoning can the dissent claim that recognizing a compelling interest in these cases is an *a fortiori* application of *Grutter*.

C

Stripped of the baseless and novel interests the dissent asserts on their behalf, the school boards cannot plausibly maintain that their plans further a compelling interest. As I explained in *Grutter*, only "those measures the State must take to provide a bulwark against anarchy . . . or to prevent violence" and "a government's effort to remedy past discrimination for which it is responsible" constitute compelling interests. 539 U. S., at 353, 351–352 (opinion concurring in part and dissenting in part). Neither of the parties has argued—nor could they—that race-based student assignment is necessary to provide a bulwark against anarchy or to prevent violence. And as I explained above, the school districts have no remedial interest in pursuing these programs. See Part I–B, *supra*. Accordingly, the school boards cannot satisfy strict scrutiny. These plans are unconstitutional.

III

Most of the dissent's criticisms of today's result can be traced to its rejection of the colorblind Constitution. See *post*, at 830. The dissent attempts to marginalize the notion of a colorblind Constitution by consigning it to me and Members of today's plurality.[19] See *ibid.*; see also *post*, at 862–863. But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy:* "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (dissenting opinion). And my view was the rallying cry for the lawyers who litigated *Brown*. See, *e. g.*, Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument in *Brown* v. *Board of Education*, O. T. 1953, p. 65 ("That the Constitution is color blind is our dedicated belief"); Brief for Appellants in *Brown* v. *Board of Education*, O. T. 1952, No. 8, p. 5 ("The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone");[20]

[19] The dissent halfheartedly attacks the historical underpinnings of the colorblind Constitution. *Post*, at 829–830. I have no quarrel with the proposition that the Fourteenth Amendment sought to bring former slaves into American society as full members. *Post*, at 829 (citing *Slaughter-House Cases*, 16 Wall. 36, 71–72 (1873)). What the dissent fails to understand, however, is that the colorblind Constitution does not bar the government from taking measures to remedy past state-sponsored discrimination—indeed, it requires that such measures be taken in certain circumstances. See, *e. g.*, Part I–B, *supra*. Race-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were therefore not inconsistent with the colorblind Constitution.

[20] See also Juris. Statement in *Davis* v. *County School Board*, O. T. 1952, No. 191, p. 8 ("[W]e take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action"); Tr. of Oral Arg. in *Brown* v. *Board of Education*, O. T. 1952, No. 8, p. 7 ("We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens"); Tr. of Oral Arg. in *Briggs*

see also In Memoriam: Honorable Thurgood Marshall, Proceedings of the Bar and Officers of the Supreme Court of the United States, p. x (1993) (remarks of Judge Motley) ("Marshall had a 'Bible' to which he turned during his most depressed moments. The 'Bible' would be known in the legal community as the first Mr. Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U. S. 537, 552 (1896). I do not know of any opinion which buoyed Marshall more in his pre-*Brown* days . . . ").

The dissent appears to pin its interpretation of the Equal Protection Clause to current societal practice and expectations, deference to local officials, likely practical consequences, and reliance on previous statements from this and other courts. Such a view was ascendant in this Court's jurisprudence for several decades. It first appeared in *Plessy*, where the Court asked whether a state law providing for segregated railway cars was "a reasonable regulation." 163 U. S., at 550. The Court deferred to local authorities in making its determination, noting that in inquiring into reasonableness "there must necessarily be a large discretion on the part of the legislature." *Ibid.* The Court likewise paid heed to societal practices, local expectations, and practical consequences by looking to "the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." *Ibid.* Guided by these principles, the Court concluded: "[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia." *Id.*, at 550–551.

The segregationists in *Brown* embraced the arguments the Court endorsed in *Plessy*. Though *Brown* decisively re-

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v. *Elliott* et al., O. T. 1953, No. 2 etc., p. 50 ("[T]he state is deprived of any power to make any racial classifications in any governmental field").

jected those arguments, today's dissent replicates them to a distressing extent. Thus, the dissent argues that "[e]ach plan embodies the results of local experience and community consultation." *Post*, at 848. Similarly, the segregationists made repeated appeals to societal practice and expectation. See, *e. g.*, Brief for Appellees on Reargument in *Briggs* v. *Elliott*, O. T. 1953, No. 2, p. 76 ("[A] State has power to establish a school system which is capable of efficient administration, taking into account local problems and conditions").[21] The dissent argues that "weight [must be given] to a local school board's knowledge, expertise, and concerns," *post*, at 848, and with equal vigor, the segregationists argued for def-

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[21] See also Brief for Appellees in *Davis* v. *County School Board*, O. T. 1952, No. 191, p. 1 ("[T]he Court is asked . . . to outlaw the fixed policies of the several States which are based on local social conditions well known to the respective legislatures"); *id.*, at 9 ("For this purpose, Virginia history and present Virginia conditions are important"); Tr. of Oral Arg. in *Davis* v. *County School Board*, O. T. 1952, No. 191, p. 57 ("[T]he historical background that exists, certainly in this Virginia situation, with all the strife and the history that we have shown in this record, shows a basis, a real basis, for the classification that has been made"); *id.*, at 69 (describing the potential abolition of segregation as "contrary to the customs, the traditions and the mores of what we might claim to be a great people, established through generations, who themselves are fiercely and irrevocably dedicated to the preservation of the white and colored races"). Accord, *post*, at 868 ("Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced"); *post*, at 822 (emphasizing the importance of "local circumstances" and encouraging different localities to "try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs" (internal quotation marks omitted)); *post*, at 848 (emphasizing the school districts' "40-year history" during which both school districts have tried numerous approaches "to achieve more integrated schools"); *post*, at 863–864 ("[T]he histories of Louisville and Seattle reveal complex circumstances and a long tradition of conscientious efforts by local school boards").

erence to local authorities. See, *e. g.*, Brief for Kansas on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1, p. 14 ("We advocate only a concept of constitutional law that permits determinations of state and local policy to be made on state and local levels. We defend only the validity of the statute that enables the Topeka Board of Education to determine its own course").[22] The dissent argues that today's decision "threatens to substitute for present calm a disruptive round of race-related litigation," *post*, at 803, and claims that today's decision "risks serious harm to the law and for the Nation," *post*, at 865. The segregationists also relied upon the likely practical consequences of ending the state-imposed system of racial separation. See, *e. g.*, Brief

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[22] See also Brief for Appellees in *Brown* v. *Board of Education*, O. T. 1952, No. 8, p. 29 ("'It is universally held, therefore, that each state shall determine for itself, subject to the observance of the fundamental rights and liberties guaranteed by the federal Constitution, how it shall exercise the police power . . . . And in no field is this right of the several states more clearly recognized than in that of public education'" (quoting *Briggs* v. *Elliott*, 98 F. Supp. 529, 532 (EDSC 1951))); Brief for Appellees in *Briggs* v. *Elliott*, O. T. 1952, No. 101, p. 7 ("Local self-government in local affairs is essential to the peace and happiness of each locality and to the strength and stability of our whole federal system. Nowhere is this more profoundly true than in the field of education"); Tr. of Oral Arg. in *Briggs* v. *Elliott*, O. T. 1952, No. 101, pp. 54–55 ("What is the great national and federal policy on this matter? Is it not a fact that the very strength and fiber of our federal system is local self-government in those matters for which local action is competent? Is it not of all the activities of government the one which most nearly approaches the hearts and minds of people, the question of the education of their young? Is it not the height of wisdom that the manner in which that shall be conducted should be left to those most immediately affected by it, and that the wishes of the parents, both white and colored, should be ascertained before their children are forced into what may be an unwelcome contact?"). Accord, *post*, at 849 ("[L]ocal school boards better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils"); *post*, at 866 ("[W]hat of respect for democratic local decisionmaking by States and school boards?"); *ibid.* (explaining "that the Constitution grants local school districts a significant degree of leeway").

for Appellees on Reargument in *Davis* v. *County School Board*, O. T. 1953, No. 4, p. 37 ("Yet a holding that school segregation by race violates the Constitution will result in upheaval in all of those places not now subject to Federal judicial scrutiny. This Court has made many decisions of widespread effect; none would affect more people more directly in more fundamental interests and, in fact, cause more chaos in local government than a reversal of the decision in this case").[23] And foreshadowing today's dissent, the segregationists most heavily relied upon judicial precedent. See, *e. g.*, Brief for Appellees on Reargument in *Briggs* v. *Elliott*, O. T. 1953, No. 2, at 59 ("[I]t would be difficult indeed to find a case so favored by precedent as is the case for South Carolina here").[24]

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[23] See also Brief for Appellees in Reply to Supp. Brief for the United States on Reargument in *Davis* v. *County School Board*, O. T. 1953, No. 4, p. 17 ("The Court is . . . dealing with thousands of local school districts and schools. Is each to be the subject of litigation in the District Courts?"); Brief for Kansas on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1, p. 51 ("The delicate nature of the problem of segregation and the paramount interest of the State of Kansas in preserving the internal peace and tranquility of its people indicates that this is a question which can best be solved on the local level, at least until Congress declares otherwise"). Accord, *post*, at 861 ("At a minimum, the plurality's views would threaten a surge of race-based litigation. Hundreds of state and federal statutes and regulations use racial classifications for educational or other purposes. . . . In many such instances, the contentious force of legal challenges to these classifications, meritorious or not, would displace earlier calm"); *post*, at 865 ("Indeed, the consequences of the approach the Court takes today are serious. Yesterday, the plans under review were lawful. Today, they are not"); *post*, at 866 (predicting "further litigation, aggravating race-related conflict").

[24] See also Statement of Appellees Opposing Jurisdiction and Motion to Dismiss or Affirm in *Davis* v. *County School Board*, O. T. 1952, No. 191, p. 5 ("[I]t would be difficult to find from any field of law a legal principle more repeatedly and conclusively decided than the one sought to be raised by appellants"); Brief for Appellees on Reargument in *Davis* v. *County School Board*, O. T. 1953, No. 4, pp. 46–47 ("If this case were to be decided solely on the basis of precedent, this brief could have been much more limited. There is ample precedent in the decisions of this Court to uphold

The similarities between the dissent's arguments and the segregationists' arguments do not stop there. Like the dissent, the segregationists repeatedly cautioned the Court to consider practicalities and not to embrace too theoretical a view of the Fourteenth Amendment.[25] And just as the dis-

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school segregation"); Brief for Petitioners in *Gebhart* v. *Belton*, O. T. 1952, No. 448, p. 27 ("Respondents ask this Court to upset a long established and well settled principle recognized by numerous state Legislatures, and Courts, both state and federal, over a long period of years"); Tr. of Oral Arg. in *Briggs* v. *Elliott* et al., O. T. 1953, No. 2 etc., at 79 ("But be that doctrine what it may, somewhere, sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance. . . . We relied on the fact that this Court had not once but seven times, I think it is, pronounced in favor of the separate but equal doctrine. We relied on the fact that the courts of last appeal of some sixteen or eighteen States have passed upon the validity of the separate but equal doctrine vis-a-vis the Fourteenth Amendment. We relied on the fact that Congress has continuously since 1862 segregated its schools in the District of Columbia"); App. D to Brief for Appellees in *Briggs* v. *Elliott*, O. T. 1952, No. 101 (collecting citations of state and federal cases "[w]hich [e]nunciate the [p]rinciple that [s]tate [l]aws [p]roviding for [r]acial [s]egregation in the [p]ublic [s]chools do not [c]onflict with the Fourteenth Amendment"). Accord, *post*, at 823 ("[T]he Court set forth in *Swann* a basic principle of constitutional law—a principle of law that has found wide acceptance in the legal culture" (internal quotation marks omitted)); *post*, at 825–826 ("Lower state and federal courts had considered the matter settled and uncontroversial even before this Court decided *Swann*"); *post*, at 827 ("Numerous state and federal courts explicitly relied upon *Swann*'s guidance for decades to follow"); *post*, at 828 (stating "how lower courts understood and followed *Swann*'s enunciation of the relevant legal principle"); *post*, at 831 ("The constitutional principle enunciated in *Swann*, reiterated in subsequent cases, and relied upon over many years, provides, and has widely been thought to provide, authoritative legal guidance"); *post*, at 861 ("[T]oday's opinion will require setting aside the laws of several States and many local communities"); *post*, at 866 ("And what has happened to *Swann?* To *McDaniel?* To *Crawford?* To *Harris?* To *School Committee of Boston?* To *Seattle School Dist. No. 1?* After decades of vibrant life, they would all, under the plurality's logic, be written out of the law").

[25] Compare Brief for Appellees in *Davis* v. *County School Board*, O. T. 1952, No. 191, at 16–17 ("'It is by such practical considerations based on

sent argues that the need for these programs will lessen over time, the segregationists claimed that reliance on segregation was lessening and might eventually end.[26]

What was wrong in 1954 cannot be right today.[27] Whatever else the Court's rejection of the segregationists' argu-

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experience rather than by theoretical inconsistencies that the question of equal protection is to be answered'" (quoting *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 110 (1949))); Brief for Appellees on Reargument in *Davis* v. *County School Board*, O. T. 1953, No. 4, at 76 ("The question is a practical one for them to solve; it is not subject to solution in the theoretical realm of abstract principles"); Tr. of Oral Arg. in *Briggs* v. *Elliott* et al., O. T. 1953, No. 2 etc., at 86 ("[Y]ou cannot talk about this problem just in a vacuum in the manner of a law school discussion"), with *post*, at 858 ("The Founders meant the Constitution as a practical document").

[26] Compare Brief for Kansas on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1, at 57 ("[T]he people of Kansas . . . are abandoning the policy of segregation whenever local conditions and local attitudes make it feasible"); Brief for Appellees on Reargument in *Davis* v. *County School Board*, O. T. 1953, No. 4, at 76 ("As time passes, it may well be that segregation will end"), with *post*, at 820 ("[T]hey use race-conscious criteria in limited and gradually diminishing ways"); *post*, at 848 ("[E]ach plan's use of race-conscious elements is *diminished* compared to the use of race in preceding integration plans"); *post*, at 855 (describing the "historically diminishing use of race" in the school districts).

[27] It is no answer to say that these cases can be distinguished from *Brown* because *Brown* involved invidious racial classifications whereas the racial classifications here are benign. See *post*, at 863–864. How does one tell when a racial classification is invidious? The segregationists in *Brown* argued that their racial classifications were benign, not invidious. See Tr. of Oral Arg. in *Briggs* v. *Elliott* et al., O. T. 1953, No. 2 etc., at 83 ("It [South Carolina] is confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools"); Brief for Appellees on Reargument in *Davis* v. *County School Board*, O. T. 1953, No. 4, at 82–83 ("Our many hours of research and investigation have led only to confirmation of our view that segregation by race in Virginia's public schools at this time not only does not offend the Constitution of the United States but serves to provide a better education for living for the children of both races"); Tr. of Oral Arg. in *Davis* v. *County School Board*, O. T. 1952, No. 191, at 71

ments in *Brown* might have established, it certainly made clear that state and local governments cannot take from the Constitution a right to make decisions on the basis of race by adverse possession. The fact that state and local governments had been discriminating on the basis of race for a long time was irrelevant to the *Brown* Court. The fact that racial discrimination was preferable to the relevant communities was irrelevant to the *Brown* Court. And the fact that the state and local governments had relied on statements in this Court's opinions was irrelevant to the *Brown* Court. The same principles guide today's decision. None of the considerations trumpeted by the dissent is relevant to the constitutionality of the school boards' race-based plans because no contextual detail—or collection of contextual details, *post*, at 804–823—can "provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race." *Adarand*, 515 U. S., at 240 (THOMAS, J., concurring in part and concurring in judgment).[28]

("[T]o make such a transition, would undo what we have been doing, and which we propose to continue to do for the uplift and advancement of the education of both races. It would stop this march of progress, this onward sweep"). It is the height of arrogance for Members of this Court to assert blindly that their motives are better than others.

[28] See also *id.*, at 8–9 ("It has been urged that [these state laws and policies] derive validity as a consequence of a long duration supported and made possible by a long line of judicial decisions, including expressions in some of the decisions of this Court. At the same time, it is urged that these laws are valid as a matter of constitutionally permissible social experimentation by the States. On the matter of stare decisis, I submit that the duration of the challenged practice, while it is persuasive, is not controlling. . . . As a matter of social experimentation, the laws in question must satisfy the requirements of the Constitution. While this Court has permitted the States to legislate or otherwise officially act experimentally in the social and economic fields, it has always recognized and held that this power is subject to the limitations of the Constitution, and that the tests of the Constitution must be met"); Reply Brief for Appellants on Reargument in *Briggs* v. *Elliott* et al., O. T. 1953, No. 2 etc., pp. 18–19

In place of the colorblind Constitution, the dissent would permit measures to keep the races together and proscribe measures to keep the races apart.[29] See *post*, at 829–835, 865. Although no such distinction is apparent in the Fourteenth Amendment, the dissent would constitutionalize today's faddish social theories that embrace that distinction. The Constitution is not that malleable. Even if current social theories favor classroom racial engineering as necessary to "solve the problems at hand," *post*, at 822, the Constitution enshrines principles independent of social theories. See *Plessy*, 163 U. S., at 559 (Harlan, J., dissenting) ("The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time . . . . But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. . . . Our Constitution is color-blind, and neither knows nor tolerates classes among citizens"). Indeed, if our history has taught us anything, it has taught

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("The truth of the matter is that this is an attempt to place local mores and customs above the high equalitarian principles of our Government as set forth in our Constitution and particularly the Fourteenth Amendment. This entire contention is tantamount to saying that the vindication and enjoyment of constitutional rights recognized by this Court as present and personal can be postponed whenever such postponement is claimed to be socially desirable").

[29] The dissent does not face the complicated questions attending its proposed standard. For example, where does the dissent's principle stop? Can the government force racial mixing against the will of those being mixed? Can the government force black families to relocate to white neighborhoods in the name of bringing the races together? What about historically black colleges, which have "established traditions and programs that might disproportionately appeal to one race or another"? *United States* v. *Fordice*, 505 U. S. 717, 749 (1992) (THOMAS, J., concurring). The dissent does not and cannot answer these questions because the contours of the distinction it propounds rest entirely in the eye of the beholder.

us to beware of elites bearing racial theories.[30] See, *e. g.*, *Dred Scott* v. *Sandford*, 19 How. 393, 406, 407 (1857) ("[T]hey [members of the "negro African race"] had no rights which the white man was bound to respect"). Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be

[30] JUSTICE BREYER's good intentions, which I do not doubt, have the shelf life of JUSTICE BREYER's tenure. Unlike the dissenters, I am unwilling to delegate my constitutional responsibilities to local school boards and allow them to experiment with race-based decisionmaking on the assumption that their intentions will forever remain as good as JUSTICE BREYER's. See The Federalist No. 51, p. 349 (J. Cooke ed. 1961) ("If men were angels, no government would be necessary"). Indeed, the racial theories endorsed by the Seattle School Board should cause the dissenters to question whether local school boards should be entrusted with the power to make decisions on the basis of race. The Seattle school district's Website formerly contained the following definition of "cultural racism": "'Those aspects of society that overtly and covertly attribute value and normality to white people and whiteness, and devalue, stereotype, and label people of color as "other," different, less than, or render them invisible. Examples of these norms include defining white skin tones as nude or flesh colored, having a future time orientation, emphasizing individualism as opposed to a more collective ideology, defining one form of English as standard . . . .'" See Harrell, School Web Site Removed: Examples of Racism Sparked Controversy, Seattle Post-Intelligencer, June 2, 2006, pp. B1, B5. After the site was removed, the district offered the comforting clarification that the site was not intended "'to hold onto unsuccessful concepts such as melting pot or colorblind mentality.'" *Ibid.;* see also *ante,* at 730, n. 14 (plurality opinion).

More recently, the school district sent a delegation of high school students to a "White Privilege Conference." See Equity and Race Relations White Privilege Conference, http://www.seattleschools.org/area/equityandrace/whiteprivilegeconference.xml. One conference participant described "white privilege" as "an invisible package of unearned assets which I can count on cashing in each day, but about which I was meant to remain oblivious. White Privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools, and blank checks." See White Privilege Conference, Questions and Answers, http://www.uccs.edu/~wpc/faqs.htm; see generally Westneat, District's Obsessed with Race, Seattle Times, Apr. 1, 2007, p. B1 (describing racial issues in Seattle schools).

nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow.

* * *

The plans before us base school assignment decisions on students' race. Because "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," such race-based decisionmaking is unconstitutional. *Plessy*, *supra*, at 559 (Harlan, J., dissenting). I concur in THE CHIEF JUSTICE's opinion so holding.

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all. In these cases two school districts in different parts of the country seek to teach that principle by having classrooms that reflect the racial makeup of the surrounding community. That the school districts consider these plans to be necessary should remind us our highest aspirations are yet unfulfilled. But the solutions mandated by these school districts must themselves be lawful. To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome. In my view the state-mandated racial classifications at issue, official labels proclaiming the race of all persons in a broad class of citizens—elementary school students in one case, high school students in another—are unconstitutional as the cases now come to us.

I agree with THE CHIEF JUSTICE that we have jurisdiction to decide the cases before us and join Parts I and II of the Court's opinion. I also join Parts III–A and III–C for reasons provided below. My views do not allow me to join the balance of the opinion by THE CHIEF JUSTICE, which seems to me to be inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Pro-

tection Clause. JUSTICE BREYER's dissenting opinion, on the other hand, rests on what in my respectful submission is a misuse and mistaken interpretation of our precedents. This leads it to advance propositions that, in my view, are both erroneous and in fundamental conflict with basic equal protection principles. As a consequence, this separate opinion is necessary to set forth my conclusions in the two cases before the Court.

I

The opinion of the Court and JUSTICE BREYER's dissenting opinion (hereinafter dissent) describe in detail the history of integration efforts in Louisville and Seattle. These plans classify individuals by race and allocate benefits and burdens on that basis; and as a result, they are to be subjected to strict scrutiny. See *Johnson* v. *California*, 543 U. S. 499, 505–506 (2005); *ante*, at 720. The dissent finds that the school districts have identified a compelling interest in increasing diversity, including for the purpose of avoiding racial isolation. See *post*, at 838–845. The plurality, by contrast, does not acknowledge that the school districts have identified a compelling interest here. See *ante*, at 725–733. For this reason, among others, I do not join Parts III–B and IV. Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.

It is well established that when a governmental policy is subjected to strict scrutiny, "the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'" *Johnson*, *supra*, at 505 (quoting *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227 (1995)). "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493 (1989) (plurality opinion). And the inquiry

into less restrictive alternatives demanded by the narrow tailoring analysis requires in many cases a thorough understanding of how a plan works. The government bears the burden of justifying its use of individual racial classifications. As part of that burden it must establish, in detail, how decisions based on an individual student's race are made in a challenged governmental program. The Jefferson County Board of Education fails to meet this threshold mandate.

Petitioner Crystal Meredith challenges the district's decision to deny her son Joshua McDonald a requested transfer for his kindergarten enrollment. The district concedes it denied his request "under the guidelines," which is to say, on the basis of Joshua's race. Brief for Respondents in No. 05–915, p. 10; see also App. in No. 05–915, p. 97. Yet the district also maintains that the guidelines do not apply to "kindergartens," Brief for Respondents in No. 05–915, at 4, and it fails to explain the discrepancy. Resort to the record, including the parties' stipulation of facts, further confuses the matter. See App. in No. 05–915, at 43 ("Transfer applications can be denied because of lack of available space or, for students in grades other than Primary 1 (kindergarten), the racial guidelines in the District's current student assignment plan"); *id.*, at 29 ("The student assignment plan does not apply to . . . students in Primary 1"); see also Stipulation of Facts in No. 3:02–CV–00620–JGH; Doc. 32, Exh. 44, p. 6 (2003–04 Jefferson County Public Schools Elementary Student Assignment Application, Section B) ("Assignment is made to a school for Primary 1 (Kindergarten) through Grade Five as long as racial guidelines are maintained. If the Primary 1 (Kindergarten) placement does not enhance racial balance, a new application must be completed for Primary 2 (Grade One)").

The discrepancy identified is not some simple and straightforward error that touches only upon the peripheries of the district's use of individual racial classifications. To the contrary, Jefferson County in its briefing has explained how and

when it employs these classifications only in terms so broad and imprecise that they cannot withstand strict scrutiny. See, *e. g.*, Brief for Respondents in No. 05–915, at 4–10. While it acknowledges that racial classifications are used to make certain assignment decisions, it fails to make clear, for example, who makes the decisions; what if any oversight is employed; the precise circumstances in which an assignment decision will or will not be made on the basis of race; or how it is determined which of two similarly situated children will be subjected to a given race-based decision. See *ibid.;* see also App. in No. 05–915, at 38, 42 (indicating that decisions are "based on . . . the racial guidelines" without further explanation); *id.*, at 81 (setting forth the blanket mandate that "[s]chools shall work cooperatively with each other and with central office to ensure that enrollment at all schools [in question] is within the racial guidelines annually and to encourage that the enrollment at all schools progresses toward the midpoint of the guidelines"); *id.*, at 43, 76–77, 81–83; *McFarland* v. *Jefferson Cty. Public Schools*, 330 F. Supp. 2d 834, 837–845, 855–862 (WD Ky. 2004).

When litigation, as here, involves a "complex, comprehensive plan that contains multiple strategies for achieving racially integrated schools," Brief for Respondents in No. 05–915, at 4, these ambiguities become all the more problematic in light of the contradictions and confusions that result. Compare, *e. g.*, App. in No. 05–915, at 37 ("Each [Jefferson County] school . . . has a designated geographic attendance area, which is called the 'resides area' of the school[, and each] such school is the 'resides school' for those students whose parent's or guardian's residence address is within the school's geographic attendance area"); *id.*, at 82 ("All elementary students . . . shall be assigned to the school which serves the area in which they reside"); and Brief for Respondents in No. 05–915, at 5 ("There are no selection criteria for admission to [an elementary school student's] resides school, except attainment of the appropriate age and completion of

the previous grade"), with App. in No. 05–915, at 38 ("Decisions to assign students to schools within each cluster are based on available space within the [elementary] schools and the racial guidelines in the District's current student assignment plan"); *id.*, at 82 (acknowledging that a student may not be assigned to his or her resides school if it "has reached . . . the extremes of the racial guidelines").

One can attempt to identify a construction of Jefferson County's student assignment plan that, at least as a logical matter, complies with these competing propositions; but this does not remedy the underlying problem. Jefferson County fails to make clear to this Court—even in the limited respects implicated by Joshua's initial assignment and transfer denial—whether in fact it relies on racial classifications in a manner narrowly tailored to the interest in question, rather than in the far-reaching, inconsistent, and ad hoc manner that a less forgiving reading of the record would suggest. When a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State.

As for the Seattle case, the school district has gone further in describing the methods and criteria used to determine assignment decisions on the basis of individual racial classifications. See, *e. g.*, Brief for Respondents in No. 05–908, pp. 5–11. The district, nevertheless, has failed to make an adequate showing in at least one respect. It has failed to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as "white," it has employed the crude racial categories of "white" and "non-white" as the basis for its assignment decisions. See, *e. g.*, *id.*, at 1–11.

The district has identified its purposes as follows: "(1) to promote the educational benefits of diverse school enrollments; (2) to reduce the potentially harmful effects of racial isolation by allowing students the opportunity to opt out of racially isolated schools; and (3) to make sure that racially segregated housing patterns did not prevent non-white

students from having equitable access to the most popular over-subscribed schools." *Id.*, at 19. Yet the school district does not explain how, in the context of its diverse student population, a blunt distinction between "white" and "non-white" furthers these goals. As the Court explains, "a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not." *Ante,* at 724; see also Brief for United States as *Amicus Curiae* in No. 05–908, pp. 13–14. Far from being narrowly tailored to its purposes, this system threatens to defeat its own ends, and the school district has provided no convincing explanation for its design. Other problems are evident in Seattle's system, but there is no need to address them now. As the district fails to account for the classification system it has chosen, despite what appears to be its ill fit, Seattle has not shown its plan to be narrowly tailored to achieve its own ends; and thus it fails to pass strict scrutiny.

II

Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does.

This is by way of preface to my respectful submission that parts of the opinion by THE CHIEF JUSTICE imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest gov-

ernment has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," *ante*, at 748, is not sufficient to decide these cases. Fifty years of experience since *Brown* v. *Board of Education*, 347 U. S. 483 (1954), should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown*'s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

The statement by Justice Harlan that "[o]ur Constitution is color-blind" was most certainly justified in the context of his dissent in *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896). The Court's decision in that case was a grievous error it took far too long to overrule. *Plessy*, of course, concerned official classification by race applicable to all persons who sought to use railway carriages. And, as an aspiration, Justice Harlan's axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.

In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. Cf. *Grutter* v. *Bollinger*, 539 U. S. 306 (2003); *id.*, at 387–388 (KENNEDY, J., dissenting). If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a

general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible. See *Bush* v. *Vera*, 517 U. S. 952, 958 (1996) (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . Electoral district lines are 'facially race neutral,' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race'" (quoting *Adarand*, 515 U. S., at 213)). Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.

Each respondent has asserted that its assignment of individual students by race is permissible because there is no other way to avoid racial isolation in the school districts. Yet, as explained, each has failed to provide the support necessary for that proposition. Cf. *Croson*, 488 U. S., at 501

("The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis"). And individual racial classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest. See *id.*, at 519 (KENNEDY, J., concurring in part and concurring in judgment).

In the cases before us it is noteworthy that the number of students whose assignment depends on express racial classifications is limited. I join Part III–C of the Court's opinion because I agree that in the context of these plans, the small number of assignments affected suggests that the schools could have achieved their stated ends through different means. These include the facially race-neutral means set forth above or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component. The latter approach would be informed by *Grutter*, though of course the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools.

III

The dissent rests on the assumptions that these sweeping race-based classifications of persons are permitted by existing precedents; that its confident endorsement of race categories for each child in a large segment of the community presents no danger to individual freedom in other, prospective realms of governmental regulation; and that the racial classifications used here cause no hurt or anger of the type the Constitution prevents. Each of these premises is, in my respectful view, incorrect.

A

The dissent's reliance on this Court's precedents to justify the explicit, sweeping, classwide racial classifications at issue

here is a misreading of our authorities that, it appears to me, tends to undermine well-accepted principles needed to guard our freedom. And in his critique of that analysis, I am in many respects in agreement with THE CHIEF JUSTICE. The conclusions he has set forth in Part III–A of the Court's opinion are correct, in my view, because the compelling interests implicated in the cases before us are distinct from the interests the Court has recognized in remedying the effects of past intentional discrimination and in increasing diversity in higher education. See *ante*, at 720–723. As the Court notes, we recognized the compelling nature of the interest in remedying past intentional discrimination in *Freeman* v. *Pitts*, 503 U. S. 467, 494 (1992), and of the interest in diversity in higher education in *Grutter*. At the same time, these compelling interests, in my view, do help inform the present inquiry. And to the extent the plurality opinion can be interpreted to foreclose consideration of these interests, I disagree with that reasoning.

As to the dissent, the general conclusions upon which it relies have no principled limit and would result in the broad acceptance of governmental racial classifications in areas far afield from schooling. The dissent's permissive strict scrutiny (which bears more than a passing resemblance to rational-basis review) could invite widespread governmental deployment of racial classifications. There is every reason to think that, if the dissent's rationale were accepted, Congress, assuming an otherwise proper exercise of its spending authority or commerce power, could mandate either the Seattle or the Jefferson County plans nationwide. There seems to be no principled rule, moreover, to limit the dissent's rationale to the context of public schools. The dissent emphasizes local control, see *post*, at 848–849, the unique history of school desegregation, see *post*, at 804, and the fact that these plans make less use of race than prior plans, see *post*, at 857–858, but these factors seem more rhetorical than integral to the analytical structure of the opinion.

This brings us to the dissent's reliance on the Court's opinions in *Gratz* v. *Bollinger*, 539 U. S. 244 (2003), and *Grutter*, 539 U. S. 306. If today's dissent said it was adhering to the views expressed in the separate opinions in *Gratz* and *Grutter*, see *Gratz*, 539 U. S., at 281 (BREYER, J., concurring in judgment); *id.*, at 282 (STEVENS, J., dissenting); *id.*, at 291 (SOUTER, J., dissenting); *id.*, at 298 (GINSBURG, J., dissenting); *Grutter*, *supra*, at 344 (GINSBURG, J., concurring), that would be understandable, and likely within the tradition—to be invoked, in my view, in rare instances—that permits us to maintain our own positions in the face of *stare decisis* when fundamental points of doctrine are at stake. See, *e. g.*, *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 770 (2002) (STEVENS, J., dissenting). To say, however, that we must ratify the racial classifications here at issue based on the majority opinions in *Gratz* and *Grutter* is, with all respect, simply baffling.

Gratz involved a system where race was not the entire classification. The procedures in *Gratz* placed much less reliance on race than do the plans at issue here. The issue in *Gratz* arose, moreover, in the context of college admissions where students had other choices and precedent supported the proposition that First Amendment interests give universities particular latitude in defining diversity. See *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 312–314 (1978) (opinion of Powell, J.). Even so the race factor was found to be invalid. *Gratz*, *supra*, at 251. If *Gratz* is to be the measure, the racial classification systems here are *a fortiori* invalid. If the dissent were to say that college cases are simply not applicable to public school systems in kindergarten through high school, this would seem to me wrong, but at least an arguable distinction. Under no fair reading, though, can the majority opinion in *Gratz* be cited as authority to sustain the racial classifications under consideration here.

The same must be said for the controlling opinion in *Grutter*. There the Court sustained a system that, it found, was flexible enough to take into account "all pertinent elements of diversity," 539 U. S., at 341 (internal quotation marks omitted), and considered race as only one factor among many, *id.*, at 340. Seattle's plan, by contrast, relies upon a mechanical formula that has denied hundreds of students their preferred schools on the basis of three rigid criteria: placement of siblings, distance from schools, and race. If those students were considered for a whole range of their talents and school needs with race as just one consideration, *Grutter* would have some application. That, though, is not the case. The only support today's dissent can draw from *Grutter* must be found in its various separate opinions, not in the opinion filed for the Court.

B

To uphold these programs the Court is asked to brush aside two concepts of central importance for determining the validity of laws and decrees designed to alleviate the hurt and adverse consequences resulting from race discrimination. The first is the difference between *de jure* and *de facto* segregation; the second, the presumptive invalidity of a State's use of racial classifications to differentiate its treatment of individuals.

In the immediate aftermath of *Brown* the Court addressed other instances where laws and practices enforced *de jure* segregation. See, *e. g.*, *Loving* v. *Virginia*, 388 U. S. 1 (1967) (marriage); *New Orleans City Park Improvement Assn.* v. *Detiege*, 358 U. S. 54 (1958) *(per curiam)* (public parks); *Gayle* v. *Browder*, 352 U. S. 903 (1956) *(per curiam)* (buses); *Holmes* v. *Atlanta*, 350 U. S. 879 (1955) *(per curiam)* (golf courses); *Mayor and City Council of Baltimore* v. *Dawson*, 350 U. S. 877 (1955) *(per curiam)* (beaches). But with reference to schools, the effect of the legal wrong proved most difficult to correct. To remedy the wrong, school districts that had been segregated by law had no choice, whether

under court supervision or pursuant to voluntary desegregation efforts, but to resort to extraordinary measures including individual student and teacher assignment to schools based on race. See, *e. g., Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 8–10 (1971); see also *Croson*, 488 U. S., at 519 (KENNEDY, J., concurring in part and concurring in judgment) (noting that racial classifications "may be the only adequate remedy after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause"). So it was, as the dissent observes, see *post*, at 814–815, that Louisville classified children by race in its school assignment and busing plan in the 1970's.

Our cases recognized a fundamental difference between those school districts that had engaged in *de jure* segregation and those whose segregation was the result of other factors. School districts that had engaged in *de jure* segregation had an affirmative constitutional duty to desegregate; those that were *de facto* segregated did not. Compare *Green* v. *School Bd. of New Kent Cty.*, 391 U. S. 430, 437–438 (1968), with *Milliken* v. *Bradley*, 418 U. S. 717, 745 (1974). The distinctions between *de jure* and *de facto* segregation extended to the remedies available to governmental units in addition to the courts. For example, in *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 274 (1986), the plurality noted: "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." The Court's decision in *Croson*, *supra*, reinforced the difference between the remedies available to redress *de facto* and *de jure* discrimination:

> "To accept [a] claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group. The dream

> of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." *Id.*, at 505–506.

From the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law. The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices.

Yet, like so many other legal categories that can overlap in some instances, the constitutional distinction between *de jure* and *de facto* segregation has been thought to be an important one. It must be conceded its primary function in school cases was to delimit the powers of the Judiciary in the fashioning of remedies. See, *e. g.*, *Milliken*, *supra*, at 746. The distinction ought not to be altogether disregarded, however, when we come to that most sensitive of all racial issues, an attempt by the government to treat whole classes of persons differently based on the government's systematic classification of each individual by race. There, too, the distinction serves as a limit on the exercise of a power that reaches to the very verge of constitutional authority. Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake. The allocation of governmental burdens and benefits, contentious under any circumstances, is even more divisive when allocations are made on the basis of individual racial classifications. See, *e. g.*, *Bakke*, 438 U. S. 265; *Adarand*, 515 U. S. 200.

Notwithstanding these concerns, allocation of benefits and burdens through individual racial classifications was found

sometimes permissible in the context of remedies for *de jure* wrong. Where there has been *de jure* segregation, there is a cognizable legal wrong, and the courts and legislatures have broad power to remedy it. The remedy, though, was limited in time and limited to the wrong. The Court has allowed school districts to remedy their prior *de jure* segregation by classifying individual students based on their race. See *North Carolina Bd. of Ed.* v. *Swann*, 402 U. S. 43, 45–46 (1971). The limitation of this power to instances where there has been *de jure* segregation serves to confine the nature, extent, and duration of governmental reliance on individual racial classifications.

The cases here were argued upon the assumption, and come to us on the premise, that the discrimination in question did not result from *de jure* actions. And when *de facto* discrimination is at issue our tradition has been that the remedial rules are different. The State must seek alternatives to the classification and differential treatment of individuals by race, at least absent some extraordinary showing not present here.

C

The dissent refers to an opinion filed by Judge Kozinski in one of the cases now before us, and that opinion relied upon an opinion filed by Chief Judge Boudin in a case presenting an issue similar to the one here. See *post*, at 836 (citing 426 F. 3d 1162, 1193–1196 (CA9 2005) (concurring opinion), in turn citing *Comfort* v. *Lynn School Comm.*, 418 F. 3d 1, 27, 29 (CA1 2005) (Boudin, C. J., concurring)). Though this may oversimplify the matter a bit, one of the main concerns underlying those opinions was this: If it is legitimate for school authorities to work to avoid racial isolation in their schools, must they do so only by indirection and general policies? Does the Constitution mandate this inefficient result? Why may the authorities not recognize the problem in candid fashion and solve it altogether through resort to direct assignments based on student racial classifications? So, the argu-

ment proceeds, if race is the problem, then perhaps race is the solution.

The argument ignores the dangers presented by individual classifications, dangers that are not as pressing when the same ends are achieved by more indirect means. When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process. On the other hand race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree.

The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward. And if this is a frustrating duality of the Equal Protection Clause it simply reflects the duality of our history and our attempts to promote freedom in a world that sometimes seems set against it. Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.

* * *

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a

compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand.

That statement, to be sure, invites this response: A sense of stigma may already become the fate of those separated out by circumstances beyond their immediate control. But to this the replication must be: Even so, measures other than differential treatment based on racial typing of individuals first must be exhausted.

The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds. Due to a variety of factors—some influenced by government, some not—neighborhoods in our communities do not reflect the diversity of our Nation as a whole. Those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications.

With this explanation I concur in the judgment of the Court.

JUSTICE STEVENS, dissenting.

While I join JUSTICE BREYER's eloquent and unanswerable dissent in its entirety, it is appropriate to add these words.

There is a cruel irony in THE CHIEF JUSTICE's reliance on our decision in *Brown* v. *Board of Education*, 349 U. S. 294

(1955). The first sentence in the concluding paragraph of his opinion states: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin." *Ante*, at 747. This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the la[w], . . . forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread."[1] THE CHIEF JUSTICE fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.[2] In this and other ways, THE CHIEF JUSTICE rewrites the history of one of this Court's most important decisions. Compare *ante*, at 746 ("history will be heard"), with *Brewer* v. *Quarterman*, 550 U. S. 286, 275 (2007) (ROBERTS, C. J., dissenting) ("It is a familiar adage that history is written by the victors").

THE CHIEF JUSTICE rejects the conclusion that the racial classifications at issue here should be viewed differently than others, because they do not impose burdens on one race alone and do not stigmatize or exclude.[3] The only justification for

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[1] Le Lys Rouge (The Red Lily) 95 (W. Stephens transl. 6th ed. 1922).

[2] See, *e. g.*, J. Wilkinson, From *Brown* to *Bakke* 11 (1979) ("Everyone understands that *Brown* v. *Board of Education* helped deliver the Negro from over three centuries of legal bondage"); Black, The Lawfulness of the Segregation Decisions, 69 Yale L. J. 421, 424–425 (1960) ("History, too, tells us that segregation was imposed on one race by the other race; consent was not invited or required. Segregation in the South grew up and is kept going because and only because the white race has wanted it that way—an incontrovertible fact which in itself hardly consorts with equality").

[3] I have long adhered to the view that a decision to exclude a member of a minority because of his race is fundamentally different from a decision to include a member of a minority for that reason. See, *e. g.*, *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 243, 248, n. 6 (1995) (STEVENS, J., dissenting); *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 316 (1986) (same). This distinction is critically important in the context of education. While the focus of our opinions is often on the benefits that minority schoolchildren receive from an integrated education, see, *e. g.*, *ante*, at 761 (THOMAS, J., concurring), children of *all* races benefit from integrated

refusing to acknowledge the obvious importance of that difference is the citation of a few recent opinions—none of which even approached unanimity—grandly proclaiming that all racial classifications must be analyzed under "strict scrutiny." See, *e. g.*, *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227 (1995). Even today, two of our wisest federal judges have rejected such a wooden reading of the Equal Protection Clause in the context of school integration. See 426 F. 3d 1162, 1193–1196 (CA9 2005) (Kozinski, J., concurring); *Comfort* v. *Lynn School Comm.*, 418 F. 3d 1, 27–29 (CA1 2005) (Boudin, C. J., concurring). The Court's misuse of the three-tiered approach to equal protection analysis merely reconfirms my own view that there is only one such Clause in the Constitution. See *Craig* v. *Boren*, 429 U. S. 190, 211 (1976) (concurring opinion).[4]

If we look at cases decided during the interim between *Brown* and *Adarand*, we can see how a rigid adherence to

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classrooms and playgrounds, see *Wygant*, 476 U. S., at 316 ("[T]he fact that persons of different races do, indeed, have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it").

[4] THE CHIEF JUSTICE twice cites my dissent in *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980). See *ante*, at 720, 730–731. In that case, I stressed the importance of confining a remedy for *past* wrongdoing to the members of the injured class. See 448 U. S., at 539. The present cases, unlike *Fullilove* but like our decision in *Wygant*, 476 U. S. 267, require us to "ask whether the Board[s'] action[s] advanc[e] the public interest in educating children for the *future*," *id.*, at 313 (STEVENS, J., dissenting) (emphasis added). See *ibid.* ("In my opinion, it is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future"). See also *Adarand*, 515 U. S., at 261–262 (STEVENS, J., dissenting) ("This program, then, if in part a remedy for past discrimination, is most importantly a forward-looking response to practical problems faced by minority subcontractors").

tiers of scrutiny obscures *Brown*'s clear message. Perhaps the best example is provided by our approval of the decision of the Supreme Judicial Court of Massachusetts in 1967 upholding a state statute mandating racial integration in that State's school system. See *School Comm. of Boston* v. *Board of Education*, 352 Mass. 693, 227 N. E. 2d 729.[5] Rejecting arguments comparable to those that the plurality accepts today,[6] that court noted: "It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based

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[5] THE CHIEF JUSTICE states that the Massachusetts racial imbalance Act did not require express classifications. See *ante*, at 739, n. 16. This is incorrect. The Massachusetts Supreme Judicial Court expressly stated:

"The racial imbalance act requires the school committee of every municipality annually to submit statistics showing the percentage of nonwhite pupils in all public schools and in each school. Whenever the board finds that racial imbalance exists in a public school, it shall give written notice to the appropriate school committee, which shall prepare a plan to eliminate imbalance and file a copy with the board. 'The term "racial imbalance" refers to a ratio between nonwhite and other students in public schools which is sharply out of balance with the racial composition of the society in which nonwhite children study, serve and work. For the purpose of this section, racial imbalance shall be deemed to exist when the per cent of nonwhite students in any public school is in excess of fifty per cent of the total number of students in such school.'" 352 Mass., at 695, 227 N. E. 2d, at 731.

[6] Compare *ante*, at 746 ("It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954"), with Juris. Statement in *School Comm. of Boston* v. *Board of Education*, O. T. 1967, No. 759, p. 11 ("It is implicit in *Brown* v. *Board of Education*[,] 347 U. S. 483 [(1954)], that color or race is a constitutionally impermissible standard for the assignment of school children to public schools. We construe *Brown* as endorsing Mr. Justice Harlan's classical statement in *Plessy* v. *Ferguson*, 163 U. S. 537, 559 [(1896) (dissenting opinion)]: 'Our Constitution is color-blind, and neither knows nor tolerates classes among citizens'").

on race, founder on unsuspected shoals in the Fourteenth Amendment." *Id.*, at 698, 227 N. E. 2d, at 733 (footnote omitted).

Invoking our mandatory appellate jurisdiction,[7] the Boston plaintiffs prosecuted an appeal in this Court. Our ruling on the merits simply stated that the appeal was "dismissed for want of a substantial federal question." *School Comm. of Boston* v. *Board of Education*, 389 U. S. 572 (1968) *(per curiam)*. That decision not only expressed our appraisal of the merits of the appeal, but it constitutes a precedent that the Court overrules today. The subsequent statements by the unanimous Court in *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 16 (1971), by then-Justice Rehnquist in chambers in *Bustop, Inc.* v. *Los Angeles Bd. of Ed.*, 439 U. S. 1380, 1383 (1978), and by the host of state-court decisions cited by JUSTICE BREYER, see *post*, at 825–828,[8] were

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[7] In 1968 our mandatory jurisdiction was defined by the provision of the 1948 Judicial Code then codified at 28 U. S. C. § 1257, see 62 Stat. 929; that provision was repealed in 1988, see 102 Stat. 662.

[8] For example, prior to our decision in *School Comm. of Boston*, the Illinois Supreme Court had issued an unpublished opinion holding unconstitutional a similar statute aimed at eliminating racial imbalance in public schools. See Juris. Statement in *School Comm. of Boston* v. *Board of Education*, O. T. 1967, No. 759, at 9 ("Unlike the Massachusetts Court, the Illinois Supreme Court has recently held its law to eliminate racial imbalance unconstitutional on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment"); *ibid.*, n. 1. However, shortly after we dismissed the Massachusetts suit for want of a substantial federal question, the Illinois Supreme Court reversed course and upheld its statute in the published decision that JUSTICE BREYER extensively quotes in his dissent. See *Tometz* v. *Board of Ed., Waukegan City School Dist. No. 61*, 39 Ill. 2d 593, 237 N. E. 2d 498 (1968). In so doing, the Illinois Supreme Court acted in explicit reliance on our decision in *School Comm. of Boston*. See 39 Ill. 2d, at 599–600, 237 N. E. 2d, at 502 ("Too, the United States Supreme Court on January 15, 1968, dismissed an appeal in *School Committee of Boston* v. *Board of Education*, (Mass. 1967) 227 N. E. 2d 729, which challenged the statute providing for elimination of racial imbalance in public schools 'for want of a substantial federal question.' 389 U. S. 572").

fully consistent with that disposition. Unlike today's decision, they were also entirely loyal to *Brown*.

The Court has changed significantly since it decided *School Comm. of Boston* in 1968. It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision.

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

These cases consider the longstanding efforts of two local school boards to integrate their public schools. The school board plans before us resemble many others adopted in the last 50 years by primary and secondary schools throughout the Nation. All of those plans represent local efforts to bring about the kind of racially integrated education that *Brown* v. *Board of Education*, 347 U. S. 483 (1954), long ago promised—efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake. This Court has recognized that the public interests at stake in such cases are "compelling." We have approved of "narrowly tailored" plans that are no less race conscious than the plans before us. And we have understood that the Constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so.

The plurality pays inadequate attention to this law, to past opinions' rationales, their language, and the contexts in which they arise. As a result, it reverses course and reaches the wrong conclusion. In doing so, it distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought

to make a reality. This cannot be justified in the name of the Equal Protection Clause.

I

Facts

The historical and factual context in which these cases arise is critical. In *Brown*, this Court held that the government's segregation of schoolchildren by race violates the Constitution's promise of equal protection. The Court emphasized that "education is perhaps the most important function of state and local governments." 347 U. S., at 493. And it thereby set the Nation on a path toward public school integration.

In dozens of subsequent cases, this Court told school districts previously segregated by law what they must do at a minimum to comply with *Brown*'s constitutional holding. The measures required by those cases often included race-conscious practices, such as mandatory busing and race-based restrictions on voluntary transfers. See, *e. g.*, *Columbus Bd. of Ed.* v. *Penick*, 443 U. S. 449, 455, n. 3 (1979); *Davis* v. *Board of School Comm'rs of Mobile Cty.*, 402 U. S. 33, 37–38 (1971); *Green* v. *School Bd. of New Kent Cty.*, 391 U. S. 430, 441–442 (1968).

Beyond those minimum requirements, the Court left much of the determination of how to achieve integration to the judgment of local communities. Thus, in respect to race-conscious desegregation measures that the Constitution *permitted*, but did not *require* (measures similar to those at issue here), this Court unanimously stated:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within*

> *the broad discretionary powers of school authorities.*" *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 16 (1971) (emphasis added).

As a result, different districts—some acting under court decree, some acting in order to avoid threatened lawsuits, some seeking to comply with federal administrative orders, some acting purely voluntarily, some acting after federal courts had dissolved earlier orders—adopted, modified, and experimented with hosts of different kinds of plans, including race-conscious plans, all with a similar objective: greater racial integration of public schools. See F. Welch & A. Light, New Evidence on School Desegregation, p. v (1987) (hereinafter Welch) (prepared for the Commission on Civil Rights) (reviewing a sample of 125 school districts, constituting 20% of national public school enrollment, that had experimented with nearly 300 different plans over 18 years). The techniques that different districts have employed range "from voluntary transfer programs to mandatory reassignment." *Id.*, at 21. And the design of particular plans has been "dictated by both the law and the specific needs of the district." *Ibid.*

Overall these efforts brought about considerable racial integration. More recently, however, progress has stalled. Between 1968 and 1980, the number of black children attending a school where minority children constituted more than half of the school fell from 77% to 63% in the Nation (from 81% to 57% in the South) but then reversed direction by the year 2000, rising from 63% to 72% in the Nation (from 57% to 69% in the South). Similarly, between 1968 and 1980, the number of black children attending schools that were more than 90% minority fell from 64% to 33% in the Nation (from 78% to 23% in the South), but that too reversed direction, rising by the year 2000 from 33% to 37% in the Nation (from 23% to 31% in the South). As of 2002, almost 2.4 million students, or over 5% of all public school enrollment, attended schools with a white population of less than 1%. Of these,

2.3 million were black and Latino students, and only 72,000 were white. Today, more than one in six black children attend a school that is 99%–100% minority. See Appendix A, *infra*. In light of the evident risk of a return to school systems that are in fact (though not in law) resegregated, many school districts have felt a need to maintain or to extend their integration efforts.

The upshot is that myriad school districts operating in myriad circumstances have devised myriad plans, often with race-conscious elements, all for the sake of eradicating earlier school segregation, bringing about integration, or preventing retrogression. Seattle and Louisville are two such districts, and the histories of their present plans set forth typical school integration stories.

I describe those histories at length in order to highlight three important features of these cases. First, the school districts' plans serve "compelling interests" and are "narrowly tailored" on any reasonable definition of those terms. Second, the distinction between *de jure* segregation (caused by school systems) and *de facto* segregation (caused, *e. g.*, by housing patterns or generalized societal discrimination) is meaningless in the present context, thereby dooming the plurality's endeavor to find support for its views in that distinction. Third, real-world efforts to substitute racially diverse for racially segregated schools (however caused) are complex, to the point where the Constitution cannot plausibly be interpreted to rule out categorically all local efforts to use means that are "conscious" of the race of individuals.

In both Seattle and Louisville, the local school districts began with schools that were highly segregated in fact. In both cities, plaintiffs filed lawsuits claiming unconstitutional segregation. In Louisville, a Federal District Court found that school segregation reflected pre-*Brown* state laws separating the races. In Seattle, the plaintiffs alleged that school segregation unconstitutionally reflected not only generalized societal discrimination and residential housing pat-

terns, but also *school board policies and actions* that had helped to create, maintain, and aggravate racial segregation. In Louisville, a federal court entered a remedial decree. In Seattle, the parties settled after the school district pledged to undertake a desegregation plan. In both cities, the school boards adopted plans designed to achieve integration by bringing about more racially diverse schools. In each city, the school board modified its plan several times in light of, for example, hostility to busing, the threat of resegregation, and the desirability of introducing greater student choice. And in each city, the school boards' plans have evolved over time in ways that progressively *diminish* the plans' use of explicit race-conscious criteria.

The histories that follow set forth these basic facts. They are based upon numerous sources, which for ease of exposition I have cataloged, along with their corresponding citations, at Appendix B, *infra*.

A

Seattle

1. Segregation, 1945 to 1956. During and just after World War II, significant numbers of black Americans began to make Seattle their home. Few black residents lived outside the central section of the city. Most worked at unskilled jobs. Although black students made up about 3% of the total Seattle population in the mid-1950's, nearly all black children attended schools where a majority of the population was minority. Elementary schools in central Seattle were between 60% and 80% black; Garfield, the central district high school, was more than 50% minority; schools outside the central and southeastern sections of Seattle were virtually all white.

2. Preliminary Challenges, 1956 to 1969. In 1956, a memo for the Seattle School Board reported that school segregation reflected not only segregated housing patterns but also school board policies that permitted white students to

transfer out of black schools while restricting the transfer of black students into white schools. In 1958, black parents whose children attended Harrison Elementary School (with a black student population of over 75%) wrote the Seattle board, complaining that the "'boundaries for the Harrison Elementary School were not set in accordance with the long-established standards of the School District . . . but were arbitrarily set with an end to excluding colored children from McGilvra School, which is adjacent to the Harrison school district.'"

In 1963, at the insistence of the National Association for the Advancement of Colored People (NAACP) and other community groups, the school board adopted a new race-based transfer policy. The new policy added an explicitly racial criterion: If a place exists in a school, then, irrespective of other transfer criteria, a white student may transfer to a predominantly black school, and a black student may transfer to a predominantly white school.

At that time, one high school, Garfield, was about two-thirds minority; eight high schools were virtually all white. In 1963, the transfer program's first year, 239 black students and 8 white students transferred. In 1969, about 2,200 (of 10,383 total) of the district's black students and about 400 of the district's white students took advantage of the plan. For the next decade, annual program transfers remained at approximately this level.

3. The NAACP's First Legal Challenge and Seattle's Response, 1966 to 1977. In 1966, the NAACP filed a federal lawsuit against the school board, claiming that the board had "unlawfully and unconstitutionally" "establish[ed]" and "maintain[ed]" a system of "racially segregated public schools." The complaint said that 77% of black public elementary school students in Seattle attended 9 of the city's 86 elementary schools and that 23 of the remaining schools had no black students at all. Similarly, of the 1,461 black stu-

dents enrolled in the 12 senior high schools in Seattle, 1,151 (or 78.8%) attended 3 senior high schools, and 900 (61.6%) attended a single school, Garfield.

The complaint charged that the school board had brought about this segregated system in part by "mak[ing] and enforc[ing]" certain "rules and regulations," in part by "drawing . . . boundary lines" and "executing school attendance policies" that would create and maintain "predominantly Negro or non-white schools," and in part by building schools "in such a manner as to restrict the Negro plaintiffs and the class they represent to predominantly Negro or non-white schools." The complaint also charged that the board discriminated in assigning teachers.

The board responded to the lawsuit by introducing a plan that required race-based transfers and mandatory busing. The plan created three new middle schools at three school buildings in the predominantly white north end. It then created a "mixed" student body by assigning to those schools students who would otherwise attend predominantly white, or predominantly black, schools elsewhere. It used explicitly racial criteria in making these assignments (*i. e.*, it deliberately assigned to the new middle schools black students, not white students, from the black schools and white students, not black students, from the white schools). And it used busing to transport the students to their new assignments. The plan provoked considerable local opposition. Opponents brought a lawsuit. But eventually a state court found that the mandatory busing was lawful.

In 1976–1977, the plan involved the busing of about 500 middle school students (300 black students and 200 white students). Another 1,200 black students and 400 white students participated in the previously adopted voluntary transfer program. Thus about 2,000 students out of a total district population of about 60,000 students were involved in one or the other transfer program. At that time, about

20% or 12,000 of the district's students were black. And the board continued to describe 26 of its 112 schools as "segregated."

4. The NAACP's Second Legal Challenge, 1977. In 1977, the NAACP filed another legal complaint, this time with the federal Department of Health, Education, and Welfare's Office for Civil Rights (OCR). The complaint alleged that the Seattle School Board had created or perpetuated unlawful racial segregation through, *e. g.*, certain school-transfer criteria, a construction program that needlessly built new schools in white areas, district line-drawing criteria, the maintenance of inferior facilities at black schools, the use of explicit racial criteria in the assignment of teachers and other staff, and a general pattern of delay in respect to the implementation of promised desegregation efforts.

The OCR and the school board entered into a formal settlement agreement. The agreement required the board to implement what became known as the "Seattle Plan."

5. The Seattle Plan: Mandatory Busing, 1978 to 1988. The board began to implement the Seattle Plan in 1978. This plan labeled "racially imbalanced" any school at which the percentage of black students exceeded by more than 20% the minority population of the school district as a whole. It applied that label to 26 schools, including 4 high schools—Cleveland (72.8% minority), Franklin (76.6% minority), Garfield (78.4% minority), and Rainier Beach (58.9% minority). The plan paired (or "triaded") "imbalanced" black schools with "imbalanced" white schools. It then placed some grades (say, third and fourth grades) at one school building and other grades (say, fifth and sixth grades) at the other school building. And it thereby required, for example, all fourth grade students from the previously black and previously white schools first to attend together what would now be a "mixed" fourth grade at one of the school buildings and then the next year to attend what would now be a "mixed" fifth grade at the other school building.

At the same time, the plan provided that a previous "black" school would remain about 50% black, while a previous "white" school would remain about two-thirds white. It was consequently necessary to decide with some care *which* students would attend the new "mixed" grade. For this purpose, administrators cataloged the racial makeup of each neighborhood housing block. The school district met its percentage goals by assigning to the new "mixed" school an appropriate number of "black" housing blocks and "white" housing blocks. At the same time, transport from house to school involved extensive busing, with about half of all students attending a school other than the one closest to their home.

The Seattle Plan achieved the school integration that it sought. Just prior to the plan's implementation, for example, 4 of Seattle's 11 high schools were "imbalanced," *i. e.*, almost exclusively "black" or almost exclusively "white." By 1979, only two were out of "balance." By 1980, only Cleveland remained out of "balance" (as the board defined it) and that by a mere two students.

Nonetheless, the Seattle Plan, due to its busing, provoked serious opposition within the State. See generally *Washington* v. *Seattle School Dist. No. 1*, 458 U. S. 457, 461–466 (1982). Thus, Washington state voters enacted an initiative that amended state law to require students to be assigned to the schools closest to their homes. *Id.*, at 462. The Seattle School Board challenged the constitutionality of the initiative. *Id.*, at 464. This Court then held that the initiative—which would have prevented the Seattle Plan from taking effect—violated the Fourteenth Amendment. *Id.*, at 470.

6. Student Choice, 1988 to 1998. By 1988, many white families had left the school district, and many Asian families had moved in. The public school population had fallen from about 100,000 to less than 50,000. The racial makeup of the school population amounted to 43% white, 24% black, and 23% Asian or Pacific Islander, with Hispanics and Native

Americans making up the rest. The cost of busing, the harm that members of all racial communities feared that the Seattle Plan caused, the desire to attract white families back to the public schools, and the interest in providing greater school choice led the board to abandon busing and to substitute a new student assignment policy that resembles the plan now before us.

The new plan permitted each student to choose the school he or she wished to attend, subject to race-based constraints. In respect to high schools, for example, a student was given a list of a subset of schools, carefully selected by the board to balance racial distribution in the district by including neighborhood schools and schools in racially different neighborhoods elsewhere in the city. The student could then choose among those schools, indicating a first choice, and other choices the student found acceptable. In making an assignment to a particular high school, the district would give first preference to a student with a sibling already at the school. It gave second preference to a student whose race differed from a race that was "over-represented" at the school (*i. e.*, a race that accounted for a higher percentage of the school population than of the total district population). It gave third preference to students residing in the neighborhood. It gave fourth preference to students who received child care in the neighborhood. In a typical year, say, 1995, about 20,000 potential high school students participated. About 68% received their first choice. Another 16% received an "acceptable" choice. A further 16% were assigned to a school they had not listed.

7. The Current Plan, 1999 to the Present. In 1996, the school board adopted the present plan, which began in 1999. In doing so, it sought to deemphasize the use of racial criteria and to increase the likelihood that a student would receive an assignment at his first or second choice high school. The district retained a racial tiebreaker for oversubscribed schools, which takes effect only if the school's minority or

majority enrollment falls outside of a 30% range centered on the minority/majority population ratio within the district. At the same time, all students were free subsequently to transfer from the school at which they were initially placed to a different school of their choice without regard to race. Thus, at worst, a student would have to spend one year at a high school he did not pick as a first or second choice.

The new plan worked roughly as expected for the two school years during which it was in effect (1999–2000 and 2000–2001). In the 2000–2001 school year, for example, with the racial tiebreaker, the entering ninth grade class at Franklin High School had a 60% minority population; without the racial tiebreaker that same class at Franklin would have had an almost 80% minority population. (We consider only the ninth grade since only students entering that class were subject to the tiebreaker, and because the plan was not in place long enough to change the composition of an entire school.) In the year 2005–2006, by which time the racial tiebreaker had not been used for several years, Franklin's overall minority enrollment had risen to 90%. During the period the tiebreaker applied, it typically affected about 300 students per year. Between 80% and 90% of all students received their first choice assignment; between 89% and 97% received their first or second choice assignment.

Petitioner Parents Involved in Community Schools objected to Seattle's most recent plan under the State and Federal Constitutions. In due course, the Washington Supreme Court, the Federal District Court, and the Court of Appeals for the Ninth Circuit (sitting en banc) rejected the challenge and found Seattle's plan lawful.

B

Louisville

1. Before the Lawsuit, 1954 to 1972. In 1956, two years after *Brown* made clear that Kentucky could no longer require racial segregation by law, the Louisville Board of Edu-

cation created a geography-based student assignment plan designed to help achieve school integration. At the same time, it adopted an open transfer policy under which approximately 3,000 of Louisville's 46,000 students applied for transfer. By 1972, however, the Louisville School District remained highly segregated. Approximately half the district's public school enrollment was black; about half was white. Fourteen of the district's nineteen nonvocational middle and high schools were close to totally black or totally white. Nineteen of the district's forty-six elementary schools were between 80% and 100% black. Twenty-one elementary schools were between roughly 90% and 100% white.

2. Court-Imposed Guidelines and Busing, 1972 to 1991. In 1972, civil rights groups and parents, claiming unconstitutional segregation, sued the Louisville Board of Education in federal court. The original litigation eventually became a lawsuit against the Jefferson County School System, which in April 1975 absorbed Louisville's schools and combined them with those of the surrounding suburbs. (For ease of exposition, I shall still use "Louisville" to refer to what is now the combined districts.) After preliminary rulings and an eventual victory for the plaintiffs in the Court of Appeals for the Sixth Circuit, the District Court in July 1975 entered an order requiring desegregation.

The order's requirements reflected a (newly enlarged) school district student population of about 135,000, approximately 20% of whom were black. The order required the school board to create and to maintain schools with student populations that ranged, for elementary schools, between 12% and 40% black, and for secondary schools (with one exception), between 12.5% and 35% black.

The District Court also adopted a complex desegregation plan designed to achieve the order's targets. The plan required redrawing school attendance zones, closing 12 schools, and busing groups of students, selected by race and the first letter of their last names, to schools outside their immediate

neighborhoods. The plan's initial busing requirements were extensive, involving the busing of 23,000 students and a transportation fleet that had to "operate from early in the morning until late in the evening." For typical students, the plan meant busing for several years (several more years for typical black students than for typical white students). The following notice, published in a Louisville newspaper in 1976, gives a sense of how the district's race-based busing plan operated in practice:

How to tell when your child will be bused...unless

If child's last name begins with letters:	White child will be bused in grades:	Black child will be bused in grades:
A, B, F, Q	11, 12	2, 3, 5, 6, 7, 8, 9, 10, 11, 12
G, H, L	2, 7	2, 3, 4, 6, 7, 8, 9, 10, 11, 12
C, P, R, X	3, 8	2, 3, 4, 5, 6, 7, 8
M, O, T, U, V, Y	4, 9	2, 3, 4, 5, 9, 10, 11, 12
D, E, N, W, Z	5, 10	2, 4, 5, 6, 7, 8, 9, 10, 11, 12
I, J, K, S	6	3, 4, 5, 6, 7, 8, 9, 10, 11, 12

Source: Louisville Courier-Journal, June 18, 1976

Exempted students:

- ✔ Kindergarten students
- ✔ First graders
- ✔ Students in special schools, primarily for the emotionally or or physically handicapped
- ✔ Students attending schools exempted under the plan
- ✔ Some students with specific handicaps

Louisville Courier-Journal, June 18, 1976 (reproduced in J. Wilkinson, From *Brown* to *Bakke:* The Supreme Court and School Integration 1954–1978, p. 176 (1979)).

The District Court monitored implementation of the plan. In 1978, it found that the plan had brought all of Louisville's schools within its "'guidelines' for racial composition" for "at least a substantial portion of the [previous] three years." It removed the case from its active docket while stating that it expected the board "to continue to implement those portions of the desegregation order which are by their nature of a continuing effect."

By 1984, after several schools had fallen out of compliance with the order's racial percentages due to shifting demographics in the community, the school board revised its desegregation plan. In doing so, the board created a new racial "guideline," namely a "floating range of 10% above and 10% below the countywide average for the different grade levels." The board simultaneously redrew district boundaries so that middle school students could attend the same school for three years and high school students for four years. It added "magnet" programs at two high schools. And it adjusted its alphabet-based system for grouping and busing students. The board estimated that its new plan would lead to annual reassignment (with busing) of about 8,500 black students and about 8,000 white students.

3. Student Choice and Project Renaissance, 1991 to 1996. By 1991, the board had concluded that assigning elementary school students to two or more schools during their elementary school years had proved educationally unsound and, if continued, would undermine Kentucky's newly adopted Education Reform Act. It consequently conducted a nearly year-long review of its plan. In doing so, it consulted widely with parents and other members of the local community, using public presentations, public meetings, and various other methods to obtain the public's input. At the conclusion of this review, the board adopted a new plan, called "Project Renaissance," that emphasized student choice.

Project Renaissance again revised the board's racial guidelines. It provided that each elementary school would have a black student population of between 15% and 50%; each middle and high school would have a black population and a white population that fell within a range, the boundaries of which were set at 15% above and 15% below the general student population percentages in the county at that grade level. The plan then drew new geographical school assignment zones designed to satisfy these guidelines; the district could reassign students if particular schools failed to meet

the guidelines and was required to do so if a school repeatedly missed these targets.

In respect to elementary schools, the plan first drew a neighborhood line around each elementary school, and it then drew a second line around groups of elementary schools (called "clusters"). It initially assigned each student to his or her neighborhood school, but it permitted each student freely to transfer between elementary schools within each cluster *provided that* the transferring student (1) was black if transferring from a predominantly black school to a predominantly white school, or (2) was white if transferring from a predominantly white school to a predominantly black school. Students could also apply to attend magnet elementary schools or programs.

The plan required each middle school student to be assigned to his or her neighborhood school unless the student applied for, and was accepted by, a magnet middle school. The plan provided for "open" high school enrollment. Every 9th or 10th grader could apply to any high school in the system, and the high school would accept applicants according to set criteria—one of which consisted of the need to attain or remain in compliance with the plan's racial guidelines. Finally, the plan created two new magnet schools, one each at the elementary and middle school levels.

4. The Current Plan: Project Renaissance Modified, 1996 to 2003. In 1995 and 1996, the Louisville School Board, with the help of a special "Planning Team," community meetings, and other official and unofficial study groups, monitored the effects of Project Renaissance and considered proposals for improvement. Consequently, in 1996, the board modified Project Renaissance, thereby creating the present plan.

At the time, the district's public school population was approximately 30% black. The plan consequently redrew the racial "guidelines," setting the boundaries at 15% to 50% black for *all* schools. It again redrew school assignment boundaries. And it expanded the transfer opportunities

available to elementary and middle school pupils. The plan forbade transfers, however, if the transfer would lead to a school population outside the guidelines range, *i. e.*, if it would create a school where fewer than 15% or more than 50% of the students were black.

The plan also established "Parent Assistance Centers" to help parents and students navigate the school selection and assignment process. It pledged the use of other resources in order to "encourage all schools to achieve an African-American enrollment equivalent to the average district-wide African-American enrollment at the school's respective elementary, middle or high school level." And the plan continued use of magnet schools.

In 1999, several parents brought a lawsuit in federal court attacking the plan's use of racial guidelines at one of the district's magnet schools. They asked the court to dissolve the desegregation order and to hold the use of *magnet* school racial guidelines unconstitutional. The board opposed dissolution, arguing that "the old dual system" had left a "demographic imbalance" that "prevent[ed] dissolution." In 2000, after reviewing the present plan, the District Court dissolved the 1975 order. It wrote that there was "overwhelming evidence of the Board's good faith compliance with the desegregation Decree and its underlying purposes." It added that the Louisville School Board had "treated the ideal of an integrated system as much more than a legal obligation—they consider it a positive, desirable policy and an essential element of any well-rounded public school education."

The court also found that the magnet programs available at the high school in question were "not available at other high schools" in the school district. It consequently held unconstitutional the use of race-based "targets" to govern admission to *magnet schools*. And it ordered the board not to control access to those scarce programs through the use of racial targets.

5. The Current Lawsuit, 2003 to the Present. Subsequent to the District Court's dissolution of the desegregation order (in 2000) the board simply continued to implement its 1996 plan as modified to reflect the court's magnet school determination. In 2003, the petitioner now before us, Crystal Meredith, brought this lawsuit challenging the plan's unmodified portions, *i. e.*, those portions that dealt with *ordinary*, not magnet, schools. Both the District Court and the Court of Appeals for the Sixth Circuit rejected Meredith's challenge and held the unmodified aspects of the plan constitutional.

C

The histories I have set forth describe the extensive and ongoing efforts of two school districts to bring about greater racial integration of their public schools. In both cases the efforts were in part remedial. Louisville began its integration efforts in earnest when a federal court in 1975 entered a school desegregation order. Seattle undertook its integration efforts in response to the filing of a federal lawsuit and as a result of its settlement of a segregation complaint filed with the federal OCR.

The plans in both Louisville and Seattle grow out of these earlier remedial efforts. Both districts faced problems that reflected initial periods of severe racial segregation, followed by such remedial efforts as busing, followed by evidence of resegregation, followed by a need to end busing and encourage the return of, *e. g.*, suburban students through increased student choice. When formulating the plans under review, both districts drew upon their considerable experience with earlier plans, having revised their policies periodically in light of that experience. Both districts rethought their methods over time and explored a wide range of other means, including non-race-conscious policies. Both districts also considered elaborate studies and consulted widely within their communities.

Both districts sought greater racial integration for educational and democratic, as well as for remedial, reasons. Both sought to achieve these objectives while preserving their commitment to other educational goals, *e. g.*, district-wide commitment to high quality public schools, increased pupil assignment to neighborhood schools, diminished use of busing, greater student choice, reduced risk of white flight, and so forth. Consequently, the present plans expand student choice; they limit the burdens (including busing) that earlier plans had imposed upon students and their families; and they use race-conscious criteria in limited and gradually diminishing ways. In particular, they use race-conscious criteria only to mark the outer bounds of broad population-related ranges.

The histories also make clear the futility of looking simply to whether earlier school segregation was *de jure* or *de facto* in order to draw firm lines separating the constitutionally permissible from the constitutionally forbidden use of "race-conscious" criteria. JUSTICE THOMAS suggests that it will be easy to identify *de jure* segregation because "[i]n most cases, there either will or will not have been a state constitutional amendment, state statute, local ordinance, or local administrative policy explicitly requiring separation of the races." *Ante*, at 752, n. 4 (concurring opinion). But our precedent has recognized that *de jure* discrimination can be present even in the absence of racially explicit laws. See *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373–374 (1886).

No one here disputes that Louisville's segregation was *de jure*. But what about Seattle's? Was it *de facto? De jure?* A mixture? Opinions differed. Or is it that a prior federal court had not adjudicated the matter? Does that make a difference? Is Seattle free on remand to say that its schools were *de jure* segregated, just as in 1956 a memo for the school board admitted? The plurality does not seem confident as to the answer. Compare *ante*, at 720 (opinion of the Court) ("[T]he Seattle public schools *have not shown*

that they were ever segregated by law" (emphasis added)), with *ante*, at 737 (plurality opinion) (assuming "the Seattle school district was never segregated by law," but seeming to concede that a school district with *de jure* segregation need not be subject to a court order to be allowed to engage in race-based remedial measures).

A court finding of *de jure* segregation cannot be the crucial variable. After all, a number of school districts in the South that the Government or private plaintiffs challenged as segregated *by law* voluntarily desegregated their schools *without a court order*—just as Seattle did. See, *e. g.*, Coleman, Desegregation of the Public Schools in Kentucky—The Second Year After the Supreme Court's Decision, 25 J. Negro Educ. 254, 256, 261 (1956) (40 of Kentucky's 180 school districts began desegregation without court orders); Branton, Little Rock Revisited: Desegregation to Resegregation, 52 J. Negro Educ. 250, 251 (1983) (similar in Arkansas); Bullock & Rodgers, Coercion to Compliance: Southern School Districts and School Desegregation Guidelines, 38 J. Politics 987, 991 (1976) (similar in Georgia); *McDaniel* v. *Barresi*, 402 U. S. 39, 40, n. 1 (1971) (Clarke County, Georgia). See also Letter from Robert F. Kennedy, Attorney General, to John F. Kennedy, President (Jan. 24, 1963) (hereinafter Kennedy Report), online at http://www.gilderlehrman.org/search/collection_pdfs/05/63/0/05630.pdf (all Internet materials as visited June 26, 2007, and available in Clerk of Court's case file) (reporting successful efforts by the Government to induce voluntary desegregation).

Moreover, Louisville's history makes clear that a community under a court order to desegregate might submit a race-conscious remedial plan *before* the court dissolved the order, but with every intention of following that plan even *after* dissolution. How could such a plan be lawful the day before dissolution but then become unlawful the very next day? On what legal ground can the majority rest its contrary view? But see *ante*, at 720–721, 725, n. 12.

Are courts really to treat as merely *de facto* segregated those school districts that avoided a federal order by voluntarily complying with *Brown*'s requirements? See *ante*, at 720 (opinion of the Court), *ante*, at 736 (plurality opinion). This Court has previously done just the opposite, permitting a race-conscious remedy without any kind of court decree. See *McDaniel*, *supra*, at 41. Because the Constitution emphatically does not forbid the use of race-conscious measures by districts in the South that voluntarily desegregated their schools, on what basis does the plurality claim that the law forbids Seattle to do the same? But see *ante*, at 737.

The histories also indicate the complexity of the tasks and the practical difficulties that local school boards face when they seek to achieve greater racial integration. The boards work in communities where demographic patterns change, where they must meet traditional learning goals, where they must attract and retain effective teachers, where they should (and will) take account of parents' views and maintain *their* commitment to public school education, where they must adapt to court intervention, where they must encourage voluntary student and parent action—where they will find that their own good faith, their knowledge, and their understanding of local circumstances are always necessary but often insufficient to solve the problems at hand.

These facts and circumstances help explain why in this context, as to means, the law often leaves legislatures, city councils, school boards, and voters with a broad range of choice, thereby giving "different communities" the opportunity to "try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs." *Comfort* v. *Lynn School Comm.*, 418 F. 3d 1, 28 (CA1 2005) (Boudin, C. J., concurring) (citing *United States* v. *Lopez*, 514 U. S. 549, 581 (1995) (KENNEDY, J., concurring)), cert. denied, 546 U. S. 1061 (2005).

With this factual background in mind, I turn to the legal question: Does the United States Constitution prohibit these school boards from using race-conscious criteria in the limited ways at issue here?

II

The Legal Standard

A longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it. Because of its importance, I shall repeat what this Court said about the matter in *Swann.* Chief Justice Burger, on behalf of a unanimous Court in a case of exceptional importance, wrote:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities." 402 U. S., at 16.

The statement was not a technical holding in the case. But the Court set forth in *Swann* a basic principle of constitutional law—a principle of law that has found "wide acceptance in the legal culture." *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000) (internal quotation marks omitted); *Mitchell* v. *United States*, 526 U. S. 314, 330 (1999); *id.*, at 331, 332 (SCALIA, J., dissenting) (citing "'wide acceptance in the legal culture'" as "adequate reason not to overrule" prior cases).

Thus, in *North Carolina Bd. of Ed.* v. *Swann*, 402 U. S. 43, 45 (1971), this Court, citing *Swann*, restated the point. "[S]chool authorities," the Court said, "have wide discretion

in formulating school policy, and . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." Then-Justice Rehnquist echoed this view in *Bustop, Inc.* v. *Los Angeles Bd. of Ed.*, 439 U. S. 1380, 1383 (1978) (opinion in chambers), making clear that he too believed that *Swann*'s statement reflected settled law: "While I have the gravest doubts that [a state supreme court] was *required* by the United States Constitution to take the [desegregation] action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action." (Emphasis in original.)

These statements nowhere suggest that this freedom is limited to school districts where court-ordered desegregation measures are also in effect. Indeed, in *McDaniel*, a case decided the same day as *Swann*, a group of parents challenged a race-conscious student assignment plan that the Clarke County School Board had *voluntarily* adopted as a remedy without a court order (though under federal agency pressure—pressure Seattle also encountered). The plan required that each elementary school in the district maintain 20% to 40% enrollment of African-American students, corresponding to the racial composition of the district. See *Barresi* v. *Browne*, 226 Ga. 456, 456–459, 175 S. E. 2d 649, 650–651 (1970). This Court upheld the plan, see *McDaniel*, 402 U. S., at 41, rejecting the parents' argument that "a person may not be *included* or *excluded* solely because he is a Negro or because he is white," Brief for Respondents in *McDaniel*, O. T. 1970, No. 420, p. 25.

Federal authorities had claimed—as the NAACP and the OCR did in Seattle—that Clarke County schools were segregated in law, not just in fact. The plurality's claim that Seattle was "never segregated by law" is simply not accurate. Compare *ante*, at 737, with *supra*, at 807–810. The plurality could validly claim that *no court* ever found that Seattle

schools were segregated in law. But that is also true of the Clarke County schools in *McDaniel*. Unless we believe that the Constitution enforces one legal standard for the South and another for the North, this Court should grant Seattle the permission it granted Clarke County, Georgia. See *McDaniel*, *supra*, at 41 ("[S]teps will almost invariably require that students be assigned 'differently because of their race.' . . . Any other approach would freeze the status quo that is the very target of all desegregation processes").

This Court has also held that school districts may be required by federal statute to undertake race-conscious desegregation efforts even when there is no likelihood that *de jure* segregation can be shown. In *Board of Ed. of City School Dist. of New York* v. *Harris*, 444 U. S. 130, 148–149 (1979), the Court concluded that a federal statute required school districts receiving certain federal funds to remedy faculty segregation, even though in this Court's view the racial disparities in the affected schools were purely *de facto* and would not have been actionable under the Equal Protection Clause. Not even the dissenters thought the race-conscious remedial program posed a *constitutional* problem. See *id.*, at 152 (opinion of Stewart, J.). See also, *e. g.*, *Crawford* v. *Board of Ed. of Los Angeles*, 458 U. S. 527, 535–536 (1982) ("[S]tate courts of California continue to have an obligation under state law to order segregated school districts to use voluntary desegregation techniques, *whether or not there has been a finding of intentional segregation*. . . . [S]chool districts themselves retain a state-law obligation to take reasonably feasible steps to desegregate, and *they remain free to adopt reassignment and busing plans to effectuate desegregation*" (emphasis added)); *School Comm. of Boston* v. *Board of Education*, 389 U. S. 572 (1968) *(per curiam)* (dismissing for want of a federal question a challenge to a voluntary statewide integration plan using express racial criteria).

Lower state and federal courts had considered the matter settled and uncontroversial even before this Court decided

Swann. Indeed, in 1968, the Illinois Supreme Court rejected an equal protection challenge to a race-conscious state law seeking to undo *de facto* segregation:

> "To support [their] claim, the defendants heavily rely on three Federal cases, each of which held, no State law being involved, that a local school board does not have an affirmative constitutional duty to act to alleviate racial imbalance in the schools that it did not cause. However, the question as to whether the constitution requires a local school board, or a State, to act to undo *de facto* school segregation is simply not here concerned. The issue here is whether the constitution permits, rather than prohibits, voluntary State action aimed toward reducing and eventually eliminating *de facto* school segregation.
>
> "State laws or administrative policies, directed toward the reduction and eventual elimination of *de facto* segregation of children in the schools and racial imbalance, have been approved by every high State court which has considered the issue. Similarly, the Federal courts which have considered the issue . . . have recognized that voluntary programs of local school authorities designed to alleviate *de facto* segregation and racial imbalance in the schools are not constitutionally forbidden." *Tometz* v. *Board of Ed., Waukegan School Dist. No. 61*, 39 Ill. 2d 593, 597–598, 237 N. E. 2d 498, 501 (citing decisions from the high courts of Pennsylvania, Massachusetts, New Jersey, California, New York, and Connecticut, and from the Courts of Appeals for the First, Second, Fourth, and Sixth Circuits; citations omitted).

See also, *e. g., Offermann* v. *Nitkowski*, 378 F. 2d 22, 24 (CA2 1967); *Deal* v. *Cincinnati Bd. of Ed.,* 369 F. 2d 55, 61 (CA6 1966), cert. denied, 389 U. S. 847 (1967); *Springfield School Comm.* v. *Barksdale,* 348 F. 2d 261, 266 (CA1 1965); *Pennsylvania Human Relations Comm'n* v. *Chester School Dist.*,

427 Pa. 157, 164, 233 A. 2d 290, 294 (1967); *Booker* v. *Board of Ed. of Plainfield, Union Cty.*, 45 N. J. 161, 170, 212 A. 2d 1, 5 (1965); *Jackson* v. *Pasadena City School Dist.*, 59 Cal. 2d 876, 881–882, 382 P. 2d 878, 881–882 (1963).

I quote the Illinois Supreme Court at length to illustrate the prevailing legal assumption at the time *Swann* was decided. In this respect, *Swann* was not a sharp or unexpected departure from prior rulings; it reflected a consensus that had already emerged among state and lower federal courts.

If there were doubts before *Swann* was decided, they did not survive this Court's decision. Numerous state and federal courts explicitly relied upon *Swann*'s guidance for decades to follow. For instance, a Texas appeals court in 1986 rejected a Fourteenth Amendment challenge to a voluntary integration plan by explaining:

> "[T]he absence of a court order to desegregate does not mean that a school board cannot exceed minimum requirements in order to promote school integration. School authorities are traditionally given broad discretionary powers to formulate and implement educational policy and may properly decide to ensure to their students the value of an integrated school experience." *Citizens for Better Ed.* v. *Goose Creek Consol. Independent School Dist.*, 719 S. W. 2d 350, 352–353 (citing *Swann* and *North Carolina Bd. of Ed.*), appeal dism'd for want of substantial federal question, 484 U. S. 804 (1987).

Similarly, in *Zaslawsky* v. *Board of Ed. of Los Angeles City Unified School Dist.*, 610 F. 2d 661, 662–664 (1979), the Ninth Circuit rejected a federal constitutional challenge to a school district's use of mandatory faculty transfers to ensure that each school's faculty makeup would fall within 10% of the districtwide racial composition. Like the Texas court, the Ninth Circuit relied upon *Swann* and *North Carolina Bd.*

of Ed. to reject the argument that "a race-conscious plan is permissible only when there has been a judicial finding of *de jure* segregation." 610 F. 2d, at 663–664. See also, *e. g.*, *Darville* v. *Dade Cty. School Bd.*, 497 F. 2d 1002, 1004–1006 (CA5 1974); *State ex rel. Citizens Against Mandatory Bussing* v. *Brooks*, 80 Wash. 2d 121, 128–129, 492 P. 2d 536, 541–542 (1972) (en banc), overruled on other grounds, *Cole* v. *Webster*, 103 Wash. 2d 280, 692 P. 2d 799 (1984) (en banc); *School Comm. of Springfield* v. *Board of Ed.*, 362 Mass. 417, 428–429, 287 N. E. 2d 438, 447–448 (1972). These decisions illustrate well how lower courts understood and followed *Swann*'s enunciation of the relevant legal principle.

Courts are not alone in accepting as constitutionally valid the legal principle that *Swann* enunciated—*i. e.*, that the government may voluntarily adopt race-conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so. That principle has been accepted by every branch of government and is rooted in the history of the Equal Protection Clause itself. Thus, Congress has enacted numerous race-conscious statutes that illustrate that principle or rely upon its validity. See, *e. g.*, No Child Left Behind Act of 2001, 20 U. S. C. § 6311(b)(2)(C)(v) (2000 ed., Supp. IV); § 1067 *et seq.* (authorizing aid to minority institutions). In fact, without being exhaustive, I have counted 51 federal statutes that use racial classifications. I have counted well over 100 state statutes that similarly employ racial classifications. Presidential administrations for the past half century have used and supported various race-conscious measures. See, *e. g.*, Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961) (President Kennedy); Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965) (President Johnson); Sugrue, Breaking Through: The Troubled Origins of Affirmative Action in the Workplace, in Color Lines: Affirmative Action, Immigration, and Civil Rights Options for America 31 (J. Skrentny ed. 2001) (describing President Nixon's lobbying for affirmative action plans, *e. g.*, the Philadel-

phia Plan); White, Affirmative Action's Alamo: Gerald Ford Returns to Fight Once More for Michigan, Time, Aug. 23, 1999, p. 48 (reporting on President Ford's support for affirmative action); Schuck, Affirmative Action: Past, Present, and Future, 20 Yale L. & Pol'y Rev. 1, 50 (2002) (describing President Carter's support for affirmation action). And during the same time, hundreds of local school districts have adopted student assignment plans that use race-conscious criteria. See Welch 83–91.

That *Swann*'s legal statement should find such broad acceptance is not surprising. For *Swann* is predicated upon a well-established legal view of the Fourteenth Amendment. That view understands the basic objective of those who wrote the Equal Protection Clause as forbidding practices that lead to racial exclusion. The Amendment sought to bring into American society as full members those whom the Nation had previously held in slavery. See *Slaughter-House Cases*, 16 Wall. 36, 71 (1873) ("[N]o one can fail to be impressed with the one pervading purpose found in [all the Reconstruction amendments] . . . we mean the freedom of the slave race"); *Strauder* v. *West Virginia*, 100 U. S. 303, 306 (1880) ("[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated . . . all the civil rights that the superior race enjoy").

There is reason to believe that those who drafted an Amendment with this basic purpose in mind would have understood the legal and practical difference between the use of race-conscious criteria in defiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together. See generally R. Sears, A Utopian Experiment in Kentucky: Integration and Social Equality at Berea, 1866–1904 (1996) (describing federal funding, through the Freedman's Bureau, of race-conscious school integration programs). See also R. Fischer, The Segregation Struggle in Louisiana 1862–77,

p. 51 (1974) (describing the use of race-conscious remedies); Harlan, Desegregation in New Orleans Public Schools During Reconstruction, 67 Am. Hist. Rev. 663, 664 (1962) (same); W. Vaughn, Schools for All: The Blacks & Public Education in the South, 1865–1877, pp. 111–116 (1974) (same). Although the Constitution almost always forbids the former, it is significantly more lenient in respect to the latter. See *Gratz* v. *Bollinger*, 539 U. S. 244, 301 (2003) (GINSBURG, J., dissenting); *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 243 (1995) (STEVENS, J., dissenting).

Sometimes Members of this Court have disagreed about the degree of leniency that the Clause affords to programs designed to include. See *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 274 (1986); *Fullilove* v. *Klutznick*, 448 U. S. 448, 507 (1980) (Powell, J., concurring). But I can find no case in which this Court has followed JUSTICE THOMAS' "color-blind" approach. And I have found no case that otherwise repudiated this constitutional asymmetry between that which seeks to *exclude* and that which seeks to *include* members of minority races.

What does the plurality say in response? First, it seeks to distinguish *Swann* and other similar cases on the ground that those cases involved remedial plans in response to *judicial findings* of *de jure* segregation. As *McDaniel* and *Harris* show, that is historically untrue. See *supra*, at 824–825. Many school districts in the South adopted segregation remedies (to which *Swann* clearly applies) without any such federal order, see *supra*, at 821. See also Kennedy Report. Seattle's circumstances are not meaningfully different from those in, say, *McDaniel*, where this Court approved race-conscious remedies. Louisville's plan was created and initially adopted when a compulsory district court order was in place. And, in any event, the histories of Seattle and Louisville make clear that this distinction—between court-ordered and voluntary desegregation—seeks a line that sensibly cannot be drawn.

Second, the plurality downplays the importance of *Swann* and related cases by frequently describing their relevant statements as "dicta." These criticisms, however, miss the main point. *Swann* did not hide its understanding of the law in a corner of an obscure opinion or in a footnote, unread but by experts. It set forth its view prominently in an important opinion joined by all nine Justices, knowing that it would be read and followed throughout the Nation. The basic problem with the plurality's technical "dicta"-based response lies in its overly theoretical approach to case law, an approach that emphasizes rigid distinctions between holdings and dicta in a way that serves to mask the radical nature of today's decision. Law is not an exercise in mathematical logic. And statements of a legal rule set forth in a judicial opinion do not always divide neatly into "holdings" and "dicta." (Consider the legal "status" of Justice Powell's separate opinion in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978).) The constitutional principle enunciated in *Swann*, reiterated in subsequent cases, and relied upon over many years, provides, and has widely been thought to provide, authoritative legal guidance. And if the plurality now chooses to reject that principle, it cannot adequately justify its retreat simply by affixing the label "dicta" to reasoning with which it disagrees. Rather, it must explain to the courts and to the Nation *why* it would abandon guidance set forth many years before, guidance that countless others have built upon over time, and which the law has continuously embodied.

Third, a more important response is the plurality's claim that later cases—in particular *Johnson* v. *California*, 543 U. S. 499 (2005), *Adarand*, *supra*, and *Grutter* v. *Bollinger*, 539 U. S. 306 (2003)—supplanted *Swann*. See *ante*, at 720, 739, n. 16, 741–742 (citing *Adarand*, *supra*, at 227; *Johnson*, *supra*, at 505; *Grutter*, *supra*, at 326). The plurality says that cases such as *Swann* and the others I have described all "were decided before this Court definitively de-

termined that 'all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny.'" *Ante*, at 739, n. 16 (quoting *Adarand*, 515 U. S., at 227). This Court in *Adarand* added that "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Ibid.* And the Court repeated this same statement in *Grutter*. See 539 U. S., at 326.

Several of these cases were significantly more restrictive than *Swann* in respect to the degree of leniency the Fourteenth Amendment grants to programs designed to *include* people of all races. See, *e. g.*, *Adarand*, *supra; Gratz*, *supra; Grutter*, *supra.* But that legal circumstance cannot make a critical difference here for two separate reasons.

First, no case—not *Adarand*, *Gratz*, *Grutter*, or any other—has ever held that the test of "strict scrutiny" means that all racial classifications—no matter whether they seek to include or exclude—must in practice be treated the same. The Court did not say in *Adarand* or in *Johnson* or in *Grutter* that it was overturning *Swann* or its central constitutional principle.

Indeed, in its more recent opinions, the Court recognized that the "fundamental purpose" of strict scrutiny review is to "take relevant differences" between "fundamentally different situations . . . into account." *Adarand*, 515 U. S., at 228 (internal quotation marks omitted). The Court made clear that "[s]trict scrutiny does not trea[t] dissimilar race-based decisions as though they were equally objectionable." *Ibid.* (internal quotation marks omitted). It added that the fact that a law "treats [a person] unequally because of his or her race . . . says nothing about the ultimate validity of any particular law." *Id.*, at 229–230. And the Court, using the very phrase that Justice Marshall had used to describe strict scrutiny's application to any *exclusionary* use of racial criteria, sought to "*dispel the notion* that strict scrutiny" is as likely to condemn *inclusive* uses of "race-conscious" criteria

as it is to invalidate *exclusionary* uses. That is, it is *not* in all circumstances " 'strict in theory, but fatal in fact.' " *Id.*, at 237 (quoting *Fullilove*, 448 U. S., at 519 (Marshall, J., concurring in judgment)).

The Court in *Grutter* elaborated:

> "Strict scrutiny is not 'strict in theory, but fatal in fact.' . . . Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. . . .
>
> "Context matters when reviewing race-based governmental action under the Equal Protection Clause. See *Gomillion* v. *Lightfoot,* 364 U. S. 339, 343–344 (1960) (admonishing that, 'in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts'). . . . Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." 539 U. S., at 326–327.

The Court's holding in *Grutter* demonstrates that the Court meant what it said, for the Court upheld an elite law school's race-conscious admissions program.

The upshot is that the cases to which the plurality refers, though all applying strict scrutiny, do not treat exclusive and inclusive uses the same. Rather, they apply the strict scrutiny test in a manner that is "fatal in fact" only to racial classifications that harmfully *exclude;* they apply the test in a manner that is *not* fatal in fact to racial classifications that seek to *include.*

The plurality cannot avoid this simple fact. See *ante,* at 741–743. Today's opinion reveals that the plurality would

rewrite this Court's prior jurisprudence, at least in practical application, transforming the "strict scrutiny" test into a rule that is fatal in fact across the board. In doing so, the plurality parts company from this Court's prior cases, and it takes from local government the longstanding legal right to use race-conscious criteria for inclusive purposes in limited ways.

Second, as *Grutter* specified, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." 539 U. S., at 327 (citing *Gomillion* v. *Lightfoot*, 364 U. S. 339, 343–344 (1960)). And contexts differ dramatically one from the other. Governmental use of race-based criteria can arise in the context of, for example, census forms, research expenditures for diseases, assignments of police officers patrolling predominantly minority-race neighborhoods, efforts to desegregate racially segregated schools, policies that favor minorities when distributing goods or services in short supply, actions that create majority-minority electoral districts, peremptory strikes that remove potential jurors on the basis of race, and others. Given the significant differences among these contexts, it would be surprising if the law required an identically strict legal test for evaluating the constitutionality of race-based criteria as to each of them.

Here, the context is one in which school districts seek to advance or to maintain racial integration in primary and secondary schools. It is a context, as *Swann* makes clear, where history has required special administrative remedies. And it is a context in which the school boards' plans simply set race-conscious limits at the outer boundaries of a broad range.

This context is *not* a context that involves the use of race to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply. It is not one in which race-conscious limits stigma-

tize or exclude; the limits at issue do not pit the races against each other or otherwise significantly exacerbate racial tensions. They do not impose burdens unfairly upon members of one race alone but instead seek benefits for members of all races alike. The context here is one of racial limits that seek, not to keep the races apart, but to bring them together.

The importance of these differences is clear once one compares the present circumstances with other cases where one or more of these negative features are present. See, *e. g.*, *Strauder*, 100 U. S. 303; *Yick Wo*, 118 U. S. 356; *Brown*, 347 U. S. 483; *Loving* v. *Virginia*, 388 U. S. 1 (1967); *Bakke*, 438 U. S. 265; *Batson* v. *Kentucky*, 476 U. S. 79 (1986); *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989); *Shaw* v. *Reno*, 509 U. S. 630 (1993); *Adarand*, 515 U. S. 200; *Grutter*, *supra;* *Gratz*, 539 U. S. 244; *Johnson*, 543 U. S. 499.

If one examines the context more specifically, one finds that the districts' plans reflect efforts to overcome a history of segregation, embody the results of broad experience and community consultation, seek to expand student choice while reducing the need for mandatory busing, and use race-conscious criteria in highly limited ways that diminish the use of race compared to preceding integration efforts. Compare *Wessmann* v. *Gittens*, 160 F. 3d 790, 809–810 (CA1 1998) (Boudin, J., concurring), with *Comfort*, 418 F. 3d, at 28–29 (Boudin, C. J., concurring). They do not seek to award a scarce commodity on the basis of merit, for they are not magnet schools; rather, by design and in practice, they offer substantially equivalent academic programs and electives. Although some parents or children prefer some schools over others, school popularity has varied significantly over the years. In 2000, for example, Roosevelt was the most popular first choice high school in Seattle; in 2001, Ballard was the most popular; in 2000, West Seattle was one of the least popular; by 2003, it was one of the more popular. See Research, Evaluation and Assessment, Student Information

Services Office, Seattle Public Schools, Data Profile: District Summary December 2005 (hereinafter Data Profile: District Summary December 2005), online at http://www.seattleschools.org/area/siso/disprof/2005/DP05all.pdf. In a word, the school plans under review do not involve the kind of race-based harm that has led this Court, in other contexts, to find the use of race-conscious criteria unconstitutional.

These and related considerations convinced one Ninth Circuit judge in the Seattle case to apply a standard of constitutionality review that is less than "strict," and to conclude that this Court's precedents do not require the contrary. See 426 F. 3d 1162, 1193–1194 (2005) *(Parents Involved VII)* (Kozinski, J., concurring) ("That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability"). That judge is not alone. Cf. *Gratz*, *supra*, at 301 (GINSBURG, J., dissenting); *Adarand*, *supra*, at 243 (STEVENS, J., dissenting); Carter, When Victims Happen To Be Black, 97 Yale L. J. 420, 433–434 (1988).

The view that a more lenient standard than "strict scrutiny" should apply in the present context would not imply abandonment of judicial efforts carefully to determine the need for race-conscious criteria and the criteria's tailoring in light of the need. And the present context requires a court to examine carefully the race-conscious program at issue. In doing so, a reviewing judge must be fully aware of the potential dangers and pitfalls that JUSTICE THOMAS and JUSTICE KENNEDY mention. See *ante*, at 757–759 (THOMAS, J., concurring); *ante*, at 783–784, 797 (KENNEDY, J., concurring in part and concurring in judgment).

But unlike the plurality, such a judge would also be aware that a legislature or school administrators, ultimately accountable to the electorate, could *nonetheless* properly conclude that a racial classification sometimes serves a purpose important enough to overcome the risks they mention, for

example, helping to end racial isolation or to achieve a diverse student body in public schools. Cf. *ante*, at 797–798 (opinion of KENNEDY, J.). Where that is so, the judge would carefully examine the program's details to determine whether the use of race-conscious criteria is proportionate to the important ends it serves.

In my view, this contextual approach to scrutiny is altogether fitting. I believe that the law requires application here of a standard of review that is not "strict" in the traditional sense of that word, although it does require the careful review I have just described. See *Gratz*, *supra*, at 301 (GINSBURG, J., joined by SOUTER, J., dissenting); *Adarand*, *supra*, at 242–249 (STEVENS, J., joined by GINSBURG, J., dissenting); *Parents Involved VII*, *supra*, at 1193–1194 (Kozinski, J., concurring). Apparently JUSTICE KENNEDY also agrees that strict scrutiny would not apply in respect to certain "race-conscious" school board policies. See *ante*, at 789 ("Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races").

Nonetheless, in light of *Grutter* and other precedents, see, *e. g.*, *Bakke*, *supra*, at 290 (opinion of Powell, J.), I shall adopt the first alternative. I shall apply the version of strict scrutiny that those cases embody. I shall consequently ask whether the school boards in Seattle and Louisville adopted these plans to serve a "compelling governmental interest" and, if so, whether the plans are "narrowly tailored" to achieve that interest. If the plans survive this strict review, they would survive less exacting review *a fortiori*. Hence, I conclude that the plans before us pass both parts of the strict scrutiny test. Consequently I must conclude that the plans here are permitted under the Constitution.

III

Applying the Legal Standard

A

Compelling Interest

The principal interest advanced in these cases to justify the use of race-based criteria goes by various names. Sometimes a court refers to it as an interest in achieving racial "diversity." Other times a court, like the plurality here, refers to it as an interest in racial "balancing." I have used more general terms to signify that interest, describing it, for example, as an interest in promoting or preserving greater racial "integration" of public schools. By this term, I mean the school districts' interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district's schools and each individual student's public school experience.

Regardless of its name, however, the interest at stake possesses three essential elements. First, there is a historical and remedial element: an interest in setting right the consequences of prior conditions of segregation. This refers back to a time when public schools were highly segregated, often as a result of legal or administrative policies that facilitated racial segregation in public schools. It is an interest in continuing to combat the remnants of segregation caused in whole or in part by these school-related policies, which have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes. It is an interest in maintaining hard-won gains. And it has its roots in preventing what gradually may become the *de facto* resegregation of America's public schools. See Part I, *supra*, at 805–806; Appendix A, *infra*. See also *ante*, at 797 (opinion of KENNEDY, J.) ("This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children").

Second, there is an educational element: an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools. Cf. *Grutter*, 539 U. S., at 345 (GINSBURG, J., concurring). Studies suggest that children taken from those schools and placed in integrated settings often show positive academic gains. See, *e. g.*, Powell, Living and Learning: Linking Housing and Education, in Pursuit of a Dream Deferred: Linking Housing and Education Policy 15, 35 (J. Powell, G. Kearney, & V. Kay eds. 2001) (hereinafter Powell); Hallinan, Diversity Effects on Student Outcomes: Social Science Evidence, 59 Ohio St. L. J. 733, 741–742 (1998) (hereinafter Hallinan).

Other studies reach different conclusions. See, *e. g.*, D. Armor, Forced Justice (1995). See also *ante*, at 761–763 (THOMAS, J., concurring). But the evidence supporting an educational interest in racially integrated schools is well established and strong enough to permit a democratically elected school board reasonably to determine that this interest is a compelling one.

Research suggests, for example, that black children from segregated educational environments significantly increase their achievement levels once they are placed in a more integrated setting. Indeed, in Louisville itself, the achievement gap between black and white elementary school students grew substantially smaller (by seven percentage points) after the integration plan was implemented in 1975. See Powell 35. Conversely, to take another example, evidence from a district in Norfolk, Virginia, shows that resegregated schools led to a decline in the achievement test scores of children of all races. *Ibid.*

One commentator, reviewing dozens of studies of the educational benefits of desegregated schooling, found that the studies have provided "remarkably consistent" results, showing that: (1) black students' educational achievement is improved in integrated schools as compared to racially isolated schools, (2) black students' educational achievement is im-

proved in integrated classes, and (3) the earlier that black students are removed from racial isolation, the better their educational outcomes. See Hallinan 741–742. Multiple studies also indicate that black alumni of integrated schools are more likely to move into occupations traditionally closed to African-Americans, and to earn more money in those fields. See, *e. g.,* Schofield, Review of Research on School Desegregation's Impact on Elementary and Secondary School Students, in Handbook of Research on Multicultural Education 597, 606–607 (J. Banks & C. Banks eds. 1995). Cf. W. Bowen & D. Bok, The Shape of the River 118 (1998) (hereinafter Bowen & Bok).

Third, there is a democratic element: an interest in producing an educational environment that reflects the "pluralistic society" in which our children will live. *Swann,* 402 U. S., at 16. It is an interest in helping our children learn to work and play together with children of different racial backgrounds. It is an interest in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation.

Again, data support this insight. See, *e. g.,* Hallinan 745; Quillian & Campbell, Beyond Black and White: The Present and Future of Multiracial Friendship Segregation, 68 Am. Sociological Rev. 540, 541 (2003) (hereinafter Quillian & Campbell); Dawkins & Braddock, The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society, 63 J. Negro Educ. 394, 401–403 (1994) (hereinafter Dawkins & Braddock); Wells & Crain, Perpetuation Theory and the Long-Term Effects of School Desegregation, 64 Rev. Educ. Research 531, 550 (1994) (hereinafter Wells & Crain).

There are again studies that offer contrary conclusions. See, *e. g.,* Schofield, School Desegregation and Intergroup Relations: A Review of the Literature, in 17 Review of Research in Education 335, 356 (G. Grant ed. 1991). See also *ante,* at 768–770 (THOMAS, J., concurring). Again, however,

the evidence supporting a democratic interest in racially integrated schools is firmly established and sufficiently strong to permit a school board to determine, as this Court has itself often found, that this interest is compelling.

For example, one study documented that "black and white students in desegregated schools are less racially prejudiced than those in segregated schools," and that "interracial contact in desegregated schools leads to an increase in interracial sociability and friendship." Hallinan 745. See also Quillian & Campbell 541. Cf. Bowen & Bok 155. Other studies have found that both black and white students who attend integrated schools are more likely to work in desegregated companies after graduation than students who attended racially isolated schools. Dawkins & Braddock 401–403; Wells & Crain 550. Further research has shown that the desegregation of schools can help bring adult communities together by reducing segregated housing. Cities that have implemented successful school desegregation plans have witnessed increased interracial contact and neighborhoods that tend to become less racially segregated. Dawkins & Braddock 403. These effects not only reinforce the prior gains of integrated primary and secondary education; they also foresee a time when there is less need to use race-conscious criteria.

Moreover, this Court from *Swann* to *Grutter* has treated these civic effects as an important virtue of racially diverse education. See, *e. g.*, *Swann*, *supra*, at 16; *Seattle School Dist. No. 1*, 458 U. S., at 472–473. In *Grutter*, in the context of law school admissions, we found that these types of interests were, constitutionally speaking, "compelling." See 539 U. S., at 330 (recognizing that Michigan Law School's race-conscious admissions policy "promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races," and pointing out that "the skills needed in today's increasingly global marketplace can only be developed through ex-

posure to widely diverse people, cultures, ideas, and viewpoints" (internal quotation marks omitted; alteration in original)).

In light of this Court's conclusions in *Grutter*, the "compelling" nature of these interests in the context of primary and secondary public education follows here *a fortiori*. Primary and secondary schools are where the education of this Nation's children begins, where each of us begins to absorb those values we carry with us to the end of our days. As Justice Marshall said, "unless our children begin to learn together, there is little hope that our people will ever learn to live together." *Milliken* v. *Bradley*, 418 U. S. 717, 783 (1974) (dissenting opinion).

And it was *Brown*, after all, focusing upon primary and secondary schools, not *Sweatt* v. *Painter*, 339 U. S. 629 (1950), focusing on law schools, or *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, 339 U. S. 637 (1950), focusing on graduate schools, that affected so deeply not only Americans but the world. R. Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality, p. x (1975) (arguing that perhaps no other Supreme Court case has "affected more directly the minds, hearts, and daily lives of so many Americans"); J. Patterson, Brown v. Board of Education, p. xxvii (2001) (identifying *Brown* as "the most eagerly awaited and dramatic judicial decision of modern times"). See also *Parents Involved VII*, 426 F. 3d, at 1194 (Kozinski, J., concurring); Strauss, Discriminatory Intent and the Taming of *Brown*, 56 U. Chi. L. Rev. 935, 937 (1989) (calling *Brown* "the Supreme Court's greatest antidiscrimination decision"); Brief for United States as *Amicus Curiae* in *Brown*, O. T. 1952, No. 8 etc.; Dudziak, *Brown* as a Cold War Case, 91 J. Am. Hist. 32 (2004); A Great Decision, Hindustan Times (New Delhi, May 20, 1954), p. 5; USA Takes Positive Step, West African Pilot (Lagos, May 22, 1954), p. 2 (stating that *Brown* is an acknowledgment that the "United States should set an example for all other nations by taking

the lead in removing from its national life all signs and traces of racial intolerance, arrogance or discrimination"). Hence, I am not surprised that JUSTICE KENNEDY finds that "a district may consider it a compelling interest to achieve a diverse student population," including a *racially* diverse population. *Ante*, at 797–798.

The compelling interest at issue here, then, includes an effort to eradicate the remnants, not of general "societal discrimination," *ante*, at 731 (plurality opinion), but of primary and secondary school segregation, see *supra*, at 808–809, 813–814; it includes an effort to create school environments that provide better educational opportunities for all children; it includes an effort to help create citizens better prepared to know, to understand, and to work with people of all races and backgrounds, thereby furthering the kind of democratic government our Constitution foresees. If an educational interest that combines these three elements is not "compelling," what is?

The majority acknowledges that in prior cases this Court has recognized at least two interests as compelling: an interest in "remedying the effects of past intentional discrimination," and an interest in "diversity in higher education." *Ante*, at 720, 722. But the plurality does not convincingly explain why those interests do not constitute a "compelling interest" here. How do the remedial interests here differ in kind from those at issue in the voluntary desegregation efforts that Attorney General Kennedy many years ago described in his letter to the President? *Supra*, at 821. How do the educational and civic interests differ in kind from those that underlie and justify the racial "diversity" that the law school sought in *Grutter*, where this Court found a compelling interest?

The plurality tries to draw a distinction by reference to the well-established conceptual difference between *de jure* segregation ("segregation by state action") and *de facto* segregation ("racial imbalance caused by other factors"). *Ante*,

at 736. But that distinction concerns what the Constitution *requires* school boards to do, not what it *permits* them to do. Compare, *e. g., Green,* 391 U. S., at 437–438 ("School boards . . . operating state-compelled dual systems" have an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch"), with, *e. g., Milliken, supra,* at 745 (the Constitution does not impose a duty to desegregate upon districts that have not been "shown to have committed any constitutional violation").

The opinions cited by the plurality to justify its reliance upon the *de jure/de facto* distinction only address what remedial measures a school district may be constitutionally *required* to undertake. See, *e. g., Freeman* v. *Pitts,* 503 U. S. 467, 495 (1992). As to what is *permitted,* nothing in our equal protection law suggests that a State may right only those wrongs that it committed. No case of this Court has ever relied upon the *de jure/de facto* distinction in order to limit what a school district is voluntarily allowed to do. That is what is at issue here. And *Swann, McDaniel, Crawford, North Carolina Bd. of Ed., Harris,* and *Bustop* made one thing clear: significant as the difference between *de jure* and *de facto* segregation may be to the question of what a school district *must* do, that distinction is not germane to the question of what a school district *may* do.

Nor does any precedent indicate, as the plurality suggests with respect to Louisville, *ante,* at 737, that remedial interests vanish the day after a federal court declares that a district is "unitary." Of course, Louisville adopted those portions of the plan at issue here *before* a court declared Louisville "unitary." Moreover, in *Freeman,* this Court pointed out that in "one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of

history. And stubborn facts of history linger and persist." 503 U. S., at 495. See also *ante*, at 795 (opinion of KENNEDY, J.). I do not understand why this Court's cases, which rest the significance of a "unitary" finding in part upon the wisdom and desirability of returning schools to local control, should deprive those local officials of legal *permission* to use means they once found necessary to combat persisting injustices.

For his part, JUSTICE THOMAS faults my citation of various studies supporting the view that school districts can find compelling educational and civic interests in integrating their public schools. See *ante*, at 761–763, 768–769 (concurring opinion). He is entitled of course to his own opinion as to which studies he finds convincing—although it bears mention that even the author of some of JUSTICE THOMAS' preferred studies has found *some* evidence linking integrated learning environments to increased academic achievement. Compare *ante*, at 761–763 (opinion of THOMAS, J.) (citing Armor & Rossell, Desegregation and Resegregation in the Public Schools, in Beyond the Color Line: New Perspectives on Race and Ethnicity in America 219, 239, 251 (A. Thernstrom & S. Thernstrom eds. 2002); Brief for David J. Armor et al. as *Amici Curiae* 29), with Rosen, Perhaps Not All Affirmative Action is Created Equal, N. Y. Times, June 11, 2006, section 4, p. 14 (quoting David Armor as commenting, "'we did not find the [racial] achievement gap changing *significantly*'" but acknowledging that he "'did find a modest association for math but not reading in terms of racial composition and achievement, but there's a big state variation'" (emphasis added)). If we are to insist upon unanimity in the social science literature before finding a compelling interest, we might never find one. I believe only that the Constitution allows democratically elected school boards to make up their own minds as to how best to include people of all races in one America.

B

Narrow Tailoring

I next ask whether the plans before us are "narrowly tailored" to achieve these "compelling" objectives. I shall not accept the school boards' assurances on faith, cf. *Miller* v. *Johnson*, 515 U. S. 900, 920 (1995), and I shall subject the "tailoring" of their plans to "rigorous judicial review," *Grutter*, 539 U. S., at 388 (KENNEDY, J., dissenting). Several factors, taken together, nonetheless lead me to conclude that the boards' use of race-conscious criteria in these plans passes even the strictest "tailoring" test.

First, the race-conscious criteria at issue only help set the outer bounds of *broad* ranges. Cf. *id.*, at 390 (expressing concern about "narrow fluctuation band[s]"). They constitute but one part of plans that depend primarily upon other, nonracial elements. To use race in this way is not to set a forbidden "quota." See *id.*, at 335 (opinion of the Court) ("Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups'" (quoting *Croson*, 488 U. S., at 496 (plurality opinion))).

In fact, the defining feature of both plans is greater emphasis upon student choice. In Seattle, for example, in more than 80% of all cases, that choice alone determines which high schools Seattle's ninth graders will attend. After ninth grade, students can decide voluntarily to transfer to a preferred district high school (without any consideration of race-conscious criteria). *Choice*, therefore, is the "predominant factor" in these plans. *Race* is not. See *Grutter*, *supra*, at 393 (KENNEDY, J., dissenting) (allowing consideration of race only if it does "not become a predominant factor").

Indeed, the race-conscious ranges at issue in these cases often have no effect, either because the particular school is not oversubscribed in the year in question, or because the

racial makeup of the school falls within the broad range, or because the student is a transfer applicant or has a sibling at the school. In these respects, the broad ranges are less like a quota and more like the kinds of "useful starting points" that this Court has consistently found permissible, even when they set boundaries upon voluntary transfers, and even when they are based upon a community's general population. See, *e. g.*, *North Carolina Bd. of Ed.* v. *Swann*, 402 U. S., at 46 (no "absolute prohibition against [the] use" of mathematical ratios as a "starting point"); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S., at 24–25 (approving the use of a ratio reflecting "the racial composition of the whole school system" as a "useful starting point," but not as an "inflexible requirement"). Cf. *United States* v. *Montgomery County Bd. of Ed.*, 395 U. S. 225, 232 (1969) (approving a lower court desegregation order that "provided that the [school] board must move toward a goal under which 'in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system,'" and "immediately" requiring "[t]he ratio of Negro to white teachers" in each school to be equal to "the ratio of Negro to white teachers in . . . the system as a whole").

Second, broad-range limits on voluntary school choice plans are less burdensome, and hence more narrowly tailored, see *Grutter*, *supra*, at 341, than other race-conscious restrictions this Court has previously approved. See, *e. g.*, *Swann*, *supra*, at 26–27; *Montgomery County Bd. of Ed.*, *supra*, at 232. Indeed, the plans before us are *more narrowly tailored* than the race-conscious admission plans that this Court approved in *Grutter*. Here, race becomes a factor only in a fraction of students' non-merit-based assignments—not in large numbers of students' merit-based applications. Moreover, the effect of applying race-conscious criteria here affects potentially disadvantaged students *less severely,* not more severely, than the criteria at issue in *Grutter*. Disappointed students are not rejected from a

State's flagship graduate program; they simply attend a different one of the district's many public schools, which in aspiration and in fact are substantially equal. Cf. *Wygant*, 476 U. S., at 283 (plurality opinion). And, in Seattle, the disadvantaged student loses at most one year at the high school of his choice. One will search *Grutter* in vain for similarly persuasive evidence of narrow tailoring as the school districts have presented here.

Third, the manner in which the school boards developed these plans itself reflects "narrow tailoring." Each plan was devised to overcome a history of segregated public schools. Each plan embodies the results of local experience and community consultation. Each plan is the product of a process that has sought to enhance student choice, while diminishing the need for mandatory busing. And each plan's use of race-conscious elements is *diminished* compared to the use of race in preceding integration plans.

The school boards' widespread consultation, their experimentation with numerous other plans, indeed, the 40-year history that Part I sets forth, make clear that plans that are less explicitly race-based are unlikely to achieve the boards' "compelling" objectives. The history of each school system reveals highly segregated schools, followed by remedial plans that involved forced busing, followed by efforts to attract or retain students through the use of plans that abandoned busing and replaced it with greater student choice. Both cities once tried to achieve more integrated schools by relying solely upon measures such as redrawn district boundaries, new school building construction, and unrestricted voluntary transfers. In neither city did these prior attempts prove sufficient to achieve the city's integration goals. See Parts I–A and I–B, *supra*, at 807–819.

Moreover, giving some degree of weight to a local school board's knowledge, expertise, and concerns in these particular matters is not inconsistent with rigorous judicial scrutiny. It simply recognizes that judges are not well suited to act

as school administrators. Indeed, in the context of school desegregation, this Court has repeatedly stressed the importance of acknowledging that local school boards better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils. See *Milliken*, 418 U. S., at 741–742 ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process"). See also *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 49–50 (1973) (extolling local control for "the opportunity it offers for participation in the decisionmaking process that determines how . . . local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence"); *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities"); *Brown* v. *Board of Education*, 349 U. S. 294, 299 (1955) ("Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles").

Experience in Seattle and Louisville is consistent with experience elsewhere. In 1987, the U. S. Commission on Civil Rights studied 125 large school districts seeking integration. It reported that most districts—92 of them, in fact—adopted desegregation policies that combined two or more highly

race-conscious strategies, for example, rezoning or pairing. See Welch 83–91.

Having looked at dozens of *amicus* briefs, public reports, news stories, and the records in many of this Court's prior cases, which together span 50 years of desegregation history in school districts across the Nation, I have discovered many examples of districts that sought integration through explicitly race-conscious methods, including mandatory busing. Yet, I have found *no* example or model that would permit this Court to say to Seattle and to Louisville: "Here is an instance of a desegregation plan that is likely to achieve your objectives and also makes less use of race-conscious criteria than your plans." And, if the plurality cannot suggest such a model—and it cannot—then it seeks to impose a "narrow tailoring" requirement that in practice would never be met.

Indeed, if there is no such plan, or if such plans are purely imagined, it is understandable why, as the Court notes, *ante*, at 733–734, Seattle school officials concentrated on diminishing the racial component of their districts' plan, but did not pursue eliminating that element entirely. For the Court now to insist as it does, *ante*, at 735, that these school districts ought to have said so officially is either to ask for the superfluous (if they need only make explicit what is implicit) or to demand the impossible (if they must somehow provide more proof that there is no hypothetical *other* plan that could work as well as theirs). I am not aware of any case in which this Court has read the "narrow tailoring" test to impose such a requirement. Cf. *People Who Care* v. *Rockford Bd. of Ed. School Dist. No. 205*, 961 F. 2d 1335, 1338 (CA7 1992) (Easterbrook, J.) ("Would it be necessary to adjudicate the obvious before adopting (or permitting the parties to agree on) a remedy . . . ?").

The plurality also points to the school districts' use of numerical goals based upon the racial breakdown of the general school population, and it faults the districts for failing to prove that *no other set of numbers will work*. See *ante*, at

726–728. The plurality refers to no case in support of its demand. Nor is it likely to find such a case. After all, this Court has in many cases explicitly permitted districts to use target ratios based upon the district's underlying population. See, *e. g., Swann*, 402 U. S., at 24–25; *North Carolina Bd. of Ed.*, 402 U. S., at 46; *Montgomery County Bd. of Ed.*, 395 U. S., at 232. The reason is obvious: In Seattle, where the overall student population is 41% white, permitting 85% white enrollment at a single school would make it much more likely that other schools would have very few white students, whereas in Jefferson County, with a 60% white enrollment, one school with 85% white students would be less likely to skew enrollments elsewhere.

Moreover, there is research-based evidence supporting, for example, that a ratio no greater than 50% minority—which is Louisville's starting point, and as close as feasible to Seattle's starting point—is helpful in limiting the risk of "white flight." See Orfield, Metropolitan School Desegregation: Impacts on Metropolitan Society, in Pursuit of a Dream Deferred: Linking Housing and Education Policy 121, 125. Federal law also assumes that a similar target percentage will help avoid detrimental "minority group isolation." See No Child Left Behind Act of 2001, Title V, Part C, 115 Stat. 1806, 20 U. S. C. § 7231 *et seq.* (2000 ed., Supp. IV); 34 CFR §§ 280.2, 280.4 (2006) (implementing regulations). What other numbers are the boards to use as a "starting point"? Are they to spend days, weeks, or months seeking independently to validate the use of ratios that this Court has repeatedly authorized in prior cases? Are they to draw numbers out of thin air? These districts have followed this Court's holdings and advice in "tailoring" their plans. That, too, strongly supports the lawfulness of their methods.

Nor could the school districts have accomplished their desired aims (*e. g.*, avoiding forced busing, countering white flight, maintaining racial diversity) by other means. Nothing in the extensive history of desegregation efforts over the

past 50 years gives the districts, or this Court, any reason to believe that another method is possible to accomplish these goals. Nevertheless, JUSTICE KENNEDY suggests that school boards

> "may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Ante*, at 789.

But, as to "strategic site selection," Seattle has built one new high school in the last 44 years (and that specialized school serves only 300 students). In fact, six of the Seattle high schools involved in this case were built by the 1920's; the other four were open by the early 1960's. See generally N. Thompson & C. Marr, Building for Learning: Seattle Public School Histories, 1862–2000 (2002). As to "drawing" neighborhood "attendance zones" on a racial basis, Louisville tried it, and it worked only when forced busing was also part of the plan. See *supra*, at 814–816. As to "allocating resources for special programs," Seattle and Louisville have both experimented with this; indeed, these programs are often referred to as "magnet schools," but the limited desegregation effect of these efforts extends at most to those few schools to which additional resources are granted. In addition, there is no evidence from the experience of these school districts that it will make any meaningful impact. See Brief for Respondents in No. 05–908, p. 42. As to "recruiting faculty" on the basis of race, both cities have tried, but only as one part of a broader program. As to "tracking enrollments, performance, and other statistics by race," tracking *reveals* the problem; it does not cure it.

JUSTICE KENNEDY sets forth two additional concerns related to "narrow tailoring." In respect to Louisville, he says first that officials stated (1) that kindergarten assignments are not subject to the race-conscious guidelines, and (2) that the child at issue here was denied permission to attend the kindergarten he wanted because of those guidelines. Both, he explains, cannot be true. He adds that this confusion illustrates that Louisville's assignment plan (or its explanation of it to this Court) is insufficiently precise in respect to "who makes the decisions," "oversight," "the precise circumstances in which an assignment decision" will be made; and "which of two similarly situated children will be subjected to a given race-based decision." *Ante*, at 785.

The record suggests, however, that the child in question was not assigned to the school he preferred because he missed the kindergarten application deadline. See App. in No. 05–915, p. 20. After he had enrolled and after the academic year had begun, he then applied to transfer to his preferred school after the kindergarten assignment deadline had passed, *id.*, at 21, possibly causing school officials to treat his late request as an application to transfer to the first grade, in respect to which the guidelines apply. I am not certain just how the remainder of JUSTICE KENNEDY's concerns affect the lawfulness of the Louisville program, for they seem to be failures of explanation, not of administration. But Louisville should be able to answer the relevant questions on remand.

JUSTICE KENNEDY's second concern is directly related to the merits of Seattle's plan: Why does Seattle's plan group Asian-Americans, Hispanic-Americans, Native-Americans, and African-Americans together, treating all as similar minorities? *Ante*, at 786–787. The majority suggests that Seattle's classification system could permit a school to be labeled "diverse" with a 50% Asian-American and 50% white student body, and no African-American students, Hispanic

students, or students of other ethnicity. *Ante*, at 787 (opinion of KENNEDY, J.); *ante*, at 723–724 (opinion of the Court).

The 50/50 hypothetical has no support in the record here; it is conjured from the imagination. In fact, Seattle apparently began to treat these different minority groups alike in response to the federal Emergency School Aid Act's requirement that it do so. A. Siqueland, Without A Court Order: The Desegregation of Seattle's Schools 116–117 (1981) (hereinafter Siqueland). See also F. Hanawalt & R. Williams, The History of Desegregation in Seattle Public Schools, 1954–1981, p. 31 (1981) (hereinafter Hanawalt); Pub. L. 95–561, Title VI, 92 Stat. 2252 (prescribing percentage enrollment requirements for "minority" students); Siqueland 55 (discussing Department of Health, Education, and Welfare's definition of "minority"). Moreover, maintaining this federally mandated system of classification makes sense insofar as Seattle's experience indicates that the relevant circumstances in respect to each of these different minority groups are roughly similar, *e. g.*, in terms of residential patterns, and call for roughly similar responses. This is confirmed by the fact that Seattle has been able to achieve a desirable degree of diversity without the *greater* emphasis on race that drawing fine lines among minority groups would require. Does the plurality's view of the Equal Protection Clause mean that courts must give no weight to such a board determination? Does it insist upon especially strong evidence supporting inclusion of multiple minority groups in an otherwise lawful government minority-assistance program? If so, its interpretation threatens to produce divisiveness among minority groups that is incompatible with the basic objectives of the Fourteenth Amendment. Regardless, the plurality cannot object that the constitutional defect is the individualized use of race and simultaneously object that not enough account of individuals' race has been taken.

Finally, I recognize that the Court seeks to distinguish *Grutter* from these cases by claiming that *Grutter* arose in

"'the context of higher education.'" *Ante,* at 725. But that is not a meaningful legal distinction. I have explained why I do not believe the Constitution could possibly find "compelling" the provision of a racially diverse education for a 23-year-old law student but not for a 13-year-old high school pupil. See *supra,* at 841–843. And I have explained how the plans before us are more narrowly tailored than those in *Grutter.* See *supra,* at 847–848. I add that one cannot find a relevant distinction in the fact that these school districts did not examine the merits of applications "individual[ly]." See *ante,* at 722–723. The context here does not involve admission by merit; a child's academic, artistic, and athletic "merits" are not at all relevant to the child's placement. These are not affirmative action plans, and hence "individualized scrutiny" is simply beside the point.

The upshot is that these plans' specific features—(1) their limited and historically diminishing use of race, (2) their strong reliance upon other non-race-conscious elements, (3) their history and the manner in which the districts developed and modified their approach, (4) the comparison with prior plans, and (5) the lack of reasonably evident alternatives—together show that the districts' plans are "narrowly tailored" to achieve their "compelling" goals. In sum, the districts' race-conscious plans satisfy "strict scrutiny" and are therefore lawful.

IV

Direct Precedent

Two additional precedents more directly related to the plans here at issue reinforce my conclusion. The first consists of the District Court determination in the Louisville case when it dissolved its desegregation order that there was "overwhelming evidence of the Board's good faith compliance with the desegregation Decree and its underlying purposes," indeed that the board had "treated the ideal of an integrated system as much more than a legal obligation—they consider

it a positive, desirable policy and an essential element of any well-rounded public school education." *Hampton* v. *Jefferson Cty. Bd. of Ed.*, 102 F. Supp. 2d 358, 370 (WD Ky. 2000) *(Hampton II)*. When the court made this determination in 2000, it did so in the context of the Louisville desegregation plan that the board had adopted in 1996. That plan, which took effect before 1996, is the very plan that in all relevant respects is in effect now and is the subject of the present challenge.

No one claims that (the relevant portion of) Louisville's plan was unlawful in 1996 when Louisville adopted it. To the contrary, there is every reason to believe that it represented part of an effort to implement the 1978 desegregation order. But if the plan was lawful when it was first adopted and if it was lawful the day before the District Court dissolved its order, how can the plurality now suggest that it became *unlawful* the following day? Is it conceivable that the Constitution, implemented through a court desegregation order, could permit (perhaps *require*) the district to make use of a race-conscious plan the day before the order was dissolved and then *forbid* the district to use the identical plan the day after? See *id.*, at 380 ("The very analysis for dissolving desegregation decrees supports continued maintenance of a desegregated system as a compelling state interest"). The Equal Protection Clause is not incoherent. And federal courts would rightly hesitate to find unitary status if the consequences of the ruling were so dramatically disruptive.

Second, *Seattle School Dist. No. 1*, 458 U. S. 457, is directly on point. That case involves the original Seattle Plan, a *more heavily race-conscious predecessor* of the very plan now before us. In *Seattle School Dist. No. 1*, this Court struck down a state referendum that effectively barred implementation of Seattle's desegregation plan and "burden[ed] all future attempts to integrate Washington schools in districts throughout the State." *Id.*, at 462–463, 483. Because

the referendum would have prohibited the adoption of a school integration plan that involved mandatory busing, and because it would have imposed a special burden on school integration plans (plans that sought to integrate previously segregated schools), the Court found it unconstitutional. *Id.*, at 483–487.

In reaching this conclusion, the Court did not directly address the constitutional merits of the underlying Seattle Plan. But it explicitly cited *Swann*'s statement that the Constitution permitted a local district to adopt such a plan. 458 U. S., at 472, n. 15. It also cited to Justice Powell's opinion in *Bakke*, *approving of* the limited use of race-conscious criteria in a university-admissions "affirmative action" case. 458 U. S., at 472, n. 15. In addition, the Court stated that "[a]ttending an ethnically diverse school," *id.*, at 473, could help prepare "minority children for citizenship in our pluralistic society," hopefully "teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage." *Ibid.* (internal quotation marks omitted).

It is difficult to believe that the Court that held unconstitutional a referendum that would have interfered with the implementation of this plan thought that the integration plan it sought to preserve was itself an *unconstitutional* plan. And if *Seattle School Dist. No. 1* is premised upon the constitutionality of the original Seattle Plan, it is equally premised upon the constitutionality of the present plan, for the present plan *is* the Seattle Plan, modified only insofar as it places even *less* emphasis on race-conscious elements than its predecessors.

It is even more difficult to accept the plurality's contrary view, namely, that the underlying plan was unconstitutional. If that is so, then *all* of Seattle's earlier (even more race-conscious) plans must also have been unconstitutional. That necessary implication of the plurality's position strikes the 13th chime of the clock. How could the plurality adopt a

constitutional standard that would hold unconstitutional large numbers of race-conscious integration plans adopted by numerous school boards over the past 50 years while remaining true to this Court's desegregation precedent?

V

Consequences

The Founders meant the Constitution as a practical document that would transmit its basic values to future generations through principles that remained workable over time. Hence it is important to consider the potential consequences of the plurality's approach, as measured against the Constitution's objectives. To do so provides further reason to believe that the plurality's approach is legally unsound.

For one thing, consider the effect of the plurality's views on the parties before us and on similar school districts throughout the Nation. Will Louisville and all similar school districts have to return to systems like Louisville's initial 1956 plan, which did not consider race at all? See *supra*, at 813–814. That initial 1956 plan proved ineffective. Sixteen years into the plan, 14 of 19 middle and high schools remained almost totally white or almost totally black. *Ibid.*

The districts' past and current plans are not unique. They resemble other plans, promulgated by hundreds of local school boards, which have attempted a variety of desegregation methods that have evolved over time in light of experience. A 1987 Civil Rights Commission study of 125 school districts in the Nation demonstrated the breadth and variety of desegregation plans:

> "The [study] documents almost 300 desegregation plans that were implemented between 1961 and 1985. The degree of heterogeneity within these districts is immediately apparent. They are located in every region of the country and range in size from Las Cruces, New Mexico, with barely over 15,000 students attending 23 schools in 1968, to New York City, with more than one

> million students in 853 schools. The sample includes districts in urban areas of all sizes, suburbs (*e. g.*, Arlington County, Virginia) and rural areas (*e. g.*, Jefferson Parish, Louisiana, and Raleigh County, West Virginia). It contains 34 countywide districts with central cities (the 11 Florida districts fit this description, plus Clark County, Nevada and others) and a small number of consolidated districts (New Castle County, Delaware and Jefferson County, Kentucky).
>
> "The districts also vary in their racial compositions and levels of segregation. Initial plans were implemented in Mobile, Alabama and Mecklenburg County, North Carolina, and in a number of other southern districts in the face of total racial segregation. At the other extreme, Santa Clara, California had a relatively even racial distribution prior to its 1979 desegregation plan. When the 1965 plan was designed for Harford County, Maryland, the district was 92 percent white. Compton, California, on the other hand, became over 99 percent black in the 1980s, while Buffalo, New York had a virtual 50–50 split between white and minority students prior to its 1977 plan.
>
> "It is not surprising to find a large number of different desegregation strategies in a sample with this much variation." Welch 23 (footnote omitted).

A majority of these desegregation techniques explicitly considered a student's race. See *id.*, at 24–28. Transfer plans, for example, allowed students to shift from a school in which they were in the racial majority to a school in which they would be in a racial minority. Some districts, such as Richmond, California, and Buffalo, New York, permitted only "one-way" transfers, in which only black students attending predominantly black schools were permitted to transfer to designated receiver schools. *Id.*, at 25. Fifty-three of the one hundred twenty-five studied districts used transfers as a component of their plans. *Id.*, at 83–91.

At the state level, 46 States and Puerto Rico have adopted policies that encourage or require local school districts to enact interdistrict or intradistrict open choice plans. Eight of those States condition approval of transfers to another school or district on whether the transfer will produce increased racial integration. Eleven other States require local boards to deny transfers that are not in compliance with the local school board's desegregation plans. See Education Commission of the States, StateNotes, Open Enrollment: 50-State Report (2007), online at http://mb2.ecs.org/reports/Report.aspx?id=268.

Arkansas, for example, provides by statute that "[n]o student may transfer to a nonresident district where the percentage of enrollment for the student's race exceeds that percentage in the student's resident district." Ark. Code Ann. § 6–18–206(f)(1), as amended, 2007 Ark. Gen. Acts no. 552. An Ohio statute provides, in respect to student choice, that each school district must establish "[p]rocedures to ensure that an appropriate racial balance is maintained in the district schools." Ohio Rev. Code Ann. § 3313.98(B)(2)(b)(iii) (Lexis Supp. 2006). Ohio adds that a "district may object to the enrollment of a native student in an adjacent or other district in order to maintain an appropriate racial balance." § 3313.98(F)(1)(a).

A Connecticut statute states that its student choice program will seek to "preserve racial and ethnic balance." Conn. Gen. Stat. § 10–266aa(b)(2) (2007). Connecticut law requires each school district to submit racial group population figures to the State Board of Education. § 10–226a. Another Connecticut regulation provides that "[a]ny school in which the Proportion for the School falls outside of a range from 25 percentage points less to 25 percentage points more than the Comparable Proportion for the School District, shall be determined to be racially imbalanced." Conn. Agencies Regs. § 10–226e–3(b) (1999). A "racial imbalance" determination requires the district to submit a plan to correct the

racial imbalance, which plan may include "mandatory pupil reassignment." §§ 10–226e–5(a) and (c)(4).

Interpreting that State's Constitution, the Connecticut Supreme Court has held legally inadequate the reliance by a local school district solely upon some of the techniques JUSTICE KENNEDY today recommends (*e. g.*, reallocating resources, etc.). See *Sheff* v. *O'Neill*, 238 Conn. 1, 678 A. 2d 1267 (1996). The State Supreme Court wrote: "Despite the initiatives undertaken by the defendants to alleviate the severe racial and ethnic disparities among school districts, and despite the fact that the defendants did not intend to create or maintain these disparities, the disparities that continue to burden the education of the plaintiffs infringe upon their fundamental state constitutional right to a substantially equal educational opportunity." *Id.*, at 42, 678 A. 2d, at 1289.

At a minimum, the plurality's views would threaten a surge of race-based litigation. Hundreds of state and federal statutes and regulations use racial classifications for educational or other purposes. See *supra*, at 828–829. In many such instances, the contentious force of legal challenges to these classifications, meritorious or not, would displace earlier calm.

The wide variety of different integration plans that school districts use throughout the Nation suggests that the problem of racial segregation in schools, including *de facto* segregation, is difficult to solve. The fact that many such plans have used explicitly racial criteria suggests that such criteria have an important, sometimes necessary, role to play. The fact that the controlling opinion would make a school district's use of such criteria often unlawful (and the plurality's "colorblind" view would make such use always unlawful) suggests that today's opinion will require setting aside the laws of several States and many local communities.

As I have pointed out, *supra*, at 805–806, *de facto* resegregation is on the rise. See Appendix A, *infra*. It is reason-

able to conclude that such resegregation can create serious educational, social, and civic problems. See *supra*, at 839–845. Given the conditions in which school boards work to set policy, see *supra*, at 822, they may need all of the means presently at their disposal to combat those problems. Yet the plurality would deprive them of at least one tool that some districts now consider vital—the limited use of broad race-conscious student population ranges.

I use the words "may need" here deliberately. The plurality, or at least those who follow JUSTICE THOMAS' "'color-blind'" approach, see *ante*, at 772–773 (concurring opinion); *Grutter*, 539 U. S., at 353–354 (THOMAS, J., concurring in part and dissenting in part), may feel confident that, to end invidious discrimination, one must end *all* governmental use of race-conscious criteria including those with inclusive objectives. See *ante*, at 747–748 (plurality opinion); see also *ante*, at 772–773 (THOMAS, J., concurring). By way of contrast, I do not claim to know how best to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing *de facto* segregation, troubled inner-city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find answers. And it is for them to debate how best to educate the Nation's children and how best to administer America's schools to achieve that aim. The Court should leave them to their work. And it is for them to decide, to quote the plurality's slogan, whether the best "way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Ante*, at 748. See also *Parents Involved VII*, 426 F. 3d, at 1222 (Bea, J., dissenting) ("The way to end racial discrimination is to stop discriminating by race"). That is why the Equal Protection Clause out-

laws invidious discrimination, but does not similarly forbid all use of race-conscious criteria.

Until today, this Court understood the Constitution as affording the people, acting through their elected representatives, freedom to select the use of "race-conscious" criteria from among their available options. See *Adarand*, 515 U. S., at 237 ("[S]trict scrutiny" in this context is "[not] 'strict in theory, but fatal in fact'" (quoting *Fullilove*, 448 U. S., at 519 (Marshall, J., concurring in judgment))). Today, however, the Court restricts (and some Members would eliminate) that leeway. I fear the consequences of doing so for the law, for the schools, for the democratic process, and for America's efforts to create, out of its diversity, one Nation.

VI

Conclusions

To show that the school assignment plans here meet the requirements of the Constitution, I have written at exceptional length. But that length is necessary. I cannot refer to the history of the plans in these cases to justify the use of race-conscious criteria without describing that history in full. I cannot rely upon *Swann*'s statement that the use of race-conscious limits is permissible without showing, rather than simply asserting, that the statement represents a constitutional principle firmly rooted in federal and state law. Nor can I explain my disagreement with the Court's holding and the plurality's opinion without offering a detailed account of the arguments they propound and the consequences they risk.

Thus, the opinion's reasoning is long. But its conclusion is short: The plans before us satisfy the requirements of the Equal Protection Clause. And it is the plurality's opinion, not this dissent, that "fails to ground the result it would reach in law." *Ante*, at 735.

Four basic considerations have led me to this view. *First*, the histories of Louisville and Seattle reveal complex circum-

stances and a long tradition of conscientious efforts by local school boards to resist racial segregation in public schools. Segregation at the time of *Brown* gave way to expansive remedies that included busing, which in turn gave rise to fears of white flight and resegregation. For decades now, these school boards have considered and adopted and revised assignment plans that sought to rely less upon race, to emphasize greater student choice, and to improve the conditions of all schools for all students, no matter the color of their skin, no matter where they happen to reside. The plans under review—which are less burdensome, more egalitarian, and more effective than prior plans—continue in that tradition. And their history reveals school district goals whose remedial, educational, and democratic elements are inextricably intertwined each with the others. See Part I, *supra*, at 804–823.

Second, since this Court's decision in *Brown*, the law has consistently and unequivocally approved of both voluntary and compulsory race-conscious measures to combat segregated schools. The Equal Protection Clause, ratified following the Civil War, has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races. From *Swann* to *Grutter*, this Court's decisions have emphasized this distinction, recognizing that the fate of race relations in this country depends upon unity among our children, "for unless our children begin to learn together, there is little hope that our people will ever learn to live together." *Milliken*, 418 U. S., at 783 (Marshall, J., dissenting). See also Sumner, Equality Before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts (Dec. 4, 1849), in 2 The Works of Charles Sumner 327, 371 (1870) ("The law contemplates not only that all shall be taught, but that *all* shall be taught *together*"). See Part II, *supra*, at 823–837.

Third, the plans before us, subjected to rigorous judicial review, are supported by compelling state interests and are narrowly tailored to accomplish those goals. Just as diversity in higher education was deemed compelling in *Grutter*, diversity in public primary and secondary schools—where there is even more to gain—must be, *a fortiori*, a compelling state interest. Even apart from *Grutter*, five Members of this Court agree that "avoiding racial isolation" and "achiev-[ing] a diverse student population" remain today compelling interests. *Ante*, at 797–798 (opinion of KENNEDY, J.). These interests combine remedial, educational, and democratic objectives. For the reasons discussed above, however, I disagree with JUSTICE KENNEDY that Seattle and Louisville have not done enough to demonstrate that their present plans are necessary to continue upon the path set by *Brown*. These plans are *more* "narrowly tailored" than the race-conscious law school admissions criteria at issue in *Grutter*. Hence, their lawfulness follows *a fortiori* from this Court's prior decisions. See Parts III–IV, *supra*, at 838–858.

Fourth, the plurality's approach risks serious harm to the law and for the Nation. Its view of the law rests either upon a denial of the distinction between exclusionary and inclusive use of race-conscious criteria in the context of the Equal Protection Clause, or upon such a rigid application of its "test" that the distinction loses practical significance. Consequently, the Court's decision today slows down and sets back the work of local school boards to bring about racially diverse schools. See Part V, *supra*, at 858–863.

Indeed, the consequences of the approach the Court takes today are serious. Yesterday, the plans under review were lawful. Today, they are not. Yesterday, the citizens of this Nation could look for guidance to this Court's unanimous pronouncements concerning desegregation. Today, they cannot. Yesterday, school boards had available to them a

full range of means to combat segregated schools. Today, they do not.

The Court's decision undermines other basic institutional principles as well. What has happened to *stare decisis?* The history of the plans before us, their educational importance, their highly limited use of race—all these and more—make clear that the compelling interest here is stronger than in *Grutter.* The plans here are more narrowly tailored than the law school admissions program there at issue. Hence, applying *Grutter*'s strict test, their lawfulness follows *a fortiori.* To hold to the contrary is to transform that test from "strict" to "fatal in fact"—the very opposite of what *Grutter* said. And what has happened to *Swann?* To *McDaniel?* To *Crawford?* To *Harris?* To *School Committee of Boston?* To *Seattle School Dist. No. 1?* After decades of vibrant life, they would all, under the plurality's logic, be written out of the law.

And what of respect for democratic local decisionmaking by States and school boards? For several decades this Court has rested its public school decisions upon *Swann*'s basic view that the Constitution grants local school districts a significant degree of leeway where the inclusive use of race-conscious criteria is at issue. Now localities will have to cope with the difficult problems they face (including resegregation) deprived of one means they may find necessary.

And what of law's concern to diminish and peacefully settle conflict among the Nation's people? Instead of accommodating different good-faith visions of our country and our Constitution, today's holding upsets settled expectations, creates legal uncertainty, and threatens to produce considerable further litigation, aggravating race-related conflict.

And what of the long history and moral vision that the Fourteenth Amendment itself embodies? The plurality cites in support those who argued in *Brown* against segregation, and JUSTICE THOMAS likens the approach that I have taken to that of segregation's defenders. See *ante,* at 746–

748 (plurality opinion) (comparing Jim Crow segregation to Seattle and Louisville's integration polices); *ante*, at 773–782 (THOMAS, J., concurring). But segregation policies did not simply tell schoolchildren "where they could and could not go to school based on the color of their skin," *ante*, at 747 (plurality opinion); they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination. The lesson of history, see *ante*, at 746–748 (same), is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration. Indeed, it is a cruel distortion of history to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined). This is not to deny that there is a cost in applying "a state-mandated racial label." *Ante*, at 797 (KENNEDY, J., concurring in part and concurring in judgment). But that cost does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation.

* * *

Finally, what of the hope and promise of *Brown?* For much of this Nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court's finest hour, *Brown* v. *Board of Education* challenged this history and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It

sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.

Not everyone welcomed this Court's decision in *Brown*. Three years after that decision was handed down, the Governor of Arkansas ordered state militia to block the doors of a white schoolhouse so that black children could not enter. The President of the United States dispatched the 101st Airborne Division to Little Rock, Arkansas, and federal troops were needed to enforce a desegregation decree. See *Cooper* v. *Aaron*, 358 U. S. 1 (1958). Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.

The plurality is wrong to do so. The last half century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.

I must dissent.

APPENDIXES

A
Resegregation Trends

Percentage of Black Students in 90–100 Percent Nonwhite and Majority Nonwhite Public Schools by Region, 1950–1954 to 2000, Fall Enrollment

Region	1950–1954	1960–1961	1968	1972	1976	1980	1989	1999	2000
Percentage in 90–100% Nonwhite Schools									
Northeast	—	40	42.7	46.9	51.4	48.7	49.8	50.2	51.2
Border	100	59	60.2	54.7	42.5	37.0	33.7	39.7	39.6
South	100	100	77.8	24.7	22.4	23.0	26.0	31.1	30.9
Midwest	53	56	58.0	57.4	51.1	43.6	40.1	45.0	46.3
West	—	27	50.8	42.7	36.3	33.7	26.7	29.9	29.5
U. S.			**64.3**	**38.7**	**35.9**	**33.2**	**33.8**	**37.4**	**37.4**
Percentage in 50–100% Nonwhite Schools									
Northeast	—	62	66.8	69.9	72.5	79.9	75.4	77.5	78.3
Border	100	69	71.6	67.2	60.1	59.2	58.0	64.8	67.0
South	100	100	80.9	55.3	54.9	57.1	59.3	67.3	69.0
Midwest	78	80	77.3	75.3	70.3	69.5	69.4	67.9	73.3
West	—	69	72.2	68.1	67.4	66.8	67.4	76.7	75.3
U. S.			**76.6**	**63.6**	**62.4**	**62.9**	**64.9**	**70.1**	**71.6**

Source: C. Clotfelter, After *Brown:* The Rise and Retreat of School Desegregation 56 (2004) (Table 2.1).

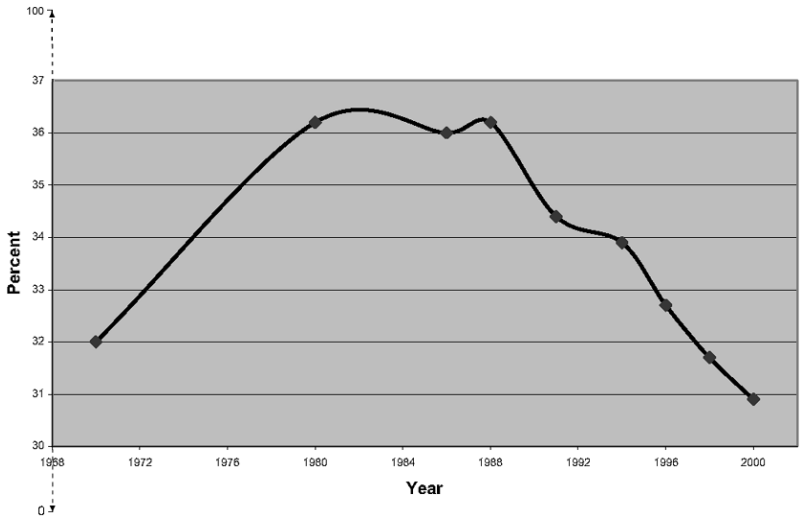
Changes in the Percentage of White Students in Schools Attended by the Average Black Student by State, 1970–2003 (includes States with 5% or greater enrollment of black students in 1970 and 1980)

	% White	% White Students in School of Average Black Student				Change		
	2003	1970	1980	1991	2003	1970–1980	1980–1991	1991–2003
Alabama	60	33	38	35	30	5	-3	-5
Arkansas	70	43	47	44	36	4	-3	-8
California	33	26	28	27	22	2	-1	-5
Connecticut	68	44	40	35	32	-4	-5	-3
Delaware	57	47	69	65	49	22	-4	-16
Florida	51	43	51	43	34	8	-8	-9
Georgia	52	35	38	35	30	3	-3	-5
Illinois	57	15	19	20	19	4	1	-1
Indiana	82	32	39	47	41	7	8	-6
Kansas	76	52	59	58	51	7	-1	-7
Kentucky	87	49	74	72	65	25	-2	-7
Louisiana	48	31	33	32	27	2	-1	-5
Maryland	50	30	35	29	23	5	-6	-6
Massachusetts	75	48	50	45	38	2	-5	-7
Michigan	73	22	23	22	22	1	-1	0
Mississippi	47	30	29	30	26	-1	1	-4
Missouri	78	21	34	40	33	13	6	-7
Nebraska	80	33	66	62	49	33	-4	-13
New Jersey	58	32	26	26	25	-6	0	-1
New York	54	29	23	20	18	-6	-3	-2
Nevada	51	56	68	62	38	12	-6	-24
N. Carolina	58	49	54	51	40	5	-3	-11
Ohio	79	28	43	41	32	15	-2	-9
Oklahoma	61	42	58	51	42	16	-7	-9
Pennsylvania	76	28	29	31	30	1	2	-1
S. Carolina	54	41	43	42	39	2	-1	-3
Tennessee	73	29	38	36	32	9	-2	-4
Texas	39	31	35	35	27	4	0	-8
Virginia	61	42	47	46	41	5	-1	-5
Wisconsin	79	26	45	39	29	19	-6	-10

Source: G. Orfield & C. Lee, Racial Transformation and the Changing Nature of Segregation 18 (Jan. 2006) (Table 8), online at http://www.civilrightsproject.harvard.edu/research/deseg/Racial_Transformation.pdf.

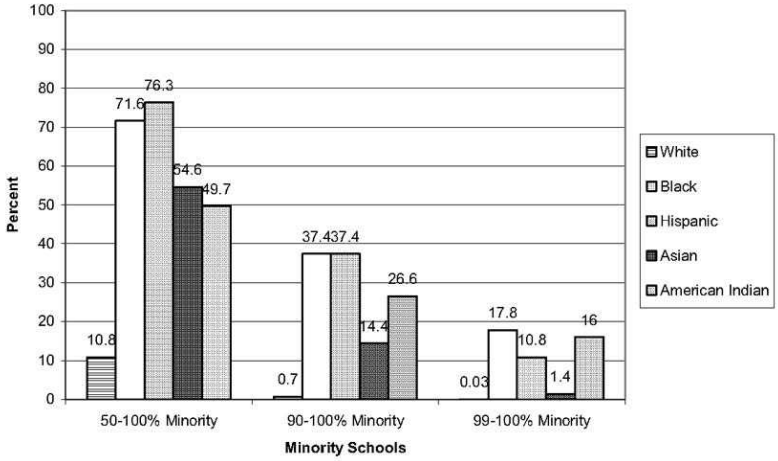
Appendix A to opinion of BREYER, J.

Percentage of White Students in Schools Attended by the Average Black Student, 1968–2000



Source: Modified from E. Frankenberg, C. Lee, & G. Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream?, p. 30, fig. 5 (Jan. 2003), online at http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (using U. S. Dept. of Education and National Center for Education Statistics Common Core of Data).

Percentage of Students in Minority Schools by Race, 2000–2001



Source: *Id.*, at 28, fig. 4.

B

Sources for Parts I–A and I–B

Part I–A: Seattle

Section 1. Segregation, 1945 to 1956

¶ 1 C. Schmid & W. McVey, Growth and Distribution of Minority Races in Seattle, Washington, 3, 7–9 (1964); Hanawalt 1–7; Taylor, The Civil Rights Movement in the American West: Black Protest in Seattle, 1960–1970, 80 J. Negro Hist. 1, 2–3 (1995); Siqueland 10; D. Pieroth, Desegregating the Public Schools, Seattle, Washington, 1954–1968, p. 6 (Dissertation Draft 1979).

Section 2. Preliminary Challenges, 1956 to 1969

¶ 1 *Id.*, at 32, 41; Hanawalt 4.
¶ 2 *Id.*, at 11–13.
¶ 3 *Id.*, at 5, 13, 27.

Section 3. The NAACP's First Legal Challenge and Seattle's Response, 1966 to 1977

¶ 1 Complaint in *Adams* v. *Bottomly*, Civ. No. 6704 (WD Wash., Mar. 18, 1966), pp. 10–11.
¶ 2 *Id.*, at 10, 14–15.
¶ 3 Planning and Evaluation Dept., Seattle Public Schools, The Plan Adopted by the Seattle School Board to Desegregate Fifth, Sixth, Seventh, and Eighth Grade Pupils in the Garfield, Lincoln, and Roosevelt High School Districts by September, 1971, pp. 6, 11 (Nov. 12, 1970) (on file with the University of Washington Library); see generally Siqueland 12–15; Hanawalt 18–20.
¶ 4 Siqueland 5, 7, 21.

Section 4. The NAACP's Second Legal Challenge, 1977

¶ 1 Administrative Complaint in *Seattle Branch, NAACP* v. *Seattle School Dist. No. 1*, pp. 2–3 (OCR, Apr. 22, 1977)

(filed with Court as exhibit in *Seattle School Dist. No. 1*, 458 U. S. 457); see generally Siqueland 23–24.

¶ 2 Memorandum of Agreement between Seattle School District No. 1 of King Cty., Washington, and the OCR (June 9, 1978) (filed with the Court as Exh. A to Kiner Affidavit in *Seattle School Dist. No. 1*, *supra*).

Section 5. The Seattle Plan: Mandatory Busing, 1978 to 1988

¶ 1 See generally *Seattle School Dist. No. 1*, *supra*, at 461; Seattle Public Schools Desegregation Planning Office, Proposed Alternative Desegregation Plans: Options for Eliminating Racial Imbalance by the 1979-80 School Year (1977) (filed with the Court in *Seattle School Dist. No. 1*, *supra*); Hanawalt 36–38, 40; Siqueland 3, 184, Table 4.

¶ 2 *Id.*, at 151–152; Hanawalt 37–38; *Seattle School Dist. No. 1*, *supra*, at 461; Motion to Dismiss or Affirm in *Seattle School Dist. No. 1*, O. T. 1981, No. 81–9.

¶ 3 *Seattle School Dist. No. 1*, *supra*, at 461; Hanawalt 40.

¶ 4 See generally *Seattle School Dist. No. 1*, *supra*.

Section 6. Student Choice, 1988 to 1998

¶ 1 L. Kohn, Priority Shift: The Fate of Mandatory Busing for School Desegregation in Seattle and the Nation 27–30, 32 (Mar. 1996).

¶ 2 *Id.*, at 32–34.

Section 7. The Current Plan, 1999 to the Present

¶ 1 App. in No. 05–908, p. 84a; Brief for Respondents in No. 05–908, at 5–7; *Parents Involved VII*, 426 F. 3d, at 1169–1170.

¶ 2 App. in No. 05–908, at 39a–42a; Data Profile: District Summary December 2005; Brief for Respondents in No. 05–908, at 9–10, 47; App. in No. 05–908, at 309a; School Board Report, School Choices and Assignments 2005–2006 School

Year (Apr. 2005), online at http://www.seattleschools.org/area/facilities-plan/Choice/0506AppsChoicesBoardApril2005final.pdf.

¶ 3 *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 149 Wash. 2d 660, 72 P. 3d 151 (2003); 137 F. Supp. 2d 1224 (WD Wash. 2001); *Parents Involved VII*, *supra.*

Part I–B: Louisville

Section 1. Before the Lawsuit, 1954 to 1972

¶ 1 *Hampton* v. *Jefferson Cty. Bd. of Ed.*, 72 F. Supp. 2d 753, 756, and nn. 2, 4, 5 (WD Ky. 1999) *(Hampton I)*.

Section 2. Court-Imposed Guidelines and Busing, 1972 to 1991

¶ 1 *Id.*, at 757–758, 762; *Newburg Area Council, Inc.* v. *Board of Ed. of Jefferson Cty.*, 489 F. 2d 925 (CA6 1973), vacated and remanded, 418 U. S. 918, reinstated with modifications, 510 F. 2d 1358 (CA6 1974) *(per curiam);* Judgment and Findings of Fact and Conclusions of Law in *Newburg Area Council, Inc.* v. *Board of Ed. of Jefferson Cty.*, Nos. 7045 and 7291 (WD Ky., July 30, 1975).

¶ 2 *Id.*, at 2, 3, and Attachment 1.

¶ 3 *Id.*, at 4–16.

¶ 4 Memorandum Opinion and Order in *Haycraft* v. *Board of Ed. of Jefferson Cty.*, Nos. 7045 and 7291 (WD Ky., June 16, 1978), pp. 1, 2, 4, 18.

¶ 5 Memorandum Opinion and Order, *Haycraft* v. *Board of Ed. of Jefferson Cty.*, Nos. 7045 and 7291 (WD Ky., Sept. 24, 1985), p. 3; Memorandum from Donald W. Ingwerson, Superintendent, to the Board of Education, Jefferson County Public School District, pp. 1, 3, 5 (Apr. 4, 1984); Memorandum from Donald W. Ingwerson, Superintendent, to the Board of Education, Jefferson County Public School District, pp. 4–5 (Dec. 19, 1991) (1991 Memorandum).

Section 3. Student Choice and Project Renaissance, 1991 to 1996

¶ 1 *Id.*, at 1–4, 7–11 (Stipulated Exh. 72); Brief for Respondents in No. 05–915, p. 12, n. 13.
¶ 2 1991 Memorandum 14–16.
¶ 3 *Id.*, at 11, 14–15.
¶ 4 *Id.*, at 15–16; Memorandum from Stephen W. Daeschner, Superintendent, to the Board of Education, Jefferson County Public School District, p. 2 (Aug. 6, 1996) (1996 Memorandum).

Section 4. The Current Plan: Project Renaissance Modified, 1996 to 2003

¶ 1 *Id.*, at 1–4; Brief for Respondents in No. 05–915, at 12, and n. 13.
¶ 2 1996 Memorandum 4–7, and Attachment 2; *Hampton I*, *supra*, at 768.
¶ 3 1996 Memorandum 5–8; *Hampton I*, *supra*, at 768, n. 30.
¶ 4 *Hampton II*, 102 F. Supp. 2d, at 359, 363, 370, 377.
¶ 5 *Id.*, at 380–381.

Section 5. The Current Lawsuit, 2003 to the Present

¶ 1 *McFarland* v. *Jefferson Cty. Public Schools*, 330 F. Supp. 2d 834 (WD Ky. 2004); *McFarland* v. *Jefferson Cty. Public Schools*, 416 F. 3d 513 (CA6 2005) *(per curiam);* Memorandum from Stephen W. Daeschner, Superintendent, to the Board of Education, Jefferson County Public School District, pp. 3–4 (Apr. 2, 2001).

Syllabus

LEEGIN CREATIVE LEATHER PRODUCTS, INC. *v.* PSKS, INC., DBA KAY'S KLOSET . . . KAY'S SHOES

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

No. 06–480. Argued March 26, 2007—Decided June 28, 2007

Given its policy of refusing to sell to retailers that discount its goods below suggested prices, petitioner (Leegin) stopped selling to respondent's (PSKS) store. PSKS filed suit, alleging, *inter alia,* that Leegin violated the antitrust laws by entering into vertical agreements with its retailers to set minimum resale prices. The District Court excluded expert testimony about Leegin's pricing policy's procompetitive effects on the ground that *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, makes it *per se* illegal under § 1 of the Sherman Act for a manufacturer and its distributor to agree on the minimum price the distributor can charge for the manufacturer's goods. At trial, PSKS alleged that Leegin and its retailers had agreed to fix prices, but Leegin argued that its pricing policy was lawful under § 1. The jury found for PSKS. On appeal, the Fifth Circuit declined to apply the rule of reason to Leegin's vertical price-fixing agreements and affirmed, finding that *Dr. Miles*' *per se* rule rendered irrelevant any procompetitive justifications for Leegin's policy.

Held: Dr. Miles is overruled, and vertical price restraints are to be judged by the rule of reason. Pp. 885–908.

(a) The accepted standard for testing whether a practice restrains trade in violation of § 1 is the rule of reason, which requires the fact-finder to weigh "all of the circumstances," *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 49, including "specific information about the relevant business" and "the restraint's history, nature, and effect," *State Oil Co.* v. *Khan,* 522 U. S. 3, 10. The rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and those with procompetitive effect that are in the consumer's best interest. However, when a restraint is deemed "unlawful *per se,*" *ibid.*, the need to study an individual restraint's reasonableness in light of real market forces is eliminated, *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 723. Resort to *per se* rules is confined to restraints "that would always or almost always tend to restrict competition and decrease output." *Ibid.* Thus, a *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, see *Broadcast Music, Inc.* v. *Columbia Broadcasting*

System, Inc., 441 U. S. 1, 9, and only if they can predict with confidence that the restraint would be invalidated in all or almost all instances under the rule of reason, see *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332, 344. Pp. 885–887.

(b) Because the reasons upon which *Dr. Miles* relied do not justify a *per se* rule, it is necessary to examine, in the first instance, the economic effects of vertical agreements to fix minimum resale prices and to determine whether the *per se* rule is nonetheless appropriate. Were this Court considering the issue as an original matter, the rule of reason, not a *per se* rule of unlawfulness, would be the appropriate standard to judge vertical price restraints. Pp. 887–899.

(1) Economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance, and the few recent studies on the subject also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule. The justifications for vertical price restraints are similar to those for other vertical restraints. Minimum resale price maintenance can stimulate interbrand competition among manufacturers selling different brands of the same type of product by reducing intrabrand competition among retailers selling the same brand. This is important because the antitrust laws' "primary purpose . . . is to protect interbrand competition," *Khan*, *supra*, at 15. A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Resale price maintenance may also give consumers more options to choose among low-price, low-service brands; high-price, high-service brands; and brands falling in between. Absent vertical price restraints, retail services that enhance interbrand competition might be underprovided because discounting retailers can free ride on retailers who furnish services and then capture some of the demand those services generate. Retail price maintenance can also increase interbrand competition by facilitating market entry for new firms and brands and by encouraging retailer services that would not be provided even absent free riding. Pp. 889–892.

(2) Setting minimum resale prices may also have anticompetitive effects; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever-present temptation. Resale price maintenance may, for example, facilitate a manufacturer cartel or be used to organize retail cartels. It can also be abused by a powerful manufacturer or retailer. Thus, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated. Pp. 892–894.

(3) Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that retail price maintenance "al-

ways or almost always tend[s] to restrict competition and decrease output," *Business Electronics*, *supra*, at 723. Vertical retail price agreements have either procompetitive or anticompetitive effects, depending on the circumstances in which they were formed; and the limited empirical evidence available does not suggest efficient uses of the agreements are infrequent or hypothetical. A *per se* rule should not be adopted for administrative convenience alone. Such rules can be counterproductive, increasing the antitrust system's total cost by prohibiting procompetitive conduct the antitrust laws should encourage. And a *per se* rule cannot be justified by the possibility of higher prices absent a further showing of anticompetitive conduct. The antitrust laws primarily are designed to protect interbrand competition from which lower prices can later result. Respondent's argument overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. Resale price maintenance has economic dangers. If the rule of reason were to apply, courts would have to be diligent in eliminating their anticompetitive uses from the market. Factors relevant to the inquiry are the number of manufacturers using the practice, the restraint's source, and a manufacturer's market power. The rule of reason is designed and used to ascertain whether transactions are anticompetitive or procompetitive. This standard principle applies to vertical price restraints. As courts gain experience with these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Pp. 894–899.

(c) *Stare decisis* does not compel continued adherence to the *per se* rule here. Because the Sherman Act is treated as a common-law statute, its prohibition on "restraint[s] of trade" evolves to meet the dynamics of present economic conditions. The rule of reason's case-by-case adjudication implements this common-law approach. Here, respected economics authorities suggest that the *per se* rule is inappropriate. And both the Department of Justice and the Federal Trade Commission recommend replacing the *per se* rule with the rule of reason. In addition, this Court has "overruled [its] precedents when subsequent cases have undermined their doctrinal underpinnings." *Dickerson* v. *United States*, 530 U. S. 428, 443. It is not surprising that the Court has distanced itself from *Dr. Miles'* rationales, for the case was decided not long after the Sherman Act was enacted, when the Court had little experience with antitrust analysis. Only eight years after *Dr. Miles*, the Court reined in the decision, holding that a manufacturer can suggest resale prices and refuse to deal with distributors who do not follow them, *United States* v. *Colgate & Co.*, 250 U. S. 300, 307–308; and more

recently the Court has tempered, limited, or overruled once strict vertical restraint prohibitions, see, *e. g.*, *GTE Sylvania*, 433 U. S., at 57–59. The *Dr. Miles* rule is also inconsistent with a principled framework, for it makes little economic sense when analyzed with the Court's other vertical restraint cases. Deciding that procompetitive effects of resale price maintenance are insufficient to overrule *Dr. Miles* would call into question cases such as *Colgate* and *GTE Sylvania*. Respondent's arguments for reaffirming *Dr. Miles* based on *stare decisis* do not require a different result. Pp. 899–907.

171 Fed. Appx. 464, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 908.

Theodore B. Olson argued the cause for petitioner. With him on the briefs were *Michael L. Denger*, *Joshua Lipton*, *Amir C. Tayrani*, *Tyler A. Baker*, *Jeffrey S. Levinger*, and *Gary Freedman*.

Deputy Solicitor General Hungar argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Barnett*, *Deputy Assistant Attorney General Masoudi*, *Lisa S. Blatt*, *Catherine G. O'Sullivan*, and *David Seidman*.

Robert W. Coykendall argued the cause for respondent. With him on the brief were *Ken M. Peterson*, *Tim J. Moore*, *Nelson J. Roach*, *D. Neil Smith*, and *Stephen R. McAllister*.

Barbara D. Underwood, Solicitor General of New York, argued the cause for the State of New York et al. as *amici curiae* urging affirmance. With her on the brief were *Andrew M. Cuomo*, Attorney General of New York, *Benjamin N. Gutman*, Acting Deputy Solicitor General, *Daniel J. Chepaitis*, Assistant Solicitor General, and *Jay L. Himes* and *Robert L. Hubbard*, Assistant Attorneys General, and the Attorneys General for their respective States as follows: *Talis J. Colberg* of Alaska, *Dustin McDaniel* of Arkansas, *Richard Blumenthal* of Connecticut, *Joseph R. Biden III* of

Delaware, *Bill McCollum* of Florida, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Thomas Miller* of Iowa, *Paul Morrison* of Kansas, *Greg Stumbo* of Kentucky, *Charles C. Foti, Jr.*, of Louisiana, *G. Steven Rowe* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Mike Cox* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Catherine Cortez Masto* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Stuart Rabner* of New Jersey, *Gary King* of New Mexico, *Roy Cooper* of North Carolina, *Marc Dann* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry McMaster* of South Carolina, *Larry Long* of South Dakota, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Patrick J. Crank* of Wyoming.*

JUSTICE KENNEDY delivered the opinion of the Court.

In *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911), the Court established the rule that it is *per se* illegal under § 1 of the Sherman Act, 15 U. S. C. § 1, for a manufacturer to agree with its distributor to set the minimum price the distributor can charge for the manufacturer's goods. The question presented by the instant case is

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*Briefs of *amici curiae* urging reversal were filed for the American Petroleum Institute by *Robert A. Long, Harry M. Ng*, and *Douglas W. Morris;* for CTIA—The Wireless Association by *Roy T. Englert, Jr., Donald J. Russell*, and *Michael Field Altshul;* for Economists by *Joseph Angland* and *Stephen V. Bomse;* and for PING, Inc., by *Thomas C. Walsh, Lawrence G. Scarborough, Aaron S. Bayer*, and *Robert M. Langer.*

Briefs of *amici curiae* urging affirmance were filed for the American Antitrust Institute by *Albert Foer;* for the Anderson Economic Group, LLC, by *Theodore R. Bolema;* for the Burlington Coat Factory Warehouse Corp. by *Jonathan W. Cuneo, Matthew Wiener*, and *Robert J. Cynkar;* and for the Consumer Federation of America by *Peter A. Barile III.*

Eugene Crew filed a brief for William S. Comanor et al. as *amici curiae.*

whether the Court should overrule the *per se* rule and allow resale price maintenance agreements to be judged by the rule of reason, the usual standard applied to determine if there is a violation of § 1. The Court has abandoned the rule of *per se* illegality for other vertical restraints a manufacturer imposes on its distributors. Respected economic analysts, furthermore, conclude that vertical price restraints can have procompetitive effects. We now hold that *Dr. Miles* should be overruled and that vertical price restraints are to be judged by the rule of reason.

I

Petitioner, Leegin Creative Leather Products, Inc. (Leegin), designs, manufactures, and distributes leather goods and accessories. In 1991, Leegin began to sell belts under the brand name "Brighton." The Brighton brand has now expanded into a variety of women's fashion accessories. It is sold across the United States in over 5,000 retail establishments, for the most part independent, small boutiques and specialty stores. Leegin's president, Jerry Kohl, also has an interest in about 70 stores that sell Brighton products. Leegin asserts that, at least for its products, small retailers treat customers better, provide customers more services, and make their shopping experience more satisfactory than do larger, often impersonal retailers. Kohl explained: "[W]e want the consumers to get a different experience than they get in Sam's Club or in Wal-Mart. And you can't get that kind of experience or support or customer service from a store like Wal-Mart." 5 Record 127.

Respondent, PSKS, Inc. (PSKS), operates Kay's Kloset, a women's apparel store in Lewisville, Texas. Kay's Kloset buys from about 75 different manufacturers and at one time sold the Brighton brand. It first started purchasing Brighton goods from Leegin in 1995. Once it began selling the brand, the store promoted Brighton. For example, it ran Brighton advertisements and had Brighton days in the store.

Kay's Kloset became the destination retailer in the area to buy Brighton products. Brighton was the store's most important brand and once accounted for 40 to 50 percent of its profits.

In 1997, Leegin instituted the "Brighton Retail Pricing and Promotion Policy." 4 *id.*, at 939. Following the policy, Leegin refused to sell to retailers that discounted Brighton goods below suggested prices. The policy contained an exception for products not selling well that the retailer did not plan on reordering. In the letter to retailers establishing the policy, Leegin stated:

> "In this age of mega stores like Macy's, Bloomingdales, May Co. and others, consumers are perplexed by promises of product quality and support of product which we believe is lacking in these large stores. Consumers are further confused by the ever popular sale, sale, sale, etc.
>
> "We, at Leegin, choose to break away from the pack by selling [at] specialty stores; specialty stores that can offer the customer great quality merchandise, superb service, and support the Brighton product 365 days a year on a consistent basis.
>
> "We realize that half the equation is Leegin producing great Brighton product and the other half is you, our retailer, creating great looking stores selling our products in a quality manner." *Ibid.*

Leegin adopted the policy to give its retailers sufficient margins to provide customers the service central to its distribution strategy. It also expressed concern that discounting harmed Brighton's brand image and reputation.

A year after instituting the pricing policy Leegin introduced a marketing strategy known as the "Heart Store Program." See *id.*, at 962–972. It offered retailers incentives to become Heart Stores, and, in exchange, retailers pledged, among other things, to sell at Leegin's suggested prices. Kay's Kloset became a Heart Store soon after Leegin created

the program. After a Leegin employee visited the store and found it unattractive, the parties appear to have agreed that Kay's Kloset would not be a Heart Store beyond 1998. Despite losing this status, Kay's Kloset continued to increase its Brighton sales.

In December 2002, Leegin discovered Kay's Kloset had been marking down Brighton's entire line by 20 percent. Kay's Kloset contended it placed Brighton products on sale to compete with nearby retailers who also were undercutting Leegin's suggested prices. Leegin, nonetheless, requested that Kay's Kloset cease discounting. Its request refused, Leegin stopped selling to the store. The loss of the Brighton brand had a considerable negative impact on the store's revenue from sales.

PSKS sued Leegin in the United States District Court for the Eastern District of Texas. It alleged, among other claims, that Leegin had violated the antitrust laws by "enter-[ing] into agreements with retailers to charge only those prices fixed by Leegin." *Id.*, at 1236. Leegin planned to introduce expert testimony describing the procompetitive effects of its pricing policy. The District Court excluded the testimony, relying on the *per se* rule established by *Dr. Miles.* At trial PSKS argued that the Heart Store program, among other things, demonstrated Leegin and its retailers had agreed to fix prices. Leegin responded that it had established a unilateral pricing policy lawful under § 1, which applies only to concerted action. See *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919). The jury agreed with PSKS and awarded it $1.2 million. Pursuant to 15 U. S. C. § 15(a), the District Court trebled the damages and reimbursed PSKS for its attorney's fees and costs. It entered judgment against Leegin in the amount of $3,975,000.80.

The Court of Appeals for the Fifth Circuit affirmed. 171 Fed. Appx. 464 (2006) *(per curiam).* On appeal Leegin did not dispute that it had entered into vertical price-fixing agreements with its retailers. Rather, it contended that the

rule of reason should have applied to those agreements. The Court of Appeals rejected this argument. *Id.*, at 466–467. It was correct to explain that it remained bound by *Dr. Miles* "[b]ecause [the Supreme] Court has consistently applied the *per se* rule to [vertical minimum price-fixing] agreements." 171 Fed. Appx., at 466. On this premise the Court of Appeals held that the District Court did not abuse its discretion in excluding the testimony of Leegin's economic expert, for the *per se* rule rendered irrelevant any procompetitive justifications for Leegin's pricing policy. *Id.*, at 467. We granted certiorari to determine whether vertical minimum resale price maintenance agreements should continue to be treated as *per se* unlawful. 549 U. S. 1092 (2006).

II

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." Ch. 647, 26 Stat. 209, as amended, 15 U. S. C. § 1. While § 1 could be interpreted to proscribe all contracts, see, *e. g.*, *Board of Trade of Chicago* v. *United States*, 246 U. S. 231, 238 (1918), the Court has never "taken a literal approach to [its] language," *Texaco Inc.* v. *Dagher*, 547 U. S. 1, 5 (2006). Rather, the Court has repeated time and again that § 1 "outlaw[s] only unreasonable restraints." *State Oil Co.* v. *Khan*, 522 U. S. 3, 10 (1997).

The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1. See *Texaco*, *supra*, at 5. "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 49 (1977). Appropriate factors to take into account include "specific information about the relevant business" and "the restraint's history, nature, and effect." *Khan*, *supra*, at 10. Whether the busi-

nesses involved have market power is a further, significant consideration. See, *e. g.*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 768 (1984) (equating the rule of reason with "an inquiry into market power and market structure designed to assess [a restraint's] actual effect"); see also *Illinois Tool Works Inc.* v. *Independent Ink, Inc.*, 547 U. S. 28, 45–46 (2006). In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

The rule of reason does not govern all restraints. Some types "are deemed unlawful *per se*." *Khan*, *supra*, at 10. The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work, *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 723 (1988); and, it must be acknowledged, the *per se* rule can give clear guidance for certain conduct. Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices, see *Texaco*, *supra*, at 5, or to divide markets, see *Palmer* v. *BRG of Ga., Inc.*, 498 U. S. 46, 49–50 (1990) *(per curiam)*.

Resort to *per se* rules is confined to restraints, like those mentioned, "that would always or almost always tend to restrict competition and decrease output." *Business Electronics*, *supra*, at 723 (internal quotation marks omitted). To justify a *per se* prohibition a restraint must have "manifestly anticompetitive" effects, *GTE Sylvania*, *supra*, at 50, and "lack . . . any redeeming virtue," *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U. S. 284, 289 (1985) (internal quotation marks omitted).

As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, see *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 9 (1979), and only if courts can predict with confidence that it would be invali-

dated in all or almost all instances under the rule of reason, see *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332, 344 (1982). It should come as no surprise, then, that "we have expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *Khan*, *supra*, at 10 (internal quotation marks omitted); see also *White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963) (refusing to adopt a *per se* rule for a vertical nonprice restraint because of the uncertainty concerning whether this type of restraint satisfied the demanding standards necessary to apply a *per se* rule). And, as we have stated, a "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *GTE Sylvania*, *supra*, at 58–59.

III

The Court has interpreted *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, as establishing a *per se* rule against a vertical agreement between a manufacturer and its distributor to set minimum resale prices. See, *e. g.*, *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 761 (1984). In *Dr. Miles* the plaintiff, a manufacturer of medicines, sold its products only to distributors who agreed to resell them at set prices. The Court found the manufacturer's control of resale prices to be unlawful. It relied on the common-law rule that "a general restraint upon alienation is ordinarily invalid." 220 U. S., at 404–405. The Court then explained that the agreements would advantage the distributors, not the manufacturer, and were analogous to a combination among competing distributors, which the law treated as void. *Id.*, at 407–408.

The reasoning of the Court's more recent jurisprudence has rejected the rationales on which *Dr. Miles* was based. By relying on the common-law rule against restraints on alienation, *id.*, at 404–405, the Court justified its decision

based on "formalistic" legal doctrine rather than "demonstrable economic effect," *GTE Sylvania*, 433 U. S., at 58–59. The Court in *Dr. Miles* relied on a treatise published in 1628, but failed to discuss in detail the business reasons that would motivate a manufacturer situated in 1911 to make use of vertical price restraints. Yet the Sherman Act's use of "restraint of trade" "invokes the common law itself, . . . not merely the static content that the common law had assigned to the term in 1890." *Business Electronics*, *supra*, at 732. The general restraint on alienation, especially in the age when then-Justice Hughes used the term, tended to evoke policy concerns extraneous to the question that controls here. Usually associated with land, not chattels, the rule arose from restrictions removing real property from the stream of commerce for generations. The Court should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance. We reaffirm that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today." *GTE Sylvania*, *supra*, at 53, n. 21 (internal quotation marks omitted).

Dr. Miles, furthermore, treated vertical agreements a manufacturer makes with its distributors as analogous to a horizontal combination among competing distributors. See 220 U. S., at 407–408. In later cases, however, the Court rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones. See, *e. g.*, *Business Electronics*, *supra*, at 734 (disclaiming the "notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality"); *Maricopa County*, *supra*, at 348, n. 18 (noting that "horizontal restraints are generally less defensible than vertical restraints"). Our recent cases formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements, differences the *Dr. Miles* Court failed to consider.

The reasons upon which *Dr. Miles* relied do not justify a *per se* rule. As a consequence, it is necessary to examine, in the first instance, the economic effects of vertical agreements to fix minimum resale prices, and to determine whether the *per se* rule is nonetheless appropriate. See *Business Electronics*, 485 U. S., at 726.

A

Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance. See, *e. g.*, Brief for Economists as *Amici Curiae* 16 ("In the theoretical literature, it is essentially undisputed that minimum [resale price maintenance] can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects"); Brief for United States as *Amicus Curiae* 9 ("[T]here is a widespread consensus that permitting a manufacturer to control the price at which its goods are sold may promote *inter*brand competition and consumer welfare in a variety of ways"); ABA Section of Antitrust Law, Antitrust Law and Economics of Product Distribution 76 (2006) ("[T]he bulk of the economic literature on [resale price maintenance] suggests that [it] is more likely to be used to enhance efficiency than for anticompetitive purposes"); see also H. Hovenkamp, The Antitrust Enterprise: Principle and Execution 184–191 (2005) (hereinafter Hovenkamp); R. Bork, The Antitrust Paradox 288–291 (1978) (hereinafter Bork). Even those more skeptical of resale price maintenance acknowledge it can have procompetitive effects. See, *e. g.*, Brief for William S. Comanor et al. as *Amici Curiae* 3 ("[G]iven [the] diversity of effects [of resale price maintenance], one could reasonably take the position that a *rule of reason* rather than a *per se* approach is warranted"); F. Scherer & D. Ross, Industrial Market Structure and Economic Performance 558 (3d ed. 1990) (hereinafter Scherer & Ross) ("The overall bal-

ance between benefits and costs [of resale price maintenance] is probably close").

The few recent studies documenting the competitive effects of resale price maintenance also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule. See Bureau of Economics Staff Report to the FTC, T. Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence 170 (1983) (hereinafter Overstreet) (noting that "[e]fficient uses of [resale price maintenance] are evidently not unusual or rare"); see also Ippolito, Resale Price Maintenance: Empirical Evidence From Litigation, 34 J. Law & Econ. 263, 292–293 (1991) (hereinafter Ippolito).

The justifications for vertical price restraints are similar to those for other vertical restraints. See *GTE Sylvania*, 433 U. S., at 54–57. Minimum resale price maintenance can stimulate interbrand competition—the competition among manufacturers selling different brands of the same type of product—by reducing intrabrand competition—the competition among retailers selling the same brand. See *id.*, at 51–52. The promotion of interbrand competition is important because "the primary purpose of the antitrust laws is to protect [this type of] competition." *Khan*, 522 U. S., at 15. A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.

Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate. *GTE Sylvania*, *supra*, at 55. Consumers might learn, for example, about

the benefits of a manufacturer's product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees. R. Posner, Antitrust Law 172–173 (2d ed. 2001) (hereinafter Posner). Or consumers might decide to buy the product because they see it in a retail establishment that has a reputation for selling high-quality merchandise. Marvel & McCafferty, Resale Price Maintenance and Quality Certification, 15 Rand J. Econ. 346, 347–349 (1984) (hereinafter Marvel & McCafferty). If the consumer can then buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer. Minimum resale price maintenance alleviates the problem because it prevents the discounter from undercutting the service provider. With price competition decreased, the manufacturer's retailers compete among themselves over services.

Resale price maintenance, in addition, can increase interbrand competition by facilitating market entry for new firms and brands. "[N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer." *GTE Sylvania, supra*, at 55; see Marvel & McCafferty 349 (noting that reliance on a retailer's reputation "will decline as the manufacturer's brand becomes better known, so that [resale price maintenance] may be particularly important as a competitive device for new entrants"). New products and new brands are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance there is a procompetitive effect.

Resale price maintenance can also increase interbrand competition by encouraging retailer services that would not

be provided even absent free riding. It may be difficult and inefficient for a manufacturer to make and enforce a contract with a retailer specifying the different services the retailer must perform. Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services. See Mathewson & Winter, The Law and Economics of Resale Price Maintenance, 13 Rev. Indus. Org. 57, 74–75 (1998) (hereinafter Mathewson & Winter); Klein & Murphy, Vertical Restraints as Contract Enforcement Mechanisms, 31 J. Law & Econ. 265, 295 (1988); see also Deneckere, Marvel, & Peck, Demand Uncertainty, Inventories, and Resale Price Maintenance, 111 Q. J. Econ. 885, 911 (1996) (noting that resale price maintenance may be beneficial to motivate retailers to stock adequate inventories of a manufacturer's goods in the face of uncertain consumer demand).

B

While vertical agreements setting minimum resale prices can have procompetitive justifications, they may have anticompetitive effects in other cases; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever-present temptation. Resale price maintenance may, for example, facilitate a manufacturer cartel. See *Business Electronics*, 485 U. S., at 725. An unlawful cartel will seek to discover if some manufacturers are undercutting the cartel's fixed prices. Resale price maintenance could assist the cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer. Resale price maintenance, furthermore, could discourage a manufacturer from cutting prices to retailers with the concomitant benefit of cheaper prices to consumers. See *ibid.;* see also Posner 172; Overstreet 19–23.

Vertical price restraints also "might be used to organize cartels at the retailer level." *Business Electronics*, *supra*, at 725–726. A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance. In that instance the manufacturer does not establish the practice to stimulate services or to promote its brand but to give inefficient retailers higher profits. Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the agreement. See Posner 172; Overstreet 13–19. Historical examples suggest this possibility is a legitimate concern. See, *e. g.*, Marvel & McCafferty, The Welfare Effects of Resale Price Maintenance, 28 J. Law & Econ. 363, 373 (1985) (hereinafter Marvel) (providing an example of the power of the National Association of Retail Druggists to compel manufacturers to use resale price maintenance); Hovenkamp 186 (suggesting that the retail druggists in *Dr. Miles* formed a cartel and used manufacturers to enforce it).

A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful. See *Texaco*, 547 U. S., at 5; *GTE Sylvania*, 433 U. S., at 58, n. 28. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason. This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.

Resale price maintenance, furthermore, can be abused by a powerful manufacturer or retailer. A dominant retailer, for example, might request resale price maintenance to forestall innovation in distribution that decreases costs. A manufacturer might consider it has little choice but to accommodate the retailer's demands for vertical price restraints if the manufacturer believes it needs access to the retailer's

distribution network. See Overstreet 31; 8 P. Areeda & H. Hovenkamp, Antitrust Law 47 (2d ed. 2004) (hereinafter Areeda & Hovenkamp); cf. *Toys "R" Us, Inc.* v. *FTC*, 221 F. 3d 928, 937–938 (CA7 2000). A manufacturer with market power, by comparison, might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants. See, *e. g.*, Marvel 366–368. As should be evident, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.

C

Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance "always or almost always tend[s] to restrict competition and decrease output." *Business Electronics*, *supra*, at 723 (internal quotation marks omitted). Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed. And although the empirical evidence on the topic is limited, it does not suggest efficient uses of the agreements are infrequent or hypothetical. See Overstreet 170; see also *id.*, at 80 (noting that for the majority of enforcement actions brought by the Federal Trade Commission between 1965 and 1982, "the use of [resale price maintenance] was not likely motivated by collusive dealers who had successfully coerced their suppliers"); Ippolito 292 (reaching a similar conclusion). As the rule would proscribe a significant amount of procompetitive conduct, these agreements appear ill suited for *per se* condemnation.

Respondent contends, nonetheless, that vertical price restraints should be *per se* unlawful because of the administrative convenience of *per se* rules. See, *e. g.*, *GTE Sylvania*, *supra*, at 50, n. 16 (noting "*per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system"). That argument sug-

gests *per se* illegality is the rule rather than the exception. This misinterprets our antitrust law. *Per se* rules may decrease administrative costs, but that is only part of the equation. Those rules can be counterproductive. They can increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage. See Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L. J. 135, 158 (1984) (hereinafter Easterbrook). They also may increase litigation costs by promoting frivolous suits against legitimate practices. The Court has thus explained that administrative "advantages are not sufficient in themselves to justify the creation of *per se* rules," *GTE Sylvania*, 433 U. S., at 50, n. 16, and has relegated their use to restraints that are "manifestly anticompetitive," *id.*, at 49–50. Were the Court now to conclude that vertical price restraints should be *per se* illegal based on administrative costs, we would undermine, if not overrule, the traditional "demanding standards" for adopting *per se* rules. *Id.*, at 50. Any possible reduction in administrative costs cannot alone justify the *Dr. Miles* rule.

Respondent also argues the *per se* rule is justified because a vertical price restraint can lead to higher prices for the manufacturer's goods. See also Overstreet 160 (noting that "price surveys indicate that [resale price maintenance] in most cases increased the prices of products sold"). Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct. Cf. *id.*, at 106 (explaining that price surveys "do not necessarily tell us anything conclusive about the welfare effects of [resale price maintenance] because the results are generally consistent with both procompetitive and anticompetitive theories"). For, as has been indicated already, the antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result. See *Khan*, 522 U. S., at 15. The Court, moreover, has evaluated other vertical restraints under the rule of reason even though prices can be

increased in the course of promoting procompetitive effects. See, *e. g.*, *Business Electronics*, 485 U. S., at 728. And resale price maintenance may reduce prices if manufacturers have resorted to costlier alternatives of controlling resale prices that are not *per se* unlawful. See *infra*, at 902–904; see also Marvel 371.

Respondent's argument, furthermore, overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. The difference between the price a manufacturer charges retailers and the price retailers charge consumers represents part of the manufacturer's cost of distribution, which, like any other cost, the manufacturer usually desires to minimize. See *GTE Sylvania*, 433 U. S., at 56, n. 24; see also *id.*, at 56 ("Economists . . . have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products"). A manufacturer has no incentive to overcompensate retailers with unjustified margins. The retailers, not the manufacturer, gain from higher retail prices. The manufacturer often loses; interbrand competition reduces its competitiveness and market share because consumers will "substitute a different brand of the same product." *Id.*, at 52, n. 19; see *Business Electronics*, *supra*, at 725. As a general matter, therefore, a single manufacturer will desire to set minimum resale prices only if the "increase in demand resulting from enhanced service . . . will more than offset a negative impact on demand of a higher retail price." Mathewson & Winter 67.

The implications of respondent's position are far reaching. Many decisions a manufacturer makes and carries out through concerted action can lead to higher prices. A manufacturer might, for example, contract with different suppliers to obtain better inputs that improve product quality. Or it might hire an advertising agency to promote awareness of its goods. Yet no one would think these actions violate the

Sherman Act because they lead to higher prices. The antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want. The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices. The same can hold true for resale price maintenance.

Resale price maintenance, it is true, does have economic dangers. If the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market. This is a realistic objective, and certain factors are relevant to the inquiry. For example, the number of manufacturers that make use of the practice in a given industry can provide important instruction. When only a few manufacturers lacking market power adopt the practice, there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers. See Overstreet 22; Bork 294. Likewise, a retailer cartel is unlikely when only a single manufacturer in a competitive market uses resale price maintenance. Interbrand competition would divert consumers to lower priced substitutes and eliminate any gains to retailers from their price-fixing agreement over a single brand. See Posner 172; Bork 292. Resale price maintenance should be subject to more careful scrutiny, by contrast, if many competing manufacturers adopt the practice. Cf. Scherer & Ross 558 (noting that "except when [resale price maintenance] spreads to cover the bulk of an industry's output, depriving consumers of a meaningful choice between high-service and low-price outlets, most [resale price maintenance arrangements] are probably innocuous"); Easterbrook 162 (suggesting that "every one of the potentially-anticompetitive outcomes of vertical arrangements depends on the uniformity of the practice").

The source of the restraint may also be an important consideration. If there is evidence retailers were the impetus

for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer. See Brief for William S. Comanor et al. as *Amici Curiae* 7–8. If, by contrast, a manufacturer adopted the policy independent of retailer pressure, the restraint is less likely to promote anticompetitive conduct. Cf. Posner 177 ("It makes all the difference whether minimum retail prices are imposed by the manufacturer in order to evoke point-of-sale services or by the dealers in order to obtain monopoly profits"). A manufacturer also has an incentive to protest inefficient retailer-induced price restraints because they can harm its competitive position.

As a final matter, that a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity has market power. If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers. See also *Business Electronics*, *supra*, at 727, n. 2 (noting "[r]etail market power is rare, because of the usual presence of interbrand competition and other dealers"). And if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets.

The rule of reason is designed and used to eliminate anticompetitive transactions from the market. This standard principle applies to vertical price restraints. A party alleging injury from a vertical agreement setting minimum resale prices will have, as a general matter, the information and resources available to show the existence of the agreement and its scope of operation. As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions

where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.

For all of the foregoing reasons, we think that were the Court considering the issue as an original matter, the rule of reason, not a *per se* rule of unlawfulness, would be the appropriate standard to judge vertical price restraints.

IV

We do not write on a clean slate, for the decision in *Dr. Miles* is almost a century old. So there is an argument for its retention on the basis of *stare decisis* alone. Even if *Dr. Miles* established an erroneous rule, "*[s]tare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Khan*, 522 U. S., at 20 (internal quotation marks omitted). And concerns about maintaining settled law are strong when the question is one of statutory interpretation. See, *e. g.*, *Hohn* v. *United States*, 524 U. S. 236, 251 (1998).

Stare decisis is not as significant in this case, however, because the issue before us is the scope of the Sherman Act. *Khan*, *supra*, at 20 ("[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act"). From the beginning the Court has treated the Sherman Act as a common-law statute. See *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 688 (1978); see also *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 98, n. 42 (1981) ("In antitrust, the federal courts . . . act more as common-law courts than in other areas governed by federal statute"). Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on "restraint[s] of trade" evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach. See *National Soc. of Professional*

Engineers, *supra*, at 688. Likewise, the boundaries of the doctrine of *per se* illegality should not be immovable. For "[i]t would make no sense to create out of the single term 'restraint of trade' a chronologically schizoid statute, in which a 'rule of reason' evolves with new circumstances and new wisdom, but a line of *per se* illegality remains forever fixed where it was." *Business Electronics*, 485 U. S., at 732.

A

Stare decisis, we conclude, does not compel our continued adherence to the *per se* rule against vertical price restraints. As discussed earlier, respected authorities in the economics literature suggest the *per se* rule is inappropriate, and there is now widespread agreement that resale price maintenance can have procompetitive effects. See, *e. g.*, Brief for Economists as *Amici Curiae* 16. It is also significant that both the Department of Justice and the Federal Trade Commission—the antitrust enforcement agencies with the ability to assess the long-term impacts of resale price maintenance—have recommended that this Court replace the *per se* rule with the traditional rule of reason. See Brief for United States as *Amicus Curiae* 6. In the antitrust context the fact that a decision has been "called into serious question" justifies our reevaluation of it. *Khan*, *supra*, at 21.

Other considerations reinforce the conclusion that *Dr. Miles* should be overturned. Of most relevance, "we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings." *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000). The Court's treatment of vertical restraints has progressed away from *Dr. Miles*' strict approach. We have distanced ourselves from the opinion's rationales. See *supra*, at 887–889; see also *Khan*, *supra*, at 21 (overruling a case when "the views underlying [it had been] eroded by this Court's precedent"); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 480–481 (1989) (same). This is unsurprising, for the case was decided not long after enactment of the

Sherman Act when the Court had little experience with antitrust analysis. Only eight years after *Dr. Miles*, moreover, the Court reined in the decision by holding that a manufacturer can announce suggested resale prices and refuse to deal with distributors who do not follow them. *Colgate*, 250 U. S., at 307–308.

In more recent cases the Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints. In 1977, the Court overturned the *per se* rule for vertical nonprice restraints, adopting the rule of reason in its stead. *GTE Sylvania*, 433 U. S., at 57–59 (overruling *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967)); see also 433 U. S., at 58, n. 29 (noting "that the advantages of vertical restrictions should not be limited to the categories of new entrants and failing firms"). While the Court in a footnote in *GTE Sylvania* suggested that differences between vertical price and nonprice restraints could support different legal treatment, see *id.*, at 51, n. 18, the central part of the opinion relied on authorities and arguments that find unequal treatment "difficult to justify," *id.*, at 69–70 (White, J., concurring in judgment).

Continuing in this direction, in two cases in the 1980's the Court defined legal rules to limit the reach of *Dr. Miles* and to accommodate the doctrines enunciated in *GTE Sylvania* and *Colgate*. See *Business Electronics*, *supra*, at 726–728; *Monsanto*, 465 U. S., at 763–764. In *Monsanto*, the Court required that antitrust plaintiffs alleging a § 1 price-fixing conspiracy must present evidence tending to exclude the possibility a manufacturer and its distributors acted in an independent manner. *Id.*, at 764. Unlike Justice Brennan's concurrence, which rejected arguments that *Dr. Miles* should be overruled, see 465 U. S., at 769, the Court "decline[d] to reach the question" whether vertical agreements fixing resale prices always should be unlawful because neither party suggested otherwise, *id.*, at 761–762, n. 7. In

Business Electronics the Court further narrowed the scope of *Dr. Miles.* It held that the *per se* rule applied only to specific agreements over price levels and not to an agreement between a manufacturer and a distributor to terminate a price-cutting distributor. 485 U. S., at 726–727, 735–736.

Most recently, in 1997, after examining the issue of vertical maximum price-fixing agreements in light of commentary and real experience, the Court overruled a 29-year-old precedent treating those agreements as *per se* illegal. *Khan*, 522 U. S., at 22 (overruling *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968)). It held instead that they should be evaluated under the traditional rule of reason. 522 U. S., at 22. Our continued limiting of the reach of the decision in *Dr. Miles* and our recent treatment of other vertical restraints justify the conclusion that *Dr. Miles* should not be retained.

The *Dr. Miles* rule is also inconsistent with a principled framework, for it makes little economic sense when analyzed with our other cases on vertical restraints. If we were to decide the procompetitive effects of resale price maintenance were insufficient to overrule *Dr. Miles*, then cases such as *Colgate* and *GTE Sylvania* themselves would be called into question. These later decisions, while they may result in less intrabrand competition, can be justified because they permit manufacturers to secure the procompetitive benefits associated with vertical price restraints through other methods. The other methods, however, could be less efficient for a particular manufacturer to establish and sustain. The end result hinders competition and consumer welfare because manufacturers are forced to engage in second-best alternatives and because consumers are required to shoulder the increased expense of the inferior practices.

The manufacturer has a number of legitimate options to achieve benefits similar to those provided by vertical price restraints. A manufacturer can exercise its *Colgate* right to refuse to deal with retailers that do not follow its suggested prices. See 250 U. S., at 307. The economic effects of uni-

lateral and concerted price setting are in general the same. See, *e. g.*, *Monsanto*, 465 U. S., at 762–764. The problem for the manufacturer is that a jury might conclude its unilateral policy was really a vertical agreement, subjecting it to treble damages and potential criminal liability. *Ibid.; Business Electronics*, *supra*, at 728. Even with the stringent standards in *Monsanto* and *Business Electronics*, this danger can lead, and has led, rational manufacturers to take wasteful measures. See, *e. g.*, Brief for PING, Inc., as *Amicus Curiae* 9–18. A manufacturer might refuse to discuss its pricing policy with its distributors except through counsel knowledgeable of the subtle intricacies of the law. Or it might terminate longstanding distributors for minor violations without seeking an explanation. See *ibid.* The increased costs these burdensome measures generate flow to consumers in the form of higher prices.

Furthermore, depending on the type of product it sells, a manufacturer might be able to achieve the procompetitive benefits of resale price maintenance by integrating downstream and selling its products directly to consumers. *Dr. Miles* tilts the relative costs of vertical integration and vertical agreement by making the former more attractive based on the *per se* rule, not on real market conditions. See *Business Electronics*, *supra*, at 725; see generally Coase, The Nature of the Firm, 4 Economica, New Series 386 (1937). This distortion might lead to inefficient integration that would not otherwise take place, so that consumers must again suffer the consequences of the suboptimal distribution strategy. And integration, unlike vertical price restraints, eliminates all intrabrand competition. See, *e. g.*, *GTE Sylvania*, *supra*, at 57, n. 26.

There is yet another consideration. A manufacturer can impose territorial restrictions on distributors and allow only one distributor to sell its goods in a given region. Our cases have recognized, and the economics literature confirms, that these vertical nonprice restraints have impacts similar to

those of vertical price restraints; both reduce intrabrand competition and can stimulate retailer services. See, *e. g.*, *Business Electronics*, *supra*, at 728; *Monsanto*, *supra*, at 762–763; see also Brief for Economists as *Amici Curiae* 17–18. Cf. Scherer & Ross 560 (noting that vertical nonprice restraints "can engender inefficiencies at least as serious as those imposed upon the consumer by resale price maintenance"); Steiner, How Manufacturers Deal with the Price-Cutting Retailer: When Are Vertical Restraints Efficient? 65 Antitrust L. J. 407, 446–447 (1997) (indicating that "antitrust law should recognize that the consumer interest is often better served by [resale price maintenance]—contrary to its per se illegality and the rule-of-reason status of vertical nonprice restraints"). The same legal standard (*per se* unlawfulness) applies to horizontal market division and horizontal price fixing because both have similar economic effect. There is likewise little economic justification for the current differential treatment of vertical price and nonprice restraints. Furthermore, vertical nonprice restraints may prove less efficient for inducing desired services, and they reduce intrabrand competition more than vertical price restraints by eliminating both price and service competition. See Brief for Economists as *Amici Curiae* 17–18.

In sum, it is a flawed antitrust doctrine that serves the interests of lawyers—by creating legal distinctions that operate as traps for the unwary—more than the interests of consumers—by requiring manufacturers to choose second-best options to achieve sound business objectives.

B

Respondent's arguments for reaffirming *Dr. Miles* on the basis of *stare decisis* do not require a different result. Respondent looks to congressional action concerning vertical price restraints. In 1937, Congress passed the Miller-Tydings Fair Trade Act, 50 Stat. 693, which made vertical price restraints legal if authorized by a fair trade law

enacted by a State. Fifteen years later, Congress expanded the exemption to permit vertical price-setting agreements between a manufacturer and a distributor to be enforced against other distributors not involved in the agreement. McGuire Act, 66 Stat. 632. In 1975, however, Congress repealed both Acts. Consumer Goods Pricing Act, 89 Stat. 801. That the *Dr. Miles* rule applied to vertical price restraints in 1975, according to respondent, shows Congress ratified the rule.

This is not so. The text of the Consumer Goods Pricing Act did not codify the rule of *per se* illegality for vertical price restraints. It rescinded statutory provisions that made them *per se* legal. Congress once again placed these restraints within the ambit of § 1 of the Sherman Act. And, as has been discussed, Congress intended § 1 to give courts the ability "to develop governing principles of law" in the common-law tradition. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 643 (1981); see *Business Electronics*, 485 U. S., at 731 ("The changing content of the term 'restraint of trade' was well recognized at the time the Sherman Act was enacted"). Congress could have set the *Dr. Miles* rule in stone, but it chose a more flexible option. We respect its decision by analyzing vertical price restraints, like all restraints, in conformance with traditional § 1 principles, including the principle that our antitrust doctrines "evolv[e] with new circumstances and new wisdom." *Business Electronics*, *supra*, at 732; see also Easterbrook 139.

The rule of reason, furthermore, is not inconsistent with the Consumer Goods Pricing Act. Unlike the earlier congressional exemption, it does not treat vertical price restraints as *per se* legal. In this respect, the justifications for the prior exemption are illuminating. Its goal "was to allow the States to protect small retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters." *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S.

97, 102 (1980). The state fair trade laws also appear to have been justified on similar grounds. See Areeda & Hovenkamp 298. The rationales for these provisions are foreign to the Sherman Act. Divorced from competition and consumer welfare, they were designed to save inefficient small retailers from their inability to compete. The purpose of the antitrust laws, by contrast, is "the protection of *competition*, not *competitors*." *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U. S. 328, 338 (1990) (internal quotation marks omitted). To the extent Congress repealed the exemption for some vertical price restraints to end its prior practice of encouraging anticompetitive conduct, the rule of reason promotes the same objective.

Respondent also relies on several congressional appropriations in the mid-1980's in which Congress did not permit the Department of Justice or the Federal Trade Commission to use funds to advocate overturning *Dr. Miles*. See, *e. g.*, 97 Stat. 1071. We need not pause long in addressing this argument. The conditions on funding are no longer in place, see, *e. g.*, Brief for United States as *Amicus Curiae* 21, and they were ambiguous at best. As much as they might show congressional approval for *Dr. Miles*, they might demonstrate a different proposition: that Congress could not pass legislation codifying the rule and reached a short-term compromise instead.

Reliance interests do not require us to reaffirm *Dr. Miles*. To be sure, reliance on a judicial opinion is a significant reason to adhere to it, *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), especially "in cases involving property and contract rights," *Khan*, 522 U. S., at 20. The reliance interests here, however, like the reliance interests in *Khan*, cannot justify an inefficient rule, especially because the narrowness of the rule has allowed manufacturers to set minimum resale prices in other ways. And while the *Dr. Miles* rule is longstanding, resale price maintenance was legal under fair trade laws

in a majority of States for a large part of the past century up until 1975.

It is also of note that during this time "when the legal environment in the [United States] was most favorable for [resale price maintenance], no more than a tiny fraction of manufacturers ever employed [resale price maintenance] contracts." Overstreet 6; see also *id.*, at 169 (noting that "no more than one percent of manufacturers, accounting for no more than ten percent of consumer goods purchases, ever employed [resale price maintenance] in any single year in the [United States]"); Scherer & Ross 549 (noting that "[t]he fraction of U. S. retail sales covered by [resale price maintenance] in its heyday has been variously estimated at from 4 to 10 percent"). To the extent consumers demand cheap goods, judging vertical price restraints under the rule of reason will not prevent the market from providing them. Cf. Easterbrook 152–153 (noting that "S.S. Kresge (the old K-Mart) flourished during the days of manufacturers' greatest freedom" because "discount stores offer a combination of price and service that many customers value" and that "[n]othing in restricted dealing threatens the ability of consumers to find low prices"); Scherer & Ross 557 (noting that "for the most part, the effects of the [Consumer Goods Pricing Act] were imperceptible because the forces of competition had already repealed the [previous antitrust exemption] in their own quiet way").

For these reasons the Court's decision in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911), is now overruled. Vertical price restraints are to be judged according to the rule of reason.

V

Noting that Leegin's president has an ownership interest in retail stores that sell Brighton, respondent claims Leegin participated in an unlawful horizontal cartel with competing

retailers. Respondent did not make this allegation in the lower courts, and we do not consider it here.

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

It is so ordered.

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

In *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 394, 408–409 (1911), this Court held that an agreement between a manufacturer of proprietary medicines and its dealers to fix the minimum price at which its medicines could be sold was "invalid . . . under the [Sherman Act, 15 U. S. C. § 1]." This Court has consistently read *Dr. Miles* as establishing a bright-line rule that agreements fixing minimum resale prices are *per se* illegal. See, *e. g.*, *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 399–401 (1927); *NYNEX Corp.* v. *Discon, Inc.*, 525 U. S. 128, 133 (1998). That *per se* rule is one upon which the legal profession, business, and the public have relied for close to a century. Today the Court holds that courts must determine the lawfulness of minimum resale price maintenance by applying, not a bright-line *per se* rule, but a circumstance-specific "rule of reason." *Ante*, at 907. And in doing so it overturns *Dr. Miles*.

The Court justifies its departure from ordinary considerations of *stare decisis* by pointing to a set of arguments well known in the antitrust literature for close to half a century. See *ante*, at 889–892. Congress has repeatedly found in these arguments insufficient grounds for overturning the *per se* rule. See, *e. g.*, Hearings on H. R. 10527 et al. before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., 74–76, 89, 99, 101–102, 192–195, 261–262 (1958). And,

in my view, they do not warrant the Court's now overturning so well-established a legal precedent.

I

The Sherman Act seeks to maintain a marketplace free of anticompetitive practices, in particular those enforced by agreement among private firms. The law assumes that such a marketplace, free of private restrictions, will tend to bring about the lower prices, better products, and more efficient production processes that consumers typically desire. In determining the lawfulness of particular practices, courts often apply a "rule of reason." They examine both a practice's likely anticompetitive effects and its beneficial business justifications. See, *e. g.*, *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 109–110, and n. 39 (1984); *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 688–691 (1978); *Board of Trade of Chicago* v. *United States*, 246 U. S. 231, 238 (1918).

Nonetheless, sometimes the likely anticompetitive consequences of a particular practice are so serious and the potential justifications so few (or, *e. g.*, so difficult to prove) that courts have departed from a pure "rule of reason" approach. And sometimes this Court has imposed a rule of *per se* unlawfulness—a rule that instructs courts to find the practice unlawful all (or nearly all) the time. See, *e. g.*, *NYNEX*, *supra*, at 133; *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332, 343–344, and n. 16 (1982); *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 50, n. 16 (1977); *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 609–611 (1972); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 213–214 (1940) (citing and quoting *Trenton Potteries*, *supra*, at 397–398).

The case before us asks which kind of approach the courts should follow where minimum resale price maintenance is at issue. Should they apply a *per se* rule (or a variation) that

would make minimum resale price maintenance always (or *almost* always) unlawful? Should they apply a "rule of reason"? Were the Court writing on a blank slate, I would find these questions difficult. But, of course, the Court is not writing on a blank slate, and that fact makes a considerable legal difference.

To best explain why the question would be difficult were we deciding it afresh, I briefly summarize several classical arguments for and against the use of a *per se* rule. The arguments focus on three sets of considerations, those involving: (1) potential anticompetitive effects, (2) potential benefits, and (3) administration. The difficulty arises out of the fact that the different sets of considerations point in different directions. See, *e. g.*, 8 P. Areeda, Antitrust Law ¶¶ 1628–1633, pp. 330–392 (1st ed. 1989) (hereinafter Areeda); 8 P. Areeda & H. Hovenkamp, Antitrust Law ¶¶ 1628–1633, pp. 288–339 (2d ed. 2004) (hereinafter Areeda & Hovenkamp); Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L. J. 135, 146–152 (1984) (hereinafter Easterbrook); Pitofsky, In Defense of Discounters: The No-Frills Case for a *Per Se* Rule Against Vertical Price Fixing, 71 Geo. L. J. 1487 (1983) (hereinafter Pitofsky); Scherer, The Economics of Vertical Restraints, 52 Antitrust L. J. 687, 706–707 (1983) (hereinafter Scherer); Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. Chi. L. Rev. 6, 22–26 (1981); Brief for William S. Comanor et al. as *Amici Curiae* 7–10.

On the one hand, agreements setting minimum resale prices may have serious anticompetitive consequences. *In respect to dealers:* Resale price maintenance agreements, rather like horizontal price agreements, can diminish or eliminate price competition among dealers of a single brand or (if practiced generally by manufacturers) among multibrand dealers. In doing so, they can prevent dealers from offering customers the lower prices that many customers prefer; they can prevent dealers from responding to changes

in demand, say, falling demand, by cutting prices; they can encourage dealers to substitute service, for price, competition, thereby threatening wastefully to attract too many resources into that portion of the industry; they can inhibit expansion by more efficient dealers whose lower prices might otherwise attract more customers, stifling the development of new, more efficient modes of retailing; and so forth. See, *e. g.*, 8 Areeda & Hovenkamp ¶ 1632c, at 319–321; Steiner, The Evolution and Applications of Dual-Stage Thinking, 49 The Antitrust Bulletin 877, 899–900 (2004); Comanor, Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy, 98 Harv. L. Rev. 983, 990–1000 (1985).

In respect to producers: Resale price maintenance agreements can help to reinforce the competition-inhibiting behavior of firms in concentrated industries. In such industries firms may tacitly collude, *i. e.*, observe each other's pricing behavior, each understanding that price cutting by one firm is likely to trigger price competition by all. See 8 Areeda & Hovenkamp ¶ 1632d, at 321–323; P. Areeda & L. Kaplow, Antitrust Analysis ¶¶ 231–233, pp. 276–283 (4th ed. 1988) (hereinafter Areeda & Kaplow). Cf. *United States* v. *Container Corp. of America*, 393 U. S. 333 (1969); Areeda & Kaplow ¶¶ 247–253, at 327–348. Where that is so, resale price maintenance can make it easier for each producer to identify (by observing retail markets) when a competitor has begun to cut prices. And a producer who cuts wholesale prices *without* lowering the minimum resale price will stand to gain little, if anything, in increased profits, because the dealer will be unable to stimulate increased consumer demand by passing along the producer's price cut to consumers. In either case, resale price maintenance agreements will tend to prevent price competition from "breaking out"; and they will thereby tend to stabilize producer prices. See Pitofsky 1490–1491. Cf., *e. g., Container Corp., supra,* at 336–337.

Those who express concern about the potential anticompetitive effects find empirical support in the behavior of prices before, and then after, Congress in 1975 repealed the Miller-Tydings Fair Trade Act, 50 Stat. 693, and the McGuire Act, 66 Stat. 631. Those Acts had permitted (but not required) individual States to enact "fair trade" laws authorizing minimum resale price maintenance. At the time of repeal minimum resale price maintenance was lawful in 36 States; it was unlawful in 14 States. See Hearings on S. 408 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 173 (1975) (hereinafter Hearings on S. 408) (statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division). Comparing prices in the former States with prices in the latter States, the Department of Justice argued that minimum resale price maintenance had raised prices by 19% to 27%. See Hearings on H. R. 2384 before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 94th Cong., 1st Sess., 122 (1975) (hereinafter Hearings on H. R. 2384) (statement of Keith I. Clearwaters, Deputy Assistant Attorney General, Antitrust Division).

After repeal, minimum resale price maintenance agreements were unlawful *per se* in every State. The Federal Trade Commission (FTC) staff, after studying numerous price surveys, wrote that collectively the surveys "indicate[d] that [resale price maintenance] in most cases increased the prices of products sold with [resale price maintenance]." Bureau of Economics Staff Report to the FTC, T. Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence 160 (1983) (hereinafter Overstreet). Most economists today agree that, in the words of a prominent antitrust treatise, "resale price maintenance tends to produce higher consumer prices than would otherwise be the case." 8 Areeda & Hovenkamp ¶ 1604b, at 40 (finding "[t]he evidence . . . persuasive on this point"). See also Brief for William S. Comanor et al. as *Amici Curiae* 4 ("It is uni-

formly acknowledged that [resale price maintenance] and other vertical restraints lead to higher consumer prices").

On the other hand, those favoring resale price maintenance have long argued that resale price maintenance agreements can provide important consumer benefits. The majority lists two: First, such agreements can facilitate new entry. *Ante*, at 891. For example, a newly entering producer wishing to build a product name might be able to convince dealers to help it do so—if, but only if, the producer can assure those dealers that they will later recoup their investment. Without resale price maintenance, late-entering dealers might take advantage of the earlier investment and, through price competition, drive prices down to the point where the early dealers cannot recover what they spent. By assuring the initial dealers that such later price competition will not occur, resale price maintenance can encourage them to carry the new product, thereby helping the new producer succeed. See 8 Areeda & Hovenkamp ¶¶ 1617a, 1631b, at 193–196, 308. The result might be increased competition at the producer level, *i. e.*, greater *inter*-brand competition, that brings with it net consumer benefits.

Second, without resale price maintenance a producer might find its efforts to sell a product undermined by what resale price maintenance advocates call "free riding." *Ante*, at 890–891. Suppose a producer concludes that it can succeed only if dealers provide certain services, say, product demonstrations, high quality shops, advertising that creates a certain product image, and so forth. Without resale price maintenance, some dealers might take a "free ride" on the investment that others make in providing those services. Such a dealer would save money by not paying for those services and could consequently cut its own price and increase its own sales. Under these circumstances, dealers might prove unwilling to invest in the provision of necessary services. See, *e. g.*, 8 Areeda & Hovenkamp ¶¶ 1611–1613,

1631c, at 126–165, 309–313; R. Posner, Antitrust Law 172–173 (2d ed. 2001); R. Bork, The Antitrust Paradox 290–291 (1978) (hereinafter Bork); Easterbrook 146–149.

Moreover, where a producer and not a group of dealers seeks a resale price maintenance agreement, there is a special reason to believe some such benefits exist. That is because, other things being equal, producers should want to encourage price competition among their dealers. By doing so they will often increase profits by selling more of their product. See *Sylvania*, 433 U. S., at 56, n. 24; Bork 290. And that is so, even if the producer possesses sufficient market power to earn a supernormal profit. That is to say, other things being equal, the producer will benefit by charging his dealers a competitive (or even a higher-than-competitive) wholesale price while encouraging price competition among them. Hence, if the producer is the moving force, the producer must have some special reason for wanting resale price maintenance; and in the absence of, say, concentrated producer markets (where that special reason might consist of a desire to stabilize wholesale prices), that special reason may well reflect the special circumstances just described: new entry, "free riding," or variations on those themes.

The upshot is, as many economists suggest, sometimes resale price maintenance can prove harmful; sometimes it can bring benefits. See, *e. g.*, Brief for Economists as *Amici Curiae* 16; 8 Areeda & Hovenkamp ¶¶ 1631–1632, at 306–328; Pitofsky 1495; Scherer 706–707. But before concluding that courts should consequently apply a rule of reason, I would ask such questions as, how often are harms or benefits likely to occur? How easy is it to separate the beneficial sheep from the antitrust goats?

Economic discussion, such as the studies the Court relies upon, can *help* provide answers to these questions, and in doing so, economics can, and should, inform antitrust law. But antitrust law cannot, and should not, precisely replicate

economists' (sometimes conflicting) views. That is because law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. And that fact means that courts will often bring their own administrative judgment to bear, sometimes applying rules of *per se* unlawfulness to business practices even when those practices sometimes produce benefits. See, *e. g.*, F. Scherer & D. Ross, Industrial Market Structure and Economic Performance 335–339 (3d ed. 1990) (hereinafter Scherer & Ross) (describing some circumstances under which price-fixing agreements could be more beneficial than "unfettered competition," but also noting potential costs of moving from a *per se* ban to a rule of reasonableness assessment of such agreements).

I have already described studies and analyses that suggest (though they cannot prove) that resale price maintenance can cause harms with some regularity—and certainly when dealers are the driving force. But what about benefits? How often, for example, will the benefits to which the Court points occur in practice? I can find no economic consensus on this point. There is a consensus in the literature that "free riding" takes place. But "free riding" often takes place in the economy without any legal effort to stop it. Many visitors to California take free rides on the Pacific Coast Highway. We all benefit freely from ideas, such as that of creating the first supermarket. Dealers often take a "free ride" on investments that others have made in building a product's name and reputation. The question is how often the "free riding" problem is serious enough significantly to deter dealer investment.

To be more specific, one can easily *imagine* a dealer who refuses to provide important presale services, say, a detailed explanation of how a product works (or who fails to provide a proper atmosphere in which to sell expensive perfume or alligator billfolds), lest customers use that "free" service (or

enjoy the psychological benefit arising when a high-priced retailer stocks a particular brand of billfold or handbag) and then buy from another dealer at a lower price. Sometimes this must happen in reality. But does it happen often? We do, after all, live in an economy where firms, despite *Dr. Miles*' *per se* rule, still sell complex technical equipment (as well as expensive perfume and alligator billfolds) to consumers.

All this is to say that the ultimate question is not whether, but *how much*, "free riding" of this sort takes place. And, after reading the briefs, I must answer that question with an uncertain "sometimes." See, *e. g.*, Brief for William S. Comanor et al. as *Amici Curiae* 6–7 (noting "skepticism in the economic literature about how often [free riding] actually occurs"); Scherer & Ross 551–555 (explaining the "severe limitations" of the free-rider justification for resale price maintenance); Pitofsky, Why *Dr. Miles* Was Right, 8 Regulation, No. 1, pp. 27, 29–30 (Jan./Feb. 1984) (similar analysis).

How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily.* For one thing, it is often difficult to identify *who*—producer or dealer—is the moving force behind any given resale price maintenance agreement. Suppose, for example, several large multibrand retailers all sell resale-price-maintained products. Suppose further that small producers set retail prices because they fear that, otherwise, the large retailers will favor (say, by allocating better shelf space) the goods of other producers who practice resale price maintenance. Who "initiated" this practice, the retailers hoping for considerable insulation from retail competition, or the producers, who simply seek to deal best with the circumstances they find? For another thing, as I just said, it is difficult to determine just when, and where, the "free riding" problem is serious enough to warrant legal protection.

I recognize that scholars have sought to develop checklists and sets of questions that will help courts separate instances where anticompetitive harms are more likely from instances where only benefits are likely to be found. See, *e. g.*, 8 Areeda & Hovenkamp ¶¶ 1633c–1633e, at 330–339. See also Brief for William S. Comanor et al. as *Amici Curiae* 8–10. But applying these criteria in court is often easier said than done. The Court's invitation to consider the existence of "market power," for example, *ante*, at 898, invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets. And resale price maintenance cases, unlike a major merger or monopoly case, are likely to prove numerous and involve only private parties. One cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs. See, *e. g.*, H. Hovenkamp, The Antitrust Enterprise 105 (2005) (litigating a rule of reason case is "one of the most costly procedures in antitrust practice"). See also Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 238–247 (1960) (describing lengthy FTC efforts to apply complex criteria in a merger case).

Are there special advantages to a bright-line rule? Without such a rule, it is often unfair, and consequently impractical, for enforcement officials to bring criminal proceedings. And since enforcement resources are limited, that loss may tempt some producers or dealers to enter into agreements that are, on balance, anticompetitive.

Given the uncertainties that surround key items in the overall balance sheet, particularly in respect to the "administrative" questions, I can concede to the majority that the problem is difficult. And, if forced to decide now, at most I might agree that the *per se* rule should be slightly modified to allow an exception for the more easily identifiable

and temporary condition of "new entry." See Pitofsky 1495. But I am not now forced to decide this question. The question before us is not what should be the rule, starting from scratch. We here must decide whether to change a clear and simple price-related antitrust rule that the courts have applied for nearly a century.

II

We write, not on a blank slate, but on a slate that begins with *Dr. Miles* and goes on to list a century's worth of similar cases, massive amounts of advice that lawyers have provided their clients, and untold numbers of business decisions those clients have taken in reliance upon that advice. See, *e. g.*, *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 721 (1944); *Sylvania*, 433 U. S., at 51, n. 18 ("The *per se* illegality of [vertical] price restrictions has been established firmly for many years . . . "). Indeed, a Westlaw search shows that *Dr. Miles* itself has been cited dozens of times in this Court and hundreds of times in lower courts. Those who wish this Court to change so well-established a legal precedent bear a heavy burden of proof. See *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 736 (1977) (noting, in declining to overrule an earlier case interpreting § 4 of the Clayton Act, that "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"). I am not aware of any case in which this Court has overturned so well-established a statutory precedent. Regardless, I do not see how the Court can claim that ordinary criteria for overruling an earlier case have been met. See, *e. g.*, *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854–855 (1992). See also *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, *ante*, at 500–503 (SCALIA, J., concurring in part and concurring in judgment).

A

I can find no change in circumstances in the past several decades that helps the majority's position. In fact, there has been one important change that argues strongly to the contrary. In 1975, Congress repealed the McGuire and Miller-Tydings Acts. See Consumer Goods Pricing Act of 1975, 89 Stat. 801. And it thereby consciously *extended Dr. Miles*' *per se* rule. Indeed, at that time the Department of Justice and the FTC, then urging application of the *per se* rule, discussed virtually every argument presented now to this Court as well as others not here presented. And they explained to Congress why Congress should reject them. See Hearings on S. 408, at 176–177 (statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division); *id.*, at 170–172 (testimony of Lewis A. Engman, Chairman of the FTC); Hearings on H. R. 2384, at 113–114 (testimony of Keith I. Clearwaters, Deputy Assistant Attorney General, Antitrust Division). Congress fully understood, and consequently intended, that the result of its repeal of McGuire and Miller-Tydings would be to make minimum resale price maintenance *per se* unlawful. See, *e. g.*, S. Rep. No. 94–466, pp. 1–3 (1975) ("Without [the exemptions authorized by the Miller-Tydings and McGuire Acts,] the agreements they authorize would violate the antitrust laws. . . . [R]epeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices"). See also *Sylvania*, *supra*, at 51, n. 18 ("Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States").

Congress did not prohibit this Court from reconsidering the *per se* rule. But enacting major legislation premised upon the existence of that rule constitutes important public

reliance upon that rule. And doing so aware of the relevant arguments constitutes even stronger reliance upon the Court's keeping the rule, at least in the absence of some significant change in respect to those arguments.

Have there been any such changes? There have been a few economic studies, described in some of the briefs, that argue, contrary to the testimony of the Justice Department and the FTC to Congress in 1975, that resale price maintenance is not harmful. One study, relying on an analysis of litigated resale price maintenance cases from 1975 to 1982, concludes that resale price maintenance does not ordinarily involve producer or dealer collusion. See Ippolito, Resale Price Maintenance: Empirical Evidence from Litigation, 34 J. Law & Econ. 263, 281–282, 292 (1991). But this study equates the failure of plaintiffs to *allege* collusion with the *absence* of collusion—an equation that overlooks the superfluous nature of allegations of horizontal collusion in a resale price maintenance case and the tacit form that such collusion might take. See H. Hovenkamp, Federal Antitrust Policy § 11.3c, p. 464, n. 19 (3d ed. 2005); *supra*, at 911.

The other study provides a theoretical basis for concluding that resale price maintenance "need not lead to higher retail prices." Marvel & McCafferty, The Political Economy of Resale Price Maintenance, 94 J. Pol. Econ. 1074, 1075 (1986). But this study develops a theoretical model "under the assumption that [resale price maintenance] is efficiency-enhancing." *Ibid.* Its only empirical support is a 1940 study that the authors acknowledge is much criticized. See *id.*, at 1091. And many other economists take a different view. See Brief for William S. Comanor et al. as *Amici Curiae* 4.

Regardless, taken together, these studies at most may offer some mild support for the majority's position. But they cannot constitute a major change in circumstances.

Petitioner and some *amici* have also presented us with newer studies that show that resale price maintenance some-

times brings consumer benefits. Overstreet 119–129 (describing numerous case studies). But the proponents of a *per se* rule have always conceded as much. What is remarkable about the majority's arguments is that *nothing* in this respect *is new.* See *supra,* at 910, 919 (citing articles and congressional testimony going back several decades). The only new feature of these arguments lies in the fact that the most current advocates of overruling *Dr. Miles* have abandoned a host of other not-very-persuasive arguments upon which prior resale price maintenance proponents used to rely. See, *e. g.,* 8 Areeda ¶ 1631a, at 350–352 (listing "'[t]raditional' justifications" for resale price maintenance).

The one arguable exception consists of the majority's claim that "even absent free riding," resale price maintenance "may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services." *Ante,* at 892. I cannot count this as an exception, however, because I do not understand how, in the absence of free riding (and assuming competitiveness), an established producer would need resale price maintenance. Why, on these assumptions, would a dealer not "expand" its "market share" as best that dealer sees fit, obtaining appropriate payment from consumers in the process? There may be an answer to this question. But I have not seen it. And I do not think that we should place significant weight upon justifications that the parties do not explain with sufficient clarity for a generalist judge to understand.

No one claims that the American economy has changed in ways that might support the majority. Concentration in retailing has increased. See, *e. g.,* Brief for Respondent 18 (since minimum resale price maintenance was banned nationwide in 1975, the total number of retailers has dropped while the growth in sales per store has risen); Brief for American Antitrust Institute as *Amicus Curiae* 17, n. 20 (citing private study reporting that the combined sales of the 10 largest

retailers worldwide has grown to nearly 30% of total retail sales of top 250 retailers; also quoting 1999 Organisation for Economic Co-operation and Development report stating that the "'last twenty years have seen momentous changes in retail distribution including significant increases in concentration'"); Mamen, Facing Goliath: Challenging the Impacts of Supermarket Consolidation on our Local Economies, Communities, and Food Security, The Oakland Institute, 1 Policy Brief, No. 3, pp. 1, 2 (Spring 2007), http://www.oaklandinstitute.org/pdfs/facing_goliath.pdf (as visited June 25, 2007, and available in Clerk of Court's case file) (noting that "[f]or many decades, the top five food retail firms in the U. S. controlled less than 20 percent of the market"; from 1997 to 2000, "the top five firms increased their market share from 24 to 42 percent of all retail sales"; and "[b]y 2003, they controlled over half of all grocery sales"). That change, other things being equal, may enable (and motivate) more retailers, accounting for a greater percentage of total retail sales volume, to seek resale price maintenance, thereby making it more difficult for price-cutting competitors (perhaps internet retailers) to obtain market share.

Nor has anyone argued that concentration among manufacturers that might use resale price maintenance has diminished significantly. And as far as I can tell, it has not. Consider household electrical appliances, which a study from the late 1950's suggests constituted a significant portion of those products subject to resale price maintenance at that time. See Hollander, United States of America, in Resale Price Maintenance 67, 80–81 (B. Yamey ed. 1966). Although it is somewhat difficult to compare census data from 2002 with that from several decades ago (because of changes in the classification system), it is clear that at least some subsets of the household electrical appliance industry are *more* concentrated, in terms of manufacturer market power, now than they were then. For instance, the top eight domestic manufacturers of household cooking appliances accounted for 68%

of the domestic market (measured by value of shipments) in 1963 (the earliest date for which I was able to find data), compared with 77% in 2002. See Dept. of Commerce, Bureau of Census, 1972 Census of Manufactures, Special Report Series, Concentration Ratios in Manufacturing, No. MC72(SR)–2, p. SR2–38 (1975) (hereinafter 1972 Census); Dept. of Commerce, Bureau of Census, 2002 Economic Census, Concentration Ratios: 2002, No. EC02–31SR–1, p. 55 (2006) (hereinafter 2002 Census). The top eight domestic manufacturers of household laundry equipment accounted for 95% of the domestic market in 1963 (90% in 1958), compared with 99% in 2002. 1972 Census, at SR2–38; 2002 Census, at 55. And the top eight domestic manufacturers of household refrigerators and freezers accounted for 91% of the domestic market in 1963, compared with 95% in 2002. 1972 Census, at SR2–38; 2002 Census, at 55. Increased concentration among manufacturers increases the likelihood that producer-originated resale price maintenance will prove more prevalent today than in years past, and more harmful. At the very least, the majority has not explained how these, or other changes in the economy, could help support its position.

In sum, there is no relevant change. And without some such change, there is no ground for abandoning a well-established antitrust rule.

B

With the preceding discussion in mind, I would consult the list of factors that our case law indicates are relevant when we consider overruling an earlier case. JUSTICE SCALIA, writing separately in another of our cases this Term, well summarizes that law. See *Wisconsin Right to Life, Inc.*, *ante*, at 500–503 (opinion concurring in part and concurring in judgment). And every relevant factor he mentions argues against overruling *Dr. Miles* here.

First, the Court applies *stare decisis* more "rigidly" in statutory than in constitutional cases. See *Glidden Co.* v.

Zdanok, 370 U. S. 530, 543 (1962); *Illinois Brick Co.*, 431 U. S., at 736. This is a statutory case.

Second, the Court does sometimes overrule cases that it decided wrongly only a reasonably short time ago. As JUSTICE SCALIA put it, "[o]verruling a *constitutional* case decided just a few years earlier is far from unprecedented." *Wisconsin Right to Life*, *ante*, at 501 (emphasis added). We here overrule one *statutory* case, *Dr. Miles*, decided 100 years ago, and we overrule the cases that reaffirmed its *per se* rule in the intervening years. See, *e. g.*, *Trenton Potteries*, 273 U. S., at 399–401; *Bausch & Lomb*, 321 U. S., at 721; *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 45–47 (1960); *Simpson* v. *Union Oil Co. of Cal.*, 377 U. S. 13, 16–17 (1964).

Third, the fact that a decision creates an "unworkable" legal regime argues in favor of overruling. See *Payne* v. *Tennessee*, 501 U. S. 808, 827–828 (1991); *Swift & Co.* v. *Wickham*, 382 U. S. 111, 116 (1965). Implementation of the *per se* rule, even with the complications attendant the exception allowed for in *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919), has proved practical over the course of the last century, particularly when compared with the many complexities of litigating a case under the "rule of reason" regime. No one has shown how moving from the *Dr. Miles* regime to "rule of reason" analysis would make the legal regime governing minimum resale price maintenance more "administrable," *Wisconsin Right to Life*, *ante*, at 501 (opinion of SCALIA, J.), particularly since *Colgate* would remain good law with respect to *unreasonable* price maintenance.

Fourth, the fact that a decision "unsettles" the law may argue in favor of overruling. See *Sylvania*, 433 U. S., at 47; *Wisconsin Right to Life*, *ante*, at 502 (opinion of SCALIA, J.). The *per se* rule is well-settled law, as the Court itself has previously recognized. *Sylvania*, *supra*, at 51, n. 18. It is the majority's change here that will unsettle the law.

Fifth, the fact that a case involves property rights or contract rights, where reliance interests are involved, argues against overruling. *Payne*, *supra*, at 828. This case involves contract rights and perhaps property rights (consider shopping malls). And there has been considerable reliance upon the *per se* rule. As I have said, Congress relied upon the continued vitality of *Dr. Miles* when it repealed Miller-Tydings and McGuire. *Supra*, at 919–920. The Executive Branch argued for repeal on the assumption that *Dr. Miles* stated the law. *Supra*, at 919–920. Moreover, whole sectors of the economy have come to rely upon the *per se* rule. A factory outlet store tells us that the rule "form[s] an essential part of the regulatory background against which [that firm] and many other discount retailers have financed, structured, and operated their businesses." Brief for Burlington Coat Factory Warehouse Corp. as *Amicus Curiae* 5. The Consumer Federation of America tells us that large low-price retailers would not exist without *Dr. Miles;* minimum resale price maintenance, "by stabilizing price levels and preventing low-price competition, erects a potentially insurmountable barrier to entry for such low-price innovators." Brief for Consumer Federation of America as *Amicus Curiae* 5, 7–9 (discussing, *inter alia*, comments by Wal-Mart's founder 25 years ago that relaxation of the *per se* ban on minimum resale price maintenance would be a "'great danger'" to Wal-Mart's then-relatively-nascent business). See also Brief for American Antitrust Institute as *Amicus Curiae* 14–15, and sources cited therein (making the same point). New distributors, including internet distributors, have similarly invested time, money, and labor in an effort to bring yet lower cost goods to Americans.

This Court's overruling of the *per se* rule jeopardizes this reliance, and more. What about malls built on the assumption that a discount distributor will remain an anchor tenant? What about home buyers who have taken a home's distance

from such a mall into account? What about Americans, producers, distributors, and consumers, who have understandably assumed, at least for the last 30 years, that price competition is a legally guaranteed way of life? The majority denies none of this. It simply says that these "reliance interests . . . , like the reliance interests in [*State Oil Co.* v.] *Khan*, [522 U. S. 3 (1997),] cannot justify an inefficient rule." *Ante*, at 906.

The Court minimizes the importance of this reliance, adding that it "is also of note" that at the time resale price maintenance contracts were lawful "'no more than a tiny fraction of manufacturers ever employed'" the practice. *Ante*, at 907 (quoting Overstreet 6). By "tiny" the Court means manufacturers that accounted for up to "'ten percent of consumer goods purchases'" annually. *Ante*, at 907. That figure in today's economy equals just over $300 billion. See Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2007, p. 649 (126th ed.) (over $3 trillion in U. S. retail sales in 2002). Putting the Court's estimate together with the Justice Department's early 1970's study translates a legal regime that permits all resale price maintenance into retail bills that are higher by an average of roughly $750 to $1,000 annually for an American family of four. Just how much higher retail bills will be after the Court's decision today, of course, depends upon what is now unknown, namely, how courts will decide future cases under a "rule of reason." But these figures indicate that the amounts involved are important to American families and cannot be dismissed as "tiny."

Sixth, the fact that a rule of law has become "embedded" in our "national culture" argues strongly against overruling. *Dickerson* v. *United States*, 530 U. S. 428, 443–444 (2000). The *per se* rule forbidding minimum resale price maintenance agreements has long been "embedded" in the law of antitrust. It involves price, the economy's "'central nervous system.'" *National Soc. of Professional Engineers*, 435

U. S., at 692 (quoting *Socony-Vacuum Oil*, 310 U. S., at 226, n. 59). It reflects a basic antitrust assumption (that consumers often prefer lower prices to more service). It embodies a basic antitrust objective (providing consumers with a free choice about such matters). And it creates an easily administered and enforceable bright line, "Do not agree about price," that businesses as well as lawyers have long understood.

The only contrary *stare decisis* factor that the majority mentions consists of its claim that this Court has "[f]rom the beginning . . . treated the Sherman Act as a common-law statute," and has previously overruled antitrust precedent. *Ante*, at 899, 900–902. It points in support to *State Oil Co.* v. *Khan*, 522 U. S. 3 (1997), overruling *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968), in which this Court had held that *maximum* resale price agreements were unlawful *per se*, and to *Sylvania*, overruling *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), in which this Court had held that producer-imposed territorial limits were unlawful *per se*.

The Court decided *Khan*, however, 29 years after *Albrecht*—still a significant period, but nowhere close to the century *Dr. Miles* has stood. The Court specifically noted the *lack* of any significant reliance upon *Albrecht*. 522 U. S., at 18–19 (*Albrecht* has had "little or no relevance to ongoing enforcement of the Sherman Act"). *Albrecht* had far less support in traditional antitrust principles than did *Dr. Miles*. Compare, *e. g.*, 8 Areeda & Hovenkamp ¶ 1632, at 316–328 (analyzing potential harms of minimum resale price maintenance), with *id.*, ¶ 1637, at 352–361 (analyzing potential harms of maximum resale price maintenance). See also, *e. g.*, Pitofsky 1490, n. 17. And Congress had nowhere expressed support for *Albrecht*'s rule. *Khan*, *supra*, at 19.

In *Sylvania*, the Court, in overruling *Schwinn*, explicitly distinguished *Dr. Miles* on the ground that while Congress had "recently . . . expressed its approval of a *per se* analysis of vertical price restrictions" by repealing the Miller-

Tydings and McGuire Acts, "[n]o similar expression of congressional intent exists for nonprice restrictions." 433 U. S., at 51, n. 18. Moreover, the Court decided *Sylvania* only a decade after *Schwinn*. And it based its overruling on a generally perceived need to avoid "confusion" in the law, 433 U. S., at 47–49, a factor totally absent here.

The Court suggests that it is following "the common-law tradition." *Ante*, at 905. But the common law would not have permitted overruling *Dr. Miles* in these circumstances. Common-law courts rarely overruled well-established earlier rules outright. Rather, they would over time issue decisions that gradually eroded the scope and effect of the rule in question, which might eventually lead the courts to put the rule to rest. One can argue that modifying the *per se* rule to make an exception, say, for new entry, see Pitofsky 1495, could prove consistent with this approach. To swallow up a century-old precedent, potentially affecting many billions of dollars of sales, is not. The reader should compare today's "common-law" decision with Justice Cardozo's decision in *Allegheny College* v. *National Chautauqua Cty. Bank of Jamestown*, 246 N. Y. 369, 159 N. E. 173 (1927), and note a gradualism that does not characterize today's decision.

Moreover, a Court that rests its decision upon economists' views of the economic merits should also take account of legal scholars' views about common-law overruling. Professors Hart and Sacks list 12 factors (similar to those I have mentioned) that support judicial "adherence to prior holdings." They all support adherence to *Dr. Miles* here. See H. Hart & A. Sacks, The Legal Process 568–569 (W. Eskridge & P. Frickey eds. 1994). Karl Llewellyn has written that the common-law judge's "conscious reshaping" of prior law "must so move as to hold the degree of movement down to the degree to which need truly presses." The Bramble Bush 156 (1960). Where here is the pressing need? The Court notes that the FTC argues here in favor of a rule of reason. See *ante*, at 900. But both Congress and the FTC,

unlike courts, are well equipped to gather empirical evidence outside the context of a single case. As neither has done so, we cannot conclude with confidence that the gains from eliminating the *per se* rule will outweigh the costs.

In sum, every *stare decisis* concern this Court has ever mentioned counsels against overruling here. It is difficult for me to understand how one can believe both that (1) satisfying a set of *stare decisis* concerns justifies overruling a recent constitutional decision, *Wisconsin Right to Life, Inc.*, *ante*, at 500–503 (SCALIA, J., joined by KENNEDY and THOMAS, JJ., concurring in part and concurring in judgment), but (2) failing to satisfy any of those same concerns nonetheless permits overruling a longstanding statutory decision. Either those concerns are relevant or they are not.

* * *

The only safe predictions to make about today's decision are that it will likely raise the price of goods at retail and that it will create considerable legal turbulence as lower courts seek to develop workable principles. I do not believe that the majority has shown new or changed conditions sufficient to warrant overruling a decision of such long standing. All ordinary *stare decisis* considerations indicate the contrary. For these reasons, with respect, I dissent.

Syllabus

PANETTI *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

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

No. 06–6407. Argued April 18, 2007—Decided June 28, 2007

Petitioner was convicted of capital murder in a Texas state court and sentenced to death despite his well-documented history of mental illness. After the Texas courts denied relief on direct appeal, petitioner filed a federal habeas petition pursuant to 28 U. S. C. § 2254, but the District Court and the Fifth Circuit rejected his claims, and this Court denied certiorari. In the course of these initial state and federal proceedings, petitioner did not argue that mental illness rendered him incompetent to be executed. Once the state trial court set an execution date, petitioner filed a motion under Texas law claiming, for the first time, that he was incompetent to be executed because of mental illness. The trial judge denied the motion without a hearing, and the Texas Court of Criminal Appeals dismissed petitioner's appeal for lack of jurisdiction.

He then filed another federal habeas petition under § 2254, and the District Court stayed his execution to allow the state trial court time to consider evidence of his then-current mental state. Once the state court began its adjudication, petitioner submitted 10 motions in which he requested, *inter alia*, a competency hearing and funds for a mental health expert. The court indicated it would rule on the outstanding motions once it had received the report written by the experts that it had appointed to review petitioner's mental condition. The experts subsequently filed this report, which concluded, *inter alia*, that petitioner had the ability to understand the reason he was to be executed. Without ruling on the outstanding motions, the judge found petitioner competent and closed the case. Petitioner then returned to the Federal District Court, seeking a resolution of his pending § 2254 petition. The District Court concluded that the state-court competency proceedings failed to comply with Texas law and were constitutionally inadequate in light of the procedural requirements mandated by *Ford* v. *Wainwright*, 477 U. S. 399, 410, where this Court held that the Eighth Amendment prohibits States from inflicting the death penalty upon insane prisoners. Although the court therefore reviewed petitioner's incompetency claim without deferring to the state court's finding of competency, it neverthe-

less granted no relief, finding that petitioner had not demonstrated that he met the standard for incompetency. Under Fifth Circuit precedent, the court explained, petitioner was competent to be executed so long as he knew the fact of his impending execution and the factual predicate for it. The Fifth Circuit affirmed.

Held:

1. This Court has statutory authority to adjudicate the claims raised in petitioner's second federal habeas application. Because § 2244(b)(2) requires that "[a] claim presented in a second or successive . . . [§ 2254] application . . . that was not presented in a prior application . . . be dismissed," the State maintains that the failure of petitioner's first § 2254 application to raise a *Ford*-based incompetency claim deprived the District Court of jurisdiction. The results this argument would produce show its flaws. Were the State's interpretation of "second or successive" correct, a prisoner would have two options: forgo the opportunity to raise a *Ford* claim in federal court; or raise the claim in a first federal habeas application even though it is premature. *Stewart* v. *Martinez-Villareal*, 523 U. S. 637, 644. The dilemma would apply not only to prisoners with mental conditions that, at the time of the initial habeas filing, were indicative of incompetency but also to all other prisoners, including those with no early sign of mental illness. Because all prisoners are at risk of deteriorations in their mental state, conscientious defense attorneys would be obliged to file unripe (and, in many cases, meritless) *Ford* claims in each and every § 2254 application. This counterintuitive approach would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any. The more reasonable interpretation of § 2244, suggested by this Court's precedents, is that Congress did not intend the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) addressing "second or successive" habeas petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe. See, *e. g.*, *Martinez-Villareal*, *supra*, at 643–645. This conclusion is confirmed by AEDPA's purposes of "further[ing] comity, finality, and federalism," *Miller-El* v. *Cockrell*, 537 U. S. 322, 337, "promot[ing] judicial efficiency and conservation of judicial resources, . . . and lend[ing] finality to state court judgments within a reasonable time," *Day* v. *McDonough*, 547 U. S. 198, 205–206. These purposes, and the practical effects of the Court's holdings, should be considered when interpreting AEDPA, particularly where, as here, petitioners "run the risk" under the proposed interpretation of "forever losing their opportunity for any federal review of their

unexhausted claims," *Rhines* v. *Weber*, 544 U. S. 269, 275. There is, finally, no argument in this case that petitioner proceeded in a manner that could be considered an abuse of the writ. Cf. *Felker* v. *Turpin*, 518 U. S. 651, 664. To the contrary, the Court has suggested that it is generally appropriate for a prisoner to wait before seeking the resolution of unripe incompetency claims. See, *e. g.*, *Martinez-Villareal*, *supra*, at 644–645. Pp. 942–947.

2. The state court failed to provide the procedures to which petitioner was entitled under the Constitution. *Ford* identifies the measures a State must provide when a prisoner alleges incompetency to be executed. Justice Powell's opinion concurring in part and concurring in the judgment in *Ford* controls, see *Marks* v. *United States*, 430 U. S. 188, 193, and constitutes "clearly established" governing law for AEDPA purposes, § 2254(d)(1). As Justice Powell elaborated, once a prisoner seeking a stay of execution has made "a substantial threshold showing of insanity," 477 U. S., at 426, the Eighth and Fourteenth Amendments entitle him to, *inter alia*, a fair hearing, *id.*, at 424, including an opportunity to submit "expert psychiatric evidence that may differ from the State's own psychiatric examination," *id.*, at 427. The procedures the state court provided petitioner were so deficient that they cannot be reconciled with any reasonable interpretation of the *Ford* rule. It is uncontested that petitioner made a substantial showing of incompetency. It is also evident from the record, however, that the state court reached its competency determination without holding a hearing or providing petitioner with an adequate opportunity to provide his own expert evidence. Moreover, there is a strong argument that the court violated state law by failing to provide a competency hearing. If so, the violation undermines any reliance the State might now place on Justice Powell's assertion that "the States should have substantial leeway to determine what process best balances the various interests at stake." *Ibid.* Under AEDPA, a federal court may grant habeas relief, as relevant, only if a state court's "adjudication of [a claim on the merits] . . . resulted in a decision that . . . involved an unreasonable application" of the relevant federal law. § 2254(d)(1). If the state court's adjudication is dependent on an antecedent unreasonable application of federal law, that requirement is satisfied, and the federal court must then resolve the claim without the deference AEDPA otherwise requires. See, *e. g.*, *Wiggins* v. *Smith*, 539 U. S. 510, 534. Having determined that the state court unreasonably applied *Ford* when it accorded petitioner the procedures in question, this Court must now consider petitioner's claim on the merits without deferring to the state court's competency finding. Pp. 948–954.

Syllabus

3. The Fifth Circuit employed an improperly restrictive test when it considered petitioner's claim of incompetency on the merits. Pp. 954–962.

(a) The Fifth Circuit's incompetency standard is too restrictive to afford a prisoner Eighth Amendment protections. Petitioner's experts in the District Court concluded that, although he claims to understand that the State says it wants to execute him for murder, his mental problems have resulted in the delusion that the stated reason is a sham, and that the State actually wants to execute him to stop him from preaching. The Fifth Circuit held, based on its earlier decisions, that such delusions are simply not relevant to whether a prisoner can be executed so long as he is aware that the State has identified the link between his crime and the punishment to be inflicted. This test ignores the possibility that even if such awareness exists, gross delusions stemming from a severe mental disorder may put that awareness in a context so far removed from reality that the punishment can serve no proper purpose. It is also inconsistent with *Ford*, for none of the principles set forth therein is in accord with the Fifth Circuit's rule. Although the *Ford* opinions did not set forth a precise competency standard, the Court did reach the express conclusion that the Constitution "places a substantive restriction on the State's power to take the life of an insane prisoner," 477 U. S., at 405, because, *inter alia*, such an execution serves no retributive purpose, *id.*, at 408. It might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the victim's surviving family and friends, to affirm its own judgment that the prisoner's culpability is so serious that the ultimate penalty must be sought and imposed. Both the potential for this recognition and the objective of community vindication are called into question, however, if the prisoner's only awareness of the link between the crime and the punishment is so distorted by mental illness that his awareness of the crime and punishment has little or no relation to the understanding shared by the community as a whole. A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter. To refuse to consider evidence of this nature is to mistake *Ford*'s holding and its logic. Pp. 954–960.

(b) Although the Court rejects the Fifth Circuit's standard, it does not attempt to set down a rule governing all competency determinations. The record is not as informative as it might be because it was developed by the District Court under the rejected standard, and, thus, this Court finds it difficult to amplify its conclusions or to make them more precise. It is proper to allow the court charged with overseeing

the development of the evidentiary record the initial opportunity to resolve petitioner's constitutional claim. Pp. 960–962.

448 F. 3d 815, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and ALITO, JJ., joined, *post,* p. 962.

Gregory W. Wiercioch argued the cause for petitioner. With him on the briefs was *Keith S. Hampton*, by appointment of the Court, 549 U. S. 1250.

R. Ted Cruz, Solicitor General of Texas, argued the cause for respondent. With him on the briefs were *Greg Abbott*, Attorney General, *Kent C. Sullivan*, First Assistant Attorney General, *Eric J. R. Nichols*, Deputy Attorney General, *Rance L. Craft*, *William L. Davis*, and *Brantley Starr*, Assistant Solicitors General, and *Tina J. Dettmer*, Assistant Attorney General.*

JUSTICE KENNEDY delivered the opinion of the Court.

"[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Ford* v. *Wainwright*, 477 U. S. 399, 409–410 (1986). The prohibition applies despite a prisoner's earlier competency to be held responsible for committing a crime and to be tried for it. Prior findings of competency do not foreclose a prisoner from proving he is incompetent to be executed because of his present mental condition. Under *Ford*, once a prisoner makes the requisite preliminary showing that his current mental state would bar his execution, the Eighth Amend-

*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Karen J. Mathis* and *Ronald J. Tabak;* for the American Psychological Association et al. by *David W. Ogden*, *Richard G. Taranto*, and *Nathalie F. P. Gilfoyle;* and for Legal Historians by *Robert N. Weiner* and *Anthony J. Franze.*

Kent S. Scheidegger filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

ment, applicable to the States under the Due Process Clause of the Fourteenth Amendment, entitles him to an adjudication to determine his condition. These determinations are governed by the substantive federal baseline for competency set down in *Ford*.

Scott Louis Panetti, referred to here as petitioner, was convicted and sentenced to death in a Texas state court. After the state trial court set an execution date, petitioner made a substantial showing he was not competent to be executed. The state court rejected his claim of incompetency on the merits. Filing a petition for writ of habeas corpus in the United States District Court for the Western District of Texas, petitioner claimed again that his mental condition barred his execution; that the Eighth Amendment set forth a substantive standard for competency different from the one advanced by the State; and that prior state-court proceedings on the issue were insufficient to satisfy the procedural requirements mandated by *Ford*. The State denied these assertions and argued, in addition, that the federal courts lacked jurisdiction to hear petitioner's claims.

We conclude we have statutory authority to adjudicate the claims petitioner raises in his habeas application; we find the state court failed to provide the procedures to which petitioner was entitled under the Constitution; and we determine that the federal appellate court employed an improperly restrictive test when it considered petitioner's claim of incompetency on the merits. We therefore reverse the judgment of the Court of Appeals for the Fifth Circuit and remand the case for further consideration.

I

On a morning in 1992 petitioner awoke before dawn, dressed in camouflage, and drove to the home of his estranged wife's parents. Breaking the front-door lock, he entered the house and, in front of his wife and daughter, shot and killed his wife's mother and father. He took his wife

and daughter hostage for the night before surrendering to police.

Tried for capital murder in 1995, petitioner sought to represent himself. The court ordered a psychiatric evaluation, which indicated that petitioner suffered from a fragmented personality, delusions, and hallucinations. 1 App. 9–14. The evaluation noted that petitioner had been hospitalized numerous times for these disorders. *Id.*, at 10; see also *id.*, at 222. Evidence later revealed that doctors had prescribed medication for petitioner's mental disorders that, in the opinion of one expert, would be difficult for a person not suffering from extreme psychosis even to tolerate. See *id.*, at 233 ("I can't imagine anybody getting that dose waking up for two to three days. You cannot take that kind of medication if you are close to normal without absolutely being put out"). Petitioner's wife described one psychotic episode in a petition she filed in 1986 seeking extraordinary relief from the Texas state courts. See *id.*, at 38–40. She explained that petitioner had become convinced the devil had possessed their home and that, in an effort to cleanse their surroundings, petitioner had buried a number of valuables next to the house and engaged in other rituals. *Id.*, at 39. Petitioner nevertheless was found competent to be tried and to waive counsel. At trial he claimed he was not guilty by reason of insanity.

During his trial petitioner engaged in behavior later described by his standby counsel as "bizarre," "scary," and "trance-like." *Id.*, at 26, 21, 22. According to the attorney, petitioner's behavior both in private and in front of the jury made it evident that he was suffering from "mental incompetence," *id.*, at 26; see also *id.*, at 22–23, and the net effect of this dynamic was to render the trial "truly a judicial farce, and a mockery of self-representation," *id.*, at 26. There was evidence on the record, moreover, to indicate that petitioner had stopped taking his antipsychotic medication a few months before trial, see *id.*, at 339, 345, a rejection of medical

advice that, it appears, petitioner has continued to this day with one brief exception, see Brief for Petitioner 16–17. According to expert testimony, failing to take this medication tends to exacerbate the underlying mental dysfunction. See *id.*, at 16, 18, n. 12; see also 1 App. 195, 228. And it is uncontested that, less than two months after petitioner was sentenced to death, the state trial court found him incompetent to waive the appointment of state habeas counsel. See Brief for Petitioner 15, n. 10. It appears, therefore, that petitioner's condition has only worsened since the start of trial.

The jury found petitioner guilty of capital murder and sentenced him to death. Petitioner challenged his conviction and sentence both on direct appeal and through state habeas proceedings. The Texas courts denied his requests for relief. See *Panetti* v. *State*, No. 72,230 (Crim. App., Dec. 3, 1997) (en banc); *Ex parte Panetti*, No. 37,145–01 (Crim. App., May 20, 1998) (en banc). This Court twice denied a petition for certiorari. *Panetti* v. *Texas*, 525 U. S. 848 (1998); *Panetti* v. *Texas*, 524 U. S. 914 (1998).

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U. S. C. § 2254 in the United States District Court for the Western District of Texas. His claims were again rejected, both by the District Court, *Panetti* v. *Johnson*, Cause No. A–99–CV–260–SS (2001), and the Court of Appeals for the Fifth Circuit, *Panetti* v. *Cockrell*, 73 Fed. Appx. 78 (2003) (judgt. order), and we again denied a petition for certiorari, *Panetti* v. *Dretke*, 540 U. S. 1052 (2003). Among the issues petitioner raised in the course of these state and federal proceedings was his competency to stand trial and to waive counsel. Petitioner did not argue, however, that mental illness rendered him incompetent to be executed.

On October 31, 2003, Judge Stephen B. Ables of the 216th Judicial District Court in Gillespie County, Texas, set petitioner's execution date for February 5, 2004. See First Order Setting Execution in Cause No. 3310; Order Setting

Execution in Cause No. 3310. On December 10, 2003, counsel for petitioner filed with Judge Ables a motion under Tex. Code Crim. Proc. Ann., Art. 46.05 (Vernon Supp. Pamphlet 2006). Petitioner claimed, for the first time, that due to mental illness he was incompetent to be executed. The judge denied the motion without a hearing. When petitioner attempted to challenge the ruling, the Texas Court of Criminal Appeals dismissed his appeal for lack of jurisdiction, indicating it has authority to review an Art. 46.05 determination only when a trial court has determined a prisoner is incompetent. *Ex parte Panetti*, No. 74,868 (Jan. 28, 2004) *(per curiam)*.

Petitioner returned to federal court, where he filed another petition for writ of habeas corpus pursuant to § 2254 and a motion for stay of execution. On February 4, 2004, the District Court stayed petitioner's execution to "allow the state court a reasonable period of time to consider the evidence of [petitioner's] current mental state." Order in Case No. A–04–CA–042–SS, 1 App. 113–114, 116.

The state court had before it, at that time, petitioner's renewed motion to determine competency to be executed (hereinafter Renewed Motion To Determine Competency). Attached to the motion were a letter and a declaration from two individuals, a psychologist and a law professor, who had interviewed petitioner while on death row on February 3, 2004. The new evidence, according to counsel, demonstrated that petitioner did not understand the reasons he was about to be executed.

Due to the absence of a transcript, the state-court proceedings after this point are not altogether clear. The claims raised before this Court nevertheless make it necessary to recount the procedural history in some detail. Based on the docket entries and the parties' filings it appears the following occurred.

The state trial court ordered the parties to participate in a telephone conference on February 9, 2004, to discuss the

status of the case. There followed a court directive instructing counsel to submit, by February 20, the names of mental health experts the court should consider appointing pursuant to Art. 46.05(f). See *ibid.* ("If the trial court determines that the defendant has made a substantial showing of incompetency, the court shall order at least two mental health experts to examine the defendant"). The court also gave the parties until February 20 to submit any motions concerning the competency procedures and advised it would hold another status conference on that same date. Defendant's Motion to Reconsider in Cause No. 3310, pp. 1–2 (Mar. 4, 2004) (hereinafter Motion to Reconsider).

On February 19, 2004, petitioner filed 10 motions related to the Art. 46.05 proceedings. They included requests for transcription of the proceedings, a competency hearing comporting with the procedural due process requirements set forth in *Ford*, and funds to hire a mental health expert. See Motion to Transcribe All Proceedings Related to Competency Determination Under Article 46.05 in Cause No. 3310; Motion to Ensure that the Article 46.05 "Final Competency Hearing" Comports with the Procedural Due Process Requirements of Ford in Cause No. 3310; Ex Parte Motion for Prepayment of Funds to Hire Mental Health Expert to Assist Defense in Article 46.05 Proceedings in Cause No. 3310.

On February 20, the court failed to hold its scheduled status conference. Petitioner's counsel called the courthouse and was advised Judge Ables was out of the office for the day. Counsel then called the Gillespie County District Attorney, who explained that the judge had informed state attorneys earlier that week that he was canceling the conference he had set and would appoint the mental health experts without input from the parties. Motion to Reconsider 2.

On February 23, 2004, counsel for petitioner received an order, dated February 20, advising that the court was appointing two mental health experts pursuant to Art. §46.05(f). Order in Cause No. 3310, p. 1 (Feb. 26, 2004), 1

App. 59. On February 25, at an informal status conference, the court denied two of petitioner's motions, indicating it would consider the others when the court-appointed mental health experts completed their evaluations. Motion to Reconsider 3. On March 4, petitioner filed a motion explaining that a delayed ruling would render a number of the motions moot. *Id.*, at 1. There is no indication the court responded to this motion.

The court-appointed experts returned with their evaluation on April 28, 2004. Concluding that petitioner "knows that he is to be executed, and that his execution will result in his death," and, moreover, that he "has the ability to understand the reason he is to be executed," the experts alleged that petitioner's uncooperative and bizarre behavior was due to calculated design: "Mr. Panetti deliberately and persistently chose to control and manipulate our interview situation," they claimed. 1 App. 75. They maintained that petitioner "could answer questions about relevant legal issues . . . if he were willing to do so." *Ibid.*

The judge sent a letter to counsel, including petitioner's attorney, Michael C. Gross, dated May 14, 2004. It said:

> "Dear Counsel:
>
> "It appears from the evaluations performed by [the court-appointed experts] that they are of the opinion that [petitioner] is competent to be executed in accordance with the standards set out in Art. 46.05 of the Code of Criminal Procedure.
>
> "Mr. Gross, if you have any other matters you wish to have considered, please file them in the case papers and get me copies by 5:00 p.m. on May 21, 2004." *Id.*, at 77–78.

Petitioner responded with a filing entitled "Objections to Experts' Report, Renewed Motion for Funds To Hire Mental Health Expert and Investigator, Renewed Motion for Appointment of Counsel, and Motion for Competency Hearing"

in Cause No. 3310 (May 21, 2004), 1 App. 82–95 (hereinafter Objections to Experts' Report). In this filing petitioner criticized the methodology and conclusions of the court-appointed experts; asserted his continued need for a mental health expert as his own criticisms of the report were "by necessity limited," *id.*, at 1; again asked the court to rule on his outstanding motions for funds and appointment of counsel; and requested a competency hearing. Petitioner also argued, as a more general matter, that the process he had received thus far failed to comply with Art. 46.05 and the procedural mandates set by *Ford.*

The court, in response, closed the case. On May 26, it released a short order identifying the report submitted by the court-appointed experts and explaining that "[b]ased on the aforesaid doctors' reports, the Court finds that [petitioner] has failed to show, by a preponderance of the evidence, that he is incompetent to be executed." Order Regarding Competency To Be Executed in Cause No. 3310, 1 App. 99. The order made no mention of petitioner's motions or other filings. Petitioner did not appeal the ruling to the Court of Criminal Appeals, and he did not petition this Court for certiorari.

This background leads to the matter now before us. Petitioner returned to federal court, seeking resolution of the § 2254 petition he had filed on January 26. The District Court granted petitioner's motions to reconsider, to stay his execution, to appoint counsel, and to provide funds. The court, in addition, set the case for an evidentiary hearing, which included testimony by a psychiatrist, a professor, and two psychologists, all called by petitioner, as well as two psychologists and three correctional officers, called by respondent. See 1 App. 117–135, 362–363; see also *id.*, at 136–336. We describe the substance of the experts' testimony in more detail later in our opinion.

On September 29, 2004, the District Court denied petitioner's habeas application on the merits. It concluded that the

state trial court had failed to comply with Art. 46.05; found the state proceedings "constitutionally inadequate" in light of *Ford;* and reviewed petitioner's Eighth Amendment claim without deferring to the state court's finding of competency. *Panetti* v. *Dretke,* 401 F. Supp. 2d 702, 706, 705–706 (WD Tex. 2004). The court nevertheless denied relief. It found petitioner had not shown incompetency as defined by Circuit precedent. *Id.,* at 712. "Ultimately," the court explained, "the Fifth Circuit test for competency to be executed requires the petitioner know no more than the fact of his impending execution and the factual predicate for the execution." *Id.,* at 711. The Court of Appeals affirmed, *Panetti* v. *Dretke,* 448 F. 3d 815 (CA5 2006), and we granted certiorari, 549 U. S. 1106 (2007).

II

We first consider our jurisdiction. The habeas corpus application on review is the second one petitioner has filed in federal court. Under the gatekeeping provisions of 28 U. S. C. § 2244(b)(2), "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed" except under certain, narrow circumstances. See §§ 2244(b)(2)(A)–(B).

The State maintains that, by direction of § 2244, the District Court lacked jurisdiction to adjudicate petitioner's § 2254 application. Its argument is straightforward: "[Petitioner's] first federal habeas application, which was fully and finally adjudicated on the merits, failed to raise a *Ford* claim," and, as a result, "[his] subsequent habeas application, which did raise a *Ford* claim, was a 'second or successive' application" under the terms of § 2244(b)(2). Supplemental Brief for Respondent 1. The State contends, moreover, that any *Ford* claim brought in an application governed by § 2244's gatekeeping provisions must be dismissed. See Supplemental Brief for Respondent 4–6 (citing §§ 2244(b)(2)(A)–(B)).

The State acknowledges that *Ford*-based incompetency claims, as a general matter, are not ripe until after the time has run to file a first federal habeas petition. See Supplemental Brief for Respondent 6. The State nevertheless maintains that its rule would not foreclose prisoners from raising *Ford* claims. Under *Stewart* v. *Martinez-Villareal*, 523 U. S. 637 (1998), the State explains, a federal court is permitted to review a prisoner's *Ford* claim once it becomes ripe if the prisoner preserved the claim by filing it in his first federal habeas application. Under the State's approach a prisoner contemplating a future *Ford* claim could preserve it by this means.

The State's argument has some force. The results it would produce, however, show its flaws. As in *Martinez-Villareal*, if the State's "interpretation of 'second or successive' were correct, the implications for habeas practice would be far reaching and seemingly perverse." 523 U. S., at 644. A prisoner would be faced with two options: forgo the opportunity to raise a *Ford* claim in federal court; or raise the claim in a first federal habeas application (which generally must be filed within one year of the relevant state-court ruling), even though it is premature. The dilemma would apply not only to prisoners with mental conditions indicative of incompetency but also to those with no early sign of mental illness. All prisoners are at risk of deteriorations in their mental state. As a result, conscientious defense attorneys would be obliged to file unripe (and, in many cases, meritless) *Ford* claims in each and every § 2254 application. This counterintuitive approach would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any.

We conclude there is another reasonable interpretation of § 2244, one that does not produce these distortions and inefficiencies.

The phrase "second or successive" is not self-defining. It takes its full meaning from our case law, including decisions

predating the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. See *Slack* v. *McDaniel*, 529 U. S. 473, 486 (2000) (citing *Martinez-Villareal*, *supra*); see also *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996). The Court has declined to interpret "second or successive" as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application. See, *e. g.*, *Slack*, 529 U. S., at 487 (concluding that a second § 2254 application was not "second or successive" after the petitioner's first application, which had challenged the same state-court judgment, had been dismissed for failure to exhaust state remedies); see also *id.*, at 486 (indicating that "pre-AEDPA law govern[ed]" the case before it but implying that the Court would reach the same result under AEDPA); see also *Martinez-Villareal*, *supra*, at 645.

Our interpretation of § 2244 in *Martinez-Villareal* is illustrative. There the prisoner filed his first habeas application before his execution date was set. In the first application he asserted, *inter alia*, that he was incompetent to be executed, citing *Ford*. The District Court, among other holdings, dismissed the claim as premature; and the Court of Appeals affirmed the ruling. When the State obtained a warrant for the execution, the prisoner filed, for the second time, a habeas application raising the same incompetency claim. The State argued that because the prisoner "already had one 'fully-litigated habeas petition, the plain meaning of § 2244(b) . . . requires his new petition to be treated as successive.'" 523 U. S., at 643.

We rejected this contention. While the later filing "may have been the second time that [the prisoner] had asked the federal courts to provide relief on his *Ford* claim," the Court declined to accept that there were, as a result, "two separate applications, [with] the second . . . necessarily subject to

§ 2244(b)." *Ibid.* The Court instead held that, in light of the particular circumstances presented by a *Ford* claim, it would treat the two filings as a single application. The petitioner "was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief." 523 U. S., at 643.

Our earlier holding does not resolve the jurisdictional question in the instant case. *Martinez-Villareal* did not address the applicability of § 2244(b) "where a prisoner raises a *Ford* claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application." *Id.*, at 645, n. Yet the Court's willingness to look to the "implications for habeas practice" when interpreting § 2244 informs the analysis here. *Id.*, at 644. We conclude, in accord with this precedent, that Congress did not intend the provisions of AEDPA addressing "second or successive" petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe.

Our conclusion is confirmed when we consider AEDPA's purposes. The statute's design is to "further the principles of comity, finality, and federalism." *Miller-El* v. *Cockrell*, 537 U. S. 322, 337 (2003) (internal quotation marks omitted). Cf. *Day* v. *McDonough*, 547 U. S. 198, 205–206 (2006) ("The AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time" (internal quotation marks omitted)).

These purposes, and the practical effects of our holdings, should be considered when interpreting AEDPA. This is particularly so when petitioners "run the risk" under the proposed interpretation of "forever losing their opportunity

for any federal review of their unexhausted claims." *Rhines* v. *Weber*, 544 U. S. 269, 275 (2005). See also *Castro* v. *United States*, 540 U. S. 375, 381 (2003). In *Rhines* "[w]e recognize[d] the gravity of [the] problem" posed when petitioners file applications with only some claims exhausted, as well as "the difficulty [this problem] has posed for petitioners and federal district courts alike." 544 U. S., at 275, 276. We sought to ensure our "solution to this problem [was] compatible with AEDPA's purposes." *Id.*, at 276. And in *Castro* we resisted an interpretation of the statute that would "produce troublesome results," "create procedural anomalies," and "close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." 540 U. S., at 380, 381. See also *Williams* v. *Taylor*, 529 U. S. 420, 437 (2000); *Johnson* v. *United States*, 544 U. S. 295, 308–309 (2005); *Duncan* v. *Walker*, 533 U. S. 167, 178 (2001); cf. *Granberry* v. *Greer*, 481 U. S. 129, 131–134 (1987).

An empty formality requiring prisoners to file unripe *Ford* claims neither respects the limited legal resources available to the States nor encourages the exhaustion of state remedies. See *Duncan*, *supra*, at 178. Instructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources, "reduc[e] piecemeal litigation," or "streamlin[e] federal habeas proceedings." *Burton* v. *Stewart*, 549 U. S. 147, 154 (2007) *(per curiam)* (internal quotation marks omitted). AEDPA's concern for finality, moreover, is not implicated, for under none of the possible approaches would federal courts be able to resolve a prisoner's *Ford* claim before execution is imminent. See *Martinez-Villareal*, *supra*, at 644–645 (acknowledging that the District Court was unable to resolve the prisoner's incompetency claim at the time of his initial habeas filing). And last-minute filings that are frivolous and designed to delay executions can be dismissed in the regular course. The require-

ment of a threshold preliminary showing, for instance, will, as a general matter, be imposed before a stay is granted or the action is allowed to proceed.

There is, in addition, no argument that petitioner's actions constituted an abuse of the writ, as that concept is explained in our cases. Cf. *Felker*, 518 U. S., at 664 ("[AEDPA's] new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ' "). To the contrary, we have confirmed that claims of incompetency to be executed remain unripe at early stages of the proceedings. See *Martinez-Villareal*, 523 U. S., at 644–645; see also *ibid.* (suggesting that it is therefore appropriate, as a general matter, for a prisoner to wait before seeking resolution of his incompetency claim); *Ford*, 477 U. S. 399 (remanding the case to the District Court to resolve Ford's incompetency claim, even though Ford had brought that claim in a second federal habeas petition); *Barnard* v. *Collins*, 13 F. 3d 871, 878 (CA5 1994) ("[O]ur research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be-executed claim on grounds of abuse of the writ"). See generally *McCleskey* v. *Zant*, 499 U. S. 467, 489–497 (1991).

In the usual case, a petition filed second in time and not otherwise permitted by the terms of § 2244 will not survive AEDPA's "second or successive" bar. There are, however, exceptions. We are hesitant to construe a statute, implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party.

The statutory bar on "second or successive" applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe. Petitioner's habeas application was properly filed, and the District Court had jurisdiction to adjudicate his claim.

III

A

Petitioner claims that the Eighth and Fourteenth Amendments of the Constitution, as elaborated by *Ford*, entitled him to certain procedures not provided in the state court; that the failure to provide these procedures constituted an unreasonable application of clearly established Supreme Court law; and that under § 2254(d) this misapplication of *Ford* allows federal-court review of his incompetency claim without deference to the state court's decision.

We agree with petitioner that no deference is due. The state court's failure to provide the procedures mandated by *Ford* constituted an unreasonable application of clearly established law as determined by this Court. It is uncontested that petitioner made a substantial showing of incompetency. This showing entitled him to, among other things, an adequate means by which to submit expert psychiatric evidence in response to the evidence that had been solicited by the state court. And it is clear from the record that the state court reached its competency determination after failing to provide petitioner with this process, notwithstanding counsel's sustained effort, diligence, and compliance with court orders. As a result of this error, our review of petitioner's underlying incompetency claim is unencumbered by the deference AEDPA normally requires.

Ford identifies the measures a State must provide when a prisoner alleges incompetency to be executed. The four-Justice plurality in *Ford* concluded as follows:

> "Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a

> decision affecting the life or death of a human being. Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 477 U. S., at 411–412.

Justice Powell's concurrence, which also addressed the question of procedure, offered a more limited holding. When there is no majority opinion, the narrower holding controls. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977). Under this rule Justice Powell's opinion constitutes "clearly established" law for purposes of § 2254 and sets the minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim.

Justice Powell's opinion states the relevant standard as follows. Once a prisoner seeking a stay of execution has made "a substantial threshold showing of insanity," the protection afforded by procedural due process includes a "fair hearing" in accord with fundamental fairness. *Ford*, 477 U. S., at 426, 424 (opinion concurring in part and concurring in judgment) (internal quotation marks omitted). This protection means a prisoner must be accorded an "opportunity to be heard," *id.*, at 424 (internal quotation marks omitted), though "a constitutionally acceptable procedure may be far less formal than a trial," *id.*, at 427. As an example of why the state procedures on review in *Ford* were deficient, Justice Powell explained, the determination of sanity "appear[ed] to have been made *solely* on the basis of the examinations performed by state-appointed psychiatrists." *Id.*, at 424. "Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations." *Ibid.*

Justice Powell did not set forth "the precise limits that due process imposes in this area." *Id.*, at 427. He observed that a State "should have substantial leeway to determine what process best balances the various interests at stake"

once it has met the "basic requirements" required by due process. *Ibid.* These basic requirements include an opportunity to submit "evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." *Ibid.*

Petitioner was entitled to these protections once he had made a "substantial threshold showing of insanity." *Id.*, at 426. He made this showing when he filed his Renewed Motion To Determine Competency—a fact disputed by no party, confirmed by the trial court's appointment of mental health experts pursuant to Article 46.05(f), and verified by our independent review of the record. The Renewed Motion to Determine Competency included pointed observations made by two experts the day before petitioner's scheduled execution; and it incorporated, through petitioner's first Motion To Determine Competency, references to the extensive evidence of mental dysfunction considered in earlier legal proceedings.

In light of this showing, the state court failed to provide petitioner with the minimum process required by *Ford.*

The state court refused to transcribe its proceedings, notwithstanding the multiple motions petitioner filed requesting this process. To the extent a more complete record may have put some of the court's actions in a more favorable light, this only constitutes further evidence of the inadequacy of the proceedings. Based on the materials available to this Court, it appears the state court on repeated occasions conveyed information to petitioner's counsel that turned out not to be true; provided at least one significant update to the State without providing the same notice to petitioner; and failed in general to keep petitioner informed as to the opportunity, if any, he would have to present his case. There is also a strong argument the court violated state law by failing to provide a competency hearing. See Tex. Code Crim. Proc. Ann., Art. 46.05(k). If this did, in fact, constitute a violation of the procedural framework Texas has mandated for the adjudication of incompetency claims, the violation undermines any reliance the State might now place on Justice

Powell's assertion that "the States should have substantial leeway to determine what process best balances the various interests at stake." *Ford*, *supra*, at 427. See also, *e. g.*, Brief for Respondent 16. What is more, the order issued by the state court implied that its determination of petitioner's competency was made solely on the basis of the examinations performed by the psychiatrists it had appointed—precisely the sort of adjudication Justice Powell warned would "invit[e] arbitrariness and error," *Ford*, *supra*, at 424.

The state court made an additional error, one that *Ford* makes clear is impermissible under the Constitution: It failed to provide petitioner with an adequate opportunity to submit expert evidence in response to the report filed by the court-appointed experts. The court mailed the experts' report to both parties in the first week of May. The report, which rejected the factual basis for petitioner's claim, set forth new allegations suggesting that petitioner's bizarre behavior was due, at least in part, to deliberate design rather than mental illness. Petitioner's counsel reached the reasonable conclusion that these allegations warranted a response. See Objections to Experts' Report 13, and n. 1. On May 14, the court told petitioner's counsel, by letter, to file "any other matters you wish to have considered" within a week. Petitioner, in response, renewed his motions for an evidentiary hearing, funds to hire a mental health expert, and other relief. He did not submit at that time expert psychiatric evidence to challenge the court-appointed experts' report, a decision that in context made sense: The court had said it would rule on his outstanding motions, which included a request for funds to hire a mental health expert and a request for an evidentiary hearing, once the court-appointed experts had completed their evaluation. Counsel was justified in relying on this representation by the court.

Texas law, moreover, provides that a court's finding of incompetency will be made on the basis of, *inter alia*, a "final competency hearing." Tex. Code Crim. Proc. Ann., Art. 46.05(k); see also *Ex parte Caldwell*, 58 S. W. 3d 127, 129,

130 (Tex. Crim. App. 2000) (confirming that the "legislature codified the dictates of *Ford* by enacting [the precursor to Art. 46.05]" and indicating that "[t]he determination of whether to appoint experts and conduct a hearing is within the discretion of the trial court" *before* a petitioner has made a substantial showing of incompetency). Had the court advised counsel it would resolve the case without first ruling on petitioner's motions and without holding a competency hearing, petitioner's counsel might have managed to procure the assistance of experts, as he had been able to do on a *pro bono* basis the day before petitioner's previously scheduled execution. It was, in any event, reasonable for counsel to refrain from procuring and submitting expert psychiatric evidence while waiting for the court to rule on the timely filed motions, all in reliance on the court's assurances.

But at this point the court simply ended the matter.

The state court failed to provide petitioner with a constitutionally adequate opportunity to be heard. After a prisoner has made the requisite threshold showing, *Ford* requires, at a minimum, that a court allow a prisoner's counsel the opportunity to make an adequate response to evidence solicited by the state court. See 477 U. S., at 424, 427. In petitioner's case this meant an opportunity to submit psychiatric evidence as a counterweight to the report filed by the court-appointed experts. *Id.*, at 424. Yet petitioner failed to receive even this rudimentary process.

In light of this error we need not address whether other procedures, such as the opportunity for discovery or for the cross-examination of witnesses, would in some cases be required under the Due Process Clause. As *Ford* makes clear, the procedural deficiencies already identified constituted a violation of petitioner's federal rights.

B

The state court's denial of certain of petitioner's motions rests on an implicit finding: that the procedures it provided

were adequate to resolve the competency claim. In light of the procedural history we have described, however, this determination cannot be reconciled with any reasonable application of the controlling standard in *Ford.*

That the standard is stated in general terms does not mean the application was reasonable. AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Carey* v. *Musladin*, 549 U. S. 70, 81 (2006) (KENNEDY, J., concurring in judgment). Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced." *Lockyer* v. *Andrade*, 538 U. S. 63, 76 (2003). The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. See, *e. g.*, *Williams* v. *Taylor*, 529 U. S. 362 (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in *Strickland* v. *Washington*, 466 U. S. 668 (1984)). These principles guide a reviewing court that is faced, as we are here, with a record that cannot, under any reasonable interpretation of the controlling legal standard, support a certain legal ruling.

Under AEDPA, a federal court may grant habeas relief, as relevant, only if the state court's "adjudication of [a claim on the merits] . . . resulted in a decision that . . . involved an unreasonable application" of the relevant law. When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires. See *Wiggins* v. *Smith*, 539 U. S. 510, 534 (2003) (performing the analysis required under *Strickland*'s second prong without deferring to the state court's decision because the state court's resolution of *Strickland*'s first prong involved an unreasonable application of law); 539 U. S., at 527–

529 (confirming that the state court's ultimate decision to reject the prisoner's ineffective-assistance-of-counsel claim was based on the first prong and not the second). See also *Williams*, *supra*, at 395–397; *Early* v. *Packer*, 537 U. S. 3, 8 (2002) *(per curiam)* (indicating that § 2254 does not preclude relief if either "the reasoning [or] the result of the state-court decision contradicts [our cases]"). Here, due to the state court's unreasonable application of *Ford*, the factfinding procedures upon which the court relied were "not adequate for reaching reasonably correct results" or, at a minimum, resulted in a process that appeared to be "seriously inadequate for the ascertainment of the truth." 477 U. S., at 423–424 (Powell, J., concurring in part and concurring in judgment) (internal quotation marks omitted). We therefore consider petitioner's claim on the merits and without deferring to the state court's finding of competency.

IV

A

This brings us to the question petitioner asks the Court to resolve: whether the Eighth Amendment permits the execution of a prisoner whose mental illness deprives him of "the mental capacity to understand that [he] is being executed as a punishment for a crime." Brief for Petitioner 31.

A review of the expert testimony helps frame the issue. Four expert witnesses testified on petitioner's behalf in the District Court proceedings. One explained that petitioner's mental problems are indicative of "schizo-affective disorder," 1 App. 143, resulting in a "genuine delusion" involving his understanding of the reason for his execution, *id.*, at 157. According to the expert, this delusion has recast petitioner's execution as "part of spiritual warfare . . . between the demons and the forces of the darkness and God and the angels and the forces of light." *Id.*, at 149. As a result, the expert explained, although petitioner claims to understand "that the state is saying that [it wishes] to execute him for

[his] murder[s]," he believes in earnest that the stated reason is a "sham" and the State in truth wants to execute him "to stop him from preaching." *Ibid.* Petitioner's other expert witnesses reached similar conclusions concerning the strength and sincerity of this "fixed delusion." *Id.*, at 203; see also *id.*, at 202, 231–232, 333.

While the State's expert witnesses resisted the conclusion that petitioner's stated beliefs were necessarily indicative of incompetency, see *id.*, at 240, 247, 304, particularly in light of his perceived ability to understand certain concepts and, at times, to be "clear and lucid," *id.*, at 243; see also *id.*, at 244, 304, 312, they acknowledged evidence of mental problems, see *id.*, at 239, 245, 308. Petitioner's rebuttal witness attempted to reconcile the experts' testimony:

> "Well, first, you have to understand that when somebody is schizophrenic, it doesn't diminish their cognitive ability. . . . Instead, you have a situation where—and why we call schizophrenia thought disorder[—]the logical integration and reality connection of their thoughts are disrupted, so the stimulus comes in, and instead of being analyzed and processed in a rational, logical, linear sort of way, it gets scrambled up and it comes out in a tangential, circumstantial, symbolic . . . not really relevant kind of way. That's the essence of somebody being schizophrenic. . . . Now, it may be that if they're dealing with someone who's more familiar . . . [in] what may feel like a safer, more enclosed environment . . . those sorts of interactions may be reasonably lucid whereas a more extended conversation about more loaded material would reflect the severity of his mental illness." *Id.*, at 328–329.

See also *id.*, at 203 (suggesting that an unmedicated individual suffering from schizophrenia can "at times" hold an ordinary conversation and that "it depends [whether the discussion concerns the individual's] fixed delusional system").

There is, in short, much in the record to support the conclusion that petitioner suffers from severe delusions. See, *e. g.*, *id.*, at 157, 149, 202–203, 231–232, 328–329, 333; see generally *id.*, at 136–353.

The legal inquiry concerns whether these delusions can be said to render him incompetent. The Court of Appeals held that they could not. That holding, we conclude, rests on a flawed interpretation of *Ford*.

The Court of Appeals stated that competency is determined by whether a prisoner is aware "'that he [is] going to be executed and why he [is] going to be executed,'" 448 F. 3d, at 819 (quoting *Barnard*, 13 F. 3d, at 877); see also 448 F. 3d, at 818 (discussing *Ford*, 477 U. S., at 421–422 (Powell, J., concurring in part and concurring in judgment)). To this end, the Court of Appeals identified the relevant District Court findings as follows: First, petitioner is aware that he committed the murders; second, he is aware that he will be executed; and, third, he is aware that the reason the State has given for the execution is his commission of the crimes in question. 448 F. 3d, at 817. Under Circuit precedent this ends the analysis as a matter of law; for the Court of Appeals regards these three factual findings as necessarily demonstrating that a prisoner is aware of the reason for his execution.

The Court of Appeals concluded that its standard foreclosed petitioner from establishing incompetency by the means he now seeks to employ: a showing that his mental illness obstructs a rational understanding of the State's reason for his execution. *Id.*, at 817–818. As the court explained, "[b]ecause we hold that 'awareness,' as that term is used in *Ford*, is not necessarily synonymous with 'rational understanding,' as argued by [petitioner,] we conclude that the district court's findings are sufficient to establish that [petitioner] is competent to be executed." *Id.*, at 821.

In our view the Court of Appeals' standard is too restrictive to afford a prisoner the protections granted by the

Eighth Amendment. The opinions in *Ford,* it must be acknowledged, did not set forth a precise standard for competency. The four-Justice plurality discussed the substantive standard at a high level of generality; and Justice Powell wrote only for himself when he articulated more specific criteria. Yet in the portion of Justice Marshall's discussion constituting the opinion of the Court (the portion Justice Powell joined) the majority did reach the express conclusion that the Constitution "places a substantive restriction on the State's power to take the life of an insane prisoner." 477 U. S., at 405. The Court stated the foundation for this principle as follows:

> "[T]oday, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. . . . Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Id.*, at 409–410.

Writing for four Justices, Justice Marshall concluded by indicating that the Eighth Amendment prohibits execution of "one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Id.*, at 417. Justice Powell, in his separate opinion, asserted that the Eighth Amendment "forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.*, at 422.

The Court of Appeals' standard treats a prisoner's delusional belief system as irrelevant if the prisoner knows that the State has identified his crimes as the reason for his execution. See 401 F. Supp. 2d, at 712 (indicating that under Circuit precedent "a petitioner's delusional beliefs—even those which may result in a fundamental failure to appreciate the connection between the petitioner's crime and his execution—do not bear on the question of whether the petitioner 'knows the reason for his execution' for the purposes of the Eighth Amendment"); see also *id.*, at 711–712. Yet the *Ford* opinions nowhere indicate that delusions are irrelevant to "comprehen[sion]" or "aware[ness]" if they so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution. If anything, the *Ford* majority suggests the opposite.

Explaining the prohibition against executing a prisoner who has lost his sanity, Justice Marshall in the controlling portion of his opinion set forth various rationales, including recognition that "the execution of an insane person simply offends humanity," 477 U. S., at 407; that it "provides no example to others," *ibid.;* that "it is uncharitable to dispatch an offender into another world, when he is not of a capacity to fit himself for it," *ibid.* (internal quotation marks omitted); that "madness is its own punishment," *ibid.;* and that executing an insane person serves no retributive purpose, *id.*, at 408.

Considering the last—whether retribution is served—it might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed. The potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question, however, if the prisoner's men-

tal state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole. This problem is not necessarily overcome once the test set forth by the Court of Appeals is met. And under a similar logic the other rationales set forth by *Ford* fail to align with the distinctions drawn by the Court of Appeals.

Whether *Ford*'s inquiry into competency is formulated as a question of the prisoner's ability to "comprehen[d] the reasons" for his punishment or as a determination into whether he is "unaware of . . . why [he is] to suffer it," then, the approach taken by the Court of Appeals is inconsistent with *Ford*. The principles set forth in *Ford* are put at risk by a rule that deems delusions relevant only with respect to the State's announced reason for a punishment or the fact of an imminent execution, see 448 F. 3d, at 819, 821, as opposed to the real interests the State seeks to vindicate. We likewise find no support elsewhere in *Ford*, including in its discussions of the common law and the state standards, for the proposition that a prisoner is automatically foreclosed from demonstrating incompetency once a court has found he can identify the stated reason for his execution. A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter.

This is not to deny the fact that a concept like rational understanding is difficult to define. And we must not ignore the concern that some prisoners, whose cases are not implicated by this decision, will fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness. The mental state requisite for competence to suffer capital punishment neither presumes nor requires a person who would be considered "normal," or even "rational," in a layperson's understanding of those terms. Someone who is condemned to death for an

atrocious murder may be so callous as to be unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt; so adept in transferring blame to others as to be considered, at least in the colloquial sense, to be out of touch with reality. Those states of mind, even if extreme compared to the criminal population at large, are not what petitioner contends lie at the threshold of a competence inquiry. The beginning of doubt about competence in a case like petitioner's is not a misanthropic personality or an amoral character. It is a psychotic disorder.

Petitioner's submission is that he suffers from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced. This argument, we hold, should have been considered.

The flaws of the Court of Appeals' test are pronounced in petitioner's case. Circuit precedent required the District Court to disregard evidence of psychological dysfunction that, in the words of the judge, may have resulted in petitioner's "fundamental failure to appreciate the connection between the petitioner's crime and his execution." 401 F. Supp. 2d, at 712. To refuse to consider evidence of this nature is to mistake *Ford*'s holding and its logic. Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose. It is therefore error to derive from *Ford*, and the substantive standard for incompetency its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted.

B

Although we reject the standard followed by the Court of Appeals, we do not attempt to set down a rule governing all

competency determinations. The record is not as informative as it might be, even on the narrower issue of how a mental illness of the sort alleged by petitioner might affect this analysis. In overseeing the development of the record and in making its factual findings, the District Court found itself bound to analyze the question of competency in the terms set by Circuit precedent. It acknowledged, for example, the "difficult issue" posed by the delusions allegedly interfering with petitioner's understanding of the reason behind his execution, 401 F. Supp. 2d, at 712, but it refrained from making definitive findings of fact with respect to these matters, see *id.*, at 709. See also *id.*, at 712 (identifying testimony by Dr. Mark Cunningham indicating that petitioner "believes the State is in league with the forces of evil that have conspired against him" and, as a result, "does not even understand that the State of Texas is a lawfully constituted authority," but refraining from setting forth definitive findings of fact concerning whether this was an accurate characterization of petitioner's mindset).

The District Court declined to consider the significance those findings might have on the ultimate question of competency under the Eighth Amendment. See *ibid.* (disregarding Dr. Cunningham's testimony in light of Circuit precedent). And notwithstanding the numerous questions the District Court asked of the witnesses, see, *e. g.*, 1 App. 191–197, 216–218, 234–237, 321–323, it did not press the experts on the difficult issue it identified in its opinion, see *ibid.* The District Court, of course, was bound by Circuit precedent, and the record was developed pursuant to a standard we have found to be improper. As a result, we find it difficult to amplify our conclusions or to make them more precise. We are also hesitant to decide a question of this complexity before the District Court and the Court of Appeals have addressed, in a more definitive manner and in light of the expert evidence found to be probative, the nature and severity of petitioner's alleged mental problems.

The underpinnings of petitioner's claims should be explained and evaluated in further detail on remand. The conclusions of physicians, psychiatrists, and other experts in the field will bear upon the proper analysis. Expert evidence may clarify the extent to which severe delusions may render a subject's perception of reality so distorted that he should be deemed incompetent. Cf. Brief for American Psychological Association et al. as *Amici Curiae* 17–19 (discussing the ways in which mental health experts can inform competency determinations). And there is precedent to guide a court conducting Eighth Amendment analysis. See, *e. g.*, *Roper* v. *Simmons*, 543 U. S. 551, 560–564 (2005); *Atkins* v. *Virginia*, 536 U. S. 304, 311–314 (2002); *Ford*, 477 U. S., at 406–410.

It is proper to allow the court charged with overseeing the development of the evidentiary record in this case the initial opportunity to resolve petitioner's constitutional claim. These issues may be resolved in the first instance by the District Court.

* * *

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

Scott Panetti's mental problems date from at least 1981. While Panetti's mental illness may make him a sympathetic figure, state and federal courts have repeatedly held that he is competent to face the consequences of the two murders he committed. In a competency hearing prior to his trial in 1995, a jury determined that Panetti was competent to stand trial. A judge then determined that Panetti was competent to represent himself. At his trial, the jury rejected Panetti's insanity defense, which was supported by the testimony of two psychiatrists. Since the trial, both state and federal

habeas courts have rejected Panetti's claims that he was incompetent to stand trial and incompetent to waive his right to counsel.

This case should be simple. Panetti brings a claim under *Ford* v. *Wainwright*, 477 U. S. 399 (1986), that he is incompetent to be executed. Presented for the first time in Panetti's second federal habeas application, this claim undisputedly does not meet the statutory requirements for filing a "second or successive" habeas application. As such, Panetti's habeas application must be dismissed. Ignoring this clear statutory mandate, the Court bends over backwards to allow Panetti to bring his *Ford* claim despite no evidence that his condition has worsened—or even changed—since 1995. Along the way, the Court improperly refuses to defer to the state court's finding of competency even though Panetti had the opportunity to submit evidence and to respond to the court-appointed experts' report. Moreover, without undertaking even a cursory Eighth Amendment analysis, the Court imposes a new standard for determining incompetency. I respectfully dissent.

I

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires applicants to receive permission from the court of appeals prior to filing second or successive federal habeas applications. 28 U. S. C. § 2244(b)(3). Even if permission is sought, AEDPA requires courts to decline such requests in all but two narrow circumstances. § 2244(b)(3)(C); § 2244(b)(2).[1] Panetti raised his *Ford* claim

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[1] Section 2244(b)(2) states:

"A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

"(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

for the first time in his second federal habeas application, *ante*, at 938, 942, but he admits that he did not seek authorization from the Court of Appeals and that his claim does not satisfy either of the statutory exceptions. Accordingly, § 2244(b) requires dismissal of Panetti's "second . . . habeas corpus application."

The Court reaches a contrary conclusion by reasoning that AEDPA's phrase "second or successive" "takes its full meaning from our case law, including decisions predating the enactment of [AEDPA]." *Ante*, at 943–944 (citing *Slack* v. *McDaniel*, 529 U. S. 473, 486 (2000)). But the Court fails to identify any pre-AEDPA case that defines, explains, or modifies the phrase "second or successive." Nor does the Court identify any pre-AEDPA case in which a subsequent habeas application challenging the same state-court judgment was considered anything but "second or successive."[2] To my knowledge, there are no such cases.

Before AEDPA's enactment, the phrase "second or successive" meant the same thing it does today—any subsequent federal habeas application challenging a state-court judgment that had been previously challenged in a federal habeas application. See, *e. g.*, *Kuhlmann* v. *Wilson*, 477 U. S. 436,

"(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

"(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

[2] The Court identifies two post-AEDPA cases. *Ante*, at 944 (citing *Slack* v. *McDaniel*, 529 U. S. 473 (2000); *Stewart* v. *Martinez-Villareal*, 523 U. S. 637 (1998)). Because these cases were decided after AEDPA, they do not establish the pre-AEDPA meaning of "second or successive." Moreover, these cases do not apply here. The inapplicability of *Martinez-Villareal* is discussed below. *Infra*, at 966–967. Like *Martinez-Villareal*, the narrow exception described in *Slack* is akin to a renewal of an initial application. 529 U. S., at 486–487; see *infra*, at 966–967 (discussing *Martinez-Villareal*). Even the Court does not maintain that *Slack* applies to Panetti's claim.

451–452 (1986) (plurality opinion); *Barefoot* v. *Estelle*, 463 U. S. 880, 895 (1983). Prior to AEDPA, however, second or successive habeas applications were not always dismissed. Rather, the pre-AEDPA abuse of the writ doctrine allowed courts to entertain second or successive applications in certain circumstances. See 28 U. S. C. § 2254(b) Rule 9(b) (1994 ed.) ("A second or successive petition may be dismissed [when] new and different grounds are alleged [if] the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ"); *McCleskey* v. *Zant*, 499 U. S. 467, 470 (1991); *Kuhlmann*, *supra*, at 451–452 (plurality opinion); *Barefoot*, *supra*, at 895. Consistent with this practice, prior to AEDPA, federal courts treated *Ford* claims raised in subsequent habeas applications as "second or successive" but usually allowed such claims to proceed under the abuse of the writ doctrine.[3] See *Martin* v. *Dugger*, 686 F. Supp. 1523, 1528 (SD Fla. 1988) (permitting a *Ford* claim raised in a "second" habeas petition "[b]ecause *Ford* was a substantial change in constitutional law [and the prisoner] was unaware of the legal significance of relevant facts"); *Barnard* v. *Collins*, 13 F. 3d 871, 875, 878 (CA5 1994); *Shaw* v. *Delo*, 762 F. Supp. 853, 857–859 (ED Mo. 1991); *Johnson* v. *Cabana*, 661 F. Supp. 356, 364 (SD Miss. 1987). Still,

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[3] If, as the Court asserts, "second or successive" were a pre-AEDPA term of art that excepted *Ford* claims, it would be difficult to explain why, immediately following AEDPA's passage, Courts of Appeals uniformly considered subsequent applications raising *Ford* claims to be "second or successive" under § 2244. See *In re Medina*, 109 F. 3d 1556, 1563–1565 (CA11 1997) *(per curiam); In re Davis*, 121 F. 3d 952, 953–955 (CA5 1997); see also *Martinez-Villareal* v. *Stewart*, 118 F. 3d 628, 630–631, 633–634 (CA9 1997) *(per curiam)* (finding § 2244 applicable but allowing a *Ford* claim to proceed where it was presented in the initial habeas application).

The Courts of Appeals uniformly continue to hold that § 2244 applies to successive habeas applications raising *Ford* claims when the initial application failed to do so. See, *e. g.*, *Richardson* v. *Johnson*, 256 F. 3d 257, 258–259 (CA5 2001); *In re Provenzano*, 215 F. 3d 1233, 1235 (CA11 2000); *Nguyen* v. *Gibson*, 162 F. 3d 600, 601 (CA10 1998) *(per curiam)*.

though, at least one court found a *Ford* claim raised in a subsequent application to be an abuse of the writ. *Rector* v. *Lockhart*, 783 F. Supp. 398, 402–404 (ED Ark. 1992).

When it enacted AEDPA, Congress "further restrict[ed] the availability of relief to habeas petitioners" and placed new "limits on successive petitions." *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996). Instead of the judicial discretion that governed second or successive habeas applications prior to AEDPA, Congress required dismissal of all second and successive applications except in two specified circumstances. § 2244(b)(2). AEDPA thus eliminated much of the discretion that previously saved second or successive habeas petitions from dismissal.

Stating that we "ha[ve] declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time," *ante*, at 944, the Court relies upon *Stewart* v. *Martinez-Villareal*, 523 U. S. 637, 640, 645–646 (1998), in which we held that a subsequent application raising a *Ford* claim could go forward. In that case, however, the applicant had raised a *Ford* claim in his initial habeas application, and the District Court had dismissed it as unripe. 523 U. S., at 640. Refusing to treat the applicant's subsequent application as second or successive, the Court simply held that the second application renewed the *Ford* claim originally presented in the prior application:

> "This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but this does not mean that there were two separate applications, the second of which was necessarily subject to § 2244(b). There was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief." 523 U. S., at 643.

In other words, *Martinez-Villareal* held that where an applicant raises a *Ford* claim in an initial habeas application, § 2244 does not bar a second application once the claim ripens because the second application is a continuation of the first application. 523 U. S., at 643–645; cf. *Burton* v. *Stewart*, 549 U. S. 147, 155 (2007) *(per curiam)* ("[U]nlike Burton, the prisoner [in *Martinez-Villareal*] had attempted to bring this claim in his initial habeas petition"). *Martinez-Villareal* does not apply here because Panetti did not bring his *Ford* claim in his initial habeas application.[4]

The Court does not and cannot argue that any time a claim would not be ripe in the first habeas petition, it may be raised in a later habeas petition. We unanimously rejected such an argument in *Burton* v. *Stewart*, *supra*. In *Burton*, the petitioner filed a federal habeas petition challenging his convictions but not challenging his sentence, which was at that time still on review in the state courts. After the state courts rejected his sentencing claims, the petitioner filed a second federal habeas petition, this time challenging his sentence. The Ninth Circuit held that Burton's second petition was not "second or successive" under AEDPA, "reason[ing] that because Burton had not exhausted his sentencing claims in state court when he filed the [first] petition, they were not ripe for federal habeas review at that time." *Id.*, at 153 (internal quotation marks omitted). The Ninth Circuit found that the second petition was not foreclosed by AEDPA since the claim would not have been ripe if raised in the first

[4] The Court claims that *Martinez-Villareal* "suggest[s] that it is . . . appropriate, as a general matter, for a prisoner to wait before seeking resolution of his incompetency claim." *Ante*, at 947. But *Martinez-Villareal* "suggest[s]" no such thing. 523 U. S., at 645. To the contrary, as the Court admits, *Martinez-Villareal* does not determine whether a prisoner would even be *allowed* to bring a *Ford* claim if he waits to bring it in a second petition. *Ante*, at 945 (citing *Martinez-Villareal*, *supra*, at 645, n.).

petition. *Ibid.* We rejected the Ninth Circuit's view and held that AEDPA barred Burton's second petition. In light of *Burton*, it simply cannot be maintained that Panetti is excused from § 2244's requirements solely because his *Ford* claim would have been unripe had he included it in his first habeas application. Today's decision thus stands only for the proposition that *Ford* claims somehow deserve a special (and unjustified) exemption from the statute's plain import.

Because neither AEDPA's text, pre-AEDPA precedent, nor our AEDPA jurisprudence supports the Court's understanding of "second or successive," the Court falls back on judicial economy considerations. The Court suggests that my interpretation of the statute would create an incentive for every prisoner, regardless of his mental state, to raise and preserve a *Ford* claim in the event the prisoner later becomes insane. *Ante*, at 943, 946–947. Even if this comes to pass, it would not be the catastrophe the Court suggests. District courts could simply dismiss unripe *Ford* claims outright, and habeas applicants could then raise them in subsequent petitions under the safe harbor established by *Martinez-Villareal*. Requiring that *Ford* claims be included in an initial habeas application would have the added benefit of putting a State on notice that a prisoner intends to challenge his or her competency to be executed. In any event, regardless of whether the Court's concern is justified, judicial economy considerations cannot override AEDPA's plain meaning. Remaining faithful to AEDPA's mandate, I would dismiss Panetti's application as second or successive.

II

The Court also errs in holding that the state court unreasonably applied "clearly established" Supreme Court precedent by failing to afford Panetti adequate procedural protections. *Ante*, at 948. Panetti is entitled to habeas relief only if the state-court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Su-

preme Court of the United States." 28 U. S. C. § 2254(d)(1). Even if Justice Powell's concurrence in *Ford* qualifies as clearly established federal law on this point, the state court did not unreasonably apply *Ford*.[5]

A

The procedural rights described in *Ford* are triggered only upon "a substantial threshold showing of insanity." 477 U. S., at 426 (Powell, J., concurring in part and concurring in judgment); *id.*, at 417 (plurality opinion) (using the term "high threshold"). Following an "independent review of the record," *ante*, at 950, the majority finds that Panetti has made a satisfactory threshold showing. That conclusion is insupportable.

Panetti filed only two exhibits with his Renewed Motion to Determine Competency in the state court. See Scott Panetti's Renewed Motion to Determine Competency to Be Executed in Cause No. 3310 (Gillespie Cty., Tex., 216th Jud. Dist., Feb. 4, 2004) (hereinafter Renewed Motion).[6] The

[5] To reach the tenuous conclusion that Justice Powell's opinion constitutes clearly established federal law, *ante*, at 949, the Court ignores the tension between Justice Powell's concern that adversarial proceedings may be counterproductive and the plurality's position that adversarial proceedings are required. Compare *Ford* v. *Wainwright*, 477 U. S. 399, 426 (1986) (Powell, J., concurring in part and concurring in judgment) (stating that "ordinary adversarial procedures—complete with live testimony, cross-examination, and oral argument by counsel—are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity"), with *id.*, at 415, 417 (plurality opinion) (discussing the importance of adversarial procedures, including cross-examination). Given these contradictory statements, it is difficult to say that Justice Powell's opinion is merely a narrower version of the plurality's view. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

[6] This application was itself Panetti's second bite at the apple in the state court on the question of his competency to be executed. Panetti had previously presented a *Ford* claim in state court, but the documents that accompanied that filing contained "nothing . . . that relate[d] to his current mental state." Order in Case No. A–04–CA–042–SS (WD Tex., Jan. 28, 2004), p. 4; *id.*, at 4 (Jan. 30, 2004) (hereinafter Order of Jan. 30) (same). As a result, the state court denied relief without a hearing, *ante*,

first was a one-page letter from Dr. Cunningham to Panetti's counsel describing his 85-minute "preliminary evaluation" of Panetti. Letter from Mark D. Cunningham, Ph.D., to Michael C. Gross (Feb. 3, 2004), 1 App. 108. Far from containing "pointed observations," *ante,* at 950, Dr. Cunningham's letter is unsworn, contains no diagnosis, and does not discuss whether Panetti understood why he was being executed, *ante,* at 961. Panetti's other exhibit was a one-page declaration of a *law professor* who attended Cunningham's 85-minute meeting with Panetti. Declaration of David R. Dow (Feb. 3, 2004), 1 App. 110. Professor Dow obviously made no medical diagnosis and simply discussed his lay perception of Panetti's mental condition in a cursory manner. *Ibid.* The Court describes Dow as an "expert," *ante,* at 950, but law professors are obviously not experts when it comes to medical or psychological diagnoses.

Panetti's Renewed Motion attached no medical reports or records, no sworn testimony from any medical professional, and no diagnosis of any medical condition. The Court claims that Panetti referred "to the extensive evidence of mental dysfunction considered in earlier legal proceedings." *Ibid.* But as the Federal District Court noted, Panetti merely "outlined his mental health history for the time period from 1981 until 1997." Order of Jan. 30, at 4. This evidence—previously rejected by the state and federal courts that adjudicated Panetti's other incompetency claims—had no relevance to Panetti's competency to be executed in 2004 when he filed his *Renewed* Motion. *Ibid.* In addition to the utter lack of new medical evidence, no layperson who had observed Panetti on a day-to-day basis, such as prison guards or fellow inmates, submitted an affidavit or even a letter. In short, Panetti supported his alleged incompetency with only the preliminary observations of a psychologist and a lawyer, whose only contact with Panetti was a single 85-minute

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at 938, and the Federal District Court found no error in this determination, Order of Jan. 30, at 4.

meeting. It is absurd to suggest that this quantum of evidence clears the "high threshold," entitling claimants to the procedural protections described by the plurality and Justice Powell in *Ford*. 477 U. S., at 417 (plurality opinion); see also *id.*, at 426 (opinion of Powell, J.).[7]

B

Having determined that Panetti's evidence exceeded the high threshold set forth in *Ford*, the Court asserts that *Ford* requires that "a court allow a prisoner's counsel the opportunity to make an adequate response to evidence solicited by the state court." *Ante*, at 952 (citing *Ford*, *supra*, at 427 (opinion of Powell, J.)). Justice Powell's concurrence states that a prisoner has the right to present his or her evidence to an impartial decisionmaker. In light of the facts before the Court in *Ford*, it becomes obvious that in this case Texas more than satisfied any obligations Justice Powell described.

1

Under the Florida law at issue in *Ford*, the Governor—not a court—made the final decision as to the condemned prisoner's sanity. 477 U. S., at 412 (plurality opinion). The prisoner could not submit any evidence and had no opportunity to be heard. *Id.*, at 412–413; *id.*, at 424 (opinion of Powell, J.). In other words, the Florida procedures required

[7] The Court argues that "the trial court's appointment of mental health experts pursuant to Article 46.05(f)" "confirmed" that Panetti had made a threshold showing. *Ante*, at 950. But the state court made no such finding and may have proceeded simply in an abundance of caution, perhaps to humor the Federal District Court, which had "stay[ed] the execution [for 60 days to] allow the state court a reasonable period of time to consider the evidence of Panetti's current mental state." Order in Case No. A–04–CA–042–SS (Feb. 4, 2004), p. 3, 1 App. 116. In any event, the question today is not whether Panetti met Texas' threshold but whether he met the constitutional one. The Court cannot avoid answering that question by relying on a related state-law determination.

neither a neutral decisionmaker nor an opportunity for the prisoner to present evidence. *Id.*, at 412–413; *id.*, at 424.

Against this backdrop, Justice Powell's concurrence states that due process requires an impartial decisionmaker and a chance to present evidence:

> "The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." *Id.*, at 427.

In setting forth these minimal procedural protections, Justice Powell explained that "[b]eyond these basic requirements, the States should have substantial leeway to determine what process best balances the various interests at stake." *Ibid.* Justice Powell stressed that "ordinary adversarial procedures . . . are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity." *Id.*, at 426.

2

Because a court considered Panetti's insanity claim, the State clearly satisfied Justice Powell's requirement to "provide an impartial officer or board." *Id.*, at 427. The sole remaining question, then, is whether the state court "receive[d] evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." *Ibid.*

At the outset of its discussion, the Court suggests that Texas is not entitled to "substantial leeway" in determining what procedures are appropriate, see *ibid.*, because Texas may have "violat[ed] the procedural framework Texas has mandated for the adjudication of incompetency claims," *ante*, at 950. As its sole support for that assertion, the Court states that there is "a strong argument the court violated state law by failing to provide a competency hearing." *Ibid.* But Article 46.05 of the Texas Code of Criminal Pro-

cedure provides no right to a competency hearing: "The determination of whether to appoint experts and conduct a hearing [under Article 46.05] is within the discretion of the trial court." *Ex parte Caldwell*, 58 S. W. 3d 127, 130 (Tex. Crim. App. 2000). Contrary to the Court's statement, *ante*, at 952, this discretion does not depend on whether a substantial showing of incompetency has been made. See *Caldwell*, *supra*, at 130. Accordingly, there is no basis for denying Texas the "substantial leeway" *Ford* grants to States.

Texas law allows prisoners to submit "affidavits, records, or other evidence supporting the defendant's allegations" "that the defendant is presently incompetent to be executed." Tex. Code Crim. Proc. Ann., Art. 46.05 (Vernon Supp. Pamphlet 2006). Therefore, state law provided Panetti with the legal right to submit whatever evidence he wanted. Here, it is clear that the state court stood ready and willing to consider any evidence Panetti wished to submit. The record of the state proceedings shows that Panetti took full advantage of this opportunity. For example, after the court-appointed experts presented their report, the state court gave Panetti a chance to respond, 1 App. 78, and Panetti filed a 17-page brief objecting to the report and arguing that there were problems in its methodology.[8] Objections to Experts' Report, *id.*, at 79. No extensive consideration of Panetti's submitted evidence was necessary because the

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[8] The Court states that Panetti's "counsel reached the reasonable conclusion that these allegations warranted a response." *Ante*, at 951. But the Court fails to note that the 17-page brief *was* the response. Apart from his motions, Panetti never requested the opportunity to respond further.

Panetti criticized the court-appointed experts for visiting him only once, for not conducting psychological testing, for failing to review collateral information adequately, for failing to take into account his history of mental problems, and for the abbreviated nature of their conclusions. Objections to Experts' Report, Renewed Motion for Funds to Hire Mental Health Expert and Investigator, Renewed Motion for Competency Hearing in Cause No. 3310 (Gillespie Cty., Tex., 216th Jud. Dist., May 21, 2004), 1 App. 82–95 (hereinafter Objections to Experts' Report).

submissions—the single-page statements of one doctor and one lawyer—were paltry and unpersuasive. That the evidence presented did not warrant more extensive examination does not change the fact that Panetti had an unlimited opportunity to submit evidence to the state court.

Based on Panetti's evidence, the report by the court-appointed experts, and Panetti's objections to that report, the state court found that "[d]efendant has failed to show, by a preponderance of the evidence, that he is incompetent to be executed." *Id.*, at 99. Given Panetti's meager evidentiary submissions, it is unsurprising that the state court declined to proceed further. The Court asserts that "the order issued by the state court implied that its determination of petitioner's competency [improperly] was made solely on the basis of the examinations performed by the psychiatrists it had appointed." *Ante,* at 951. However, the order's focus on the report of the court-appointed experts indicates only that the court found the report to be persuasive. 1 App. 99. Supported by the persuasive report of two neutral experts, the court reasonably concluded that Panetti's meager evidence deserved no mention. See Part II–A, *supra.* In my view, the state court fairly implemented the procedures described by Justice Powell's opinion in *Ford*—to "receive evidence and argument from the prisoner's counsel." 477 U. S., at 427. At the very least, the state court did not unreasonably apply his concurrence. See 28 U. S. C. § 2254(d)(1).

3

Because it cannot dispute that Panetti had an unlimited opportunity to present evidence, the Court argues that the state court "failed to provide petitioner with an adequate opportunity to submit expert evidence in response to the report filed by the court-appointed experts." *Ante,* at 951. According to the Court, this opportunity was denied to Panetti because the state court failed to rule explicitly on his motions and failed to warn him that he would receive no

evidentiary hearing.[9] This position has no factual basis. After the court-appointed experts submitted their report, the state court made it clear that the case was proceeding to conclusion and that Panetti's counsel needed to submit anything else he wanted the judge to consider:

> "It appears from the evaluations performed by Dr. Mary Anderson and Dr. George Parker that they are of the opinion that Mr. Panetti is competent to be executed in accordance with the standards set out in Art. 46.05 of the Code of Criminal Procedure.

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[9] The Court does not assert that Panetti actually had a constitutional right to an evidentiary hearing or to have any of his 10 motions granted. As discussed above, Justice Powell's concurrence specifically rejected the *Ford* plurality's contention that an adversarial proceeding was constitutionally required or even appropriate. Part II–B–1, *supra*. Even a cursory look at Panetti's motions shows that the state court did not err in refusing to grant them. This Court has never recognized a right to state-provided experts or counsel on state habeas review. Cf. Ex Parte Motion for Prepayment of Funds to Hire Mental Health Expert to Assist Defense in Article 46.05 Proceedings in Cause No. 3310 (Feb. 19, 2004), 1 App. 54 (hereinafter Ex Parte Motion for Mental Health Expert); Defendant's Motion for Appointment of Counsel to Assist Him in Article 46.05 Proceedings (Feb. 19, 2004), *id.*, at 45; Ex Parte Motion for Prepayment of Funds to Hire an Investigator to Assist Defense Counsel in Cause No. 3310 (Feb. 19, 2004) (hereinafter Ex Parte Motion for Investigator). There is likewise no right to transcribed court proceedings, videotaped examinations, or any other specific protocols for conducting competency evaluations. Cf. Motion to Videotape All Competency Examinations of Scott Panetti Conducted by Court-Appointed Mental Health Experts in Cause No. 3310 (Feb. 19, 2004); Motion to Transcribe All Proceedings Related to Competency Determination Under Article 46.05 in Cause No. 3310 (Feb. 19, 2004); Motion Seeking Order Setting Out Protocol for Conducting Competency Evaluations of Scott Panetti in Cause No. 3310 (Feb. 19, 2004). And as discussed above, Panetti has no clearly established constitutional right to a formal, oral hearing, Part II–B–1, *supra*, much less a right to discovery. Cf. Defendant's Motion for Discovery in Cause No. 3310 (Feb. 19, 2004); Motion to Ensure That the Article 46.05 "Final Competency Hearing" Comports With the Procedural Due Process Requirements of *Ford* in Cause No. 3310 (Feb. 19, 2004), 1 App. 49.

> "Mr. Gross, if you have any other matters you wish to have considered, please file them in the case papers and get me copies by 5:00 p.m. on May 21, 2004." Letter from District Judge Stephen B. Ables in Cause No. 3310 (May 14, 2004), 1 App. 77–78.

Panetti's counsel got the message. Far from assuming that there would be a hearing, *ante*, at 951–952, counsel renewed his motion requesting a competency hearing and his motion seeking state funding for a mental health expert. 1 App. 96–98. Panetti's filing indicates that he understood that no hearing was currently scheduled and that if he wanted to convince the state court not to deny relief, he needed to do so immediately. See *id.*, at 80–95. The record demonstrates that what Panetti actually sought was not the opportunity to submit additional evidence—because, at that time, he had no further evidence to submit—but state funding for his pursuit of more evidence. See Ex Parte Motion for Mental Health Expert, *id.*, at 54; Ex Parte Motion for Investigator; Defendant's Motion for Appointment of Counsel to Assist Him in Article 46.05 Proceedings in Cause No. 3310 (Feb. 19, 2004), *id.*, at 45; Panetti's Response to Show Cause Order in Case No. A–04–CA–042–SS (WD Tex., June 3, 2004), p. 5; cf. Order of Jan. 30, at 4. This Court has never recognized a constitutional right to state funding for counsel in state habeas proceedings—much less for experts—and Texas law grants no such right in *Ford* proceedings. *E. g.*, *Ex parte Caldwell*, 58 S. W. 3d, at 130 (holding that funding for counsel or experts in Article 46.05 proceedings is at the discretion of the district court); *Coleman* v. *Thompson*, 501 U. S. 722, 755 (1991) (noting that there is no constitutional right to state-funded counsel in state habeas cases).

In short, there is nothing in the record to suggest that Panetti would have submitted any additional evidence had he been given another opportunity to do so. Panetti never requested more time to submit evidence and never told the

court that he wanted to submit additional evidence in the event that his requests for fees were denied. Panetti's track record of submitting no new evidence in his first Article 46.05 motion, n. 6, *supra*, and only two insubstantial exhibits in his second, Part II–A, *supra*, suggests that it was highly unlikely that Panetti planned to present anything else. Accordingly, the state-court proceedings to evaluate Panetti's insanity claim were not "contrary to, or . . . an unreasonable application of, clearly established Federal law," 28 U. S. C. § 2254(d)(1).[10]

C

Because the state court did not unreasonably apply Justice Powell's procedural analysis, we must defer to its determination that Panetti was competent to be executed. See *ibid.* Thus, Panetti is entitled to federal habeas relief only if the state court's determination that he is compe-

[10] Because the Court fails to identify any bona fide constitutional violation, it provides a laundry list of perceived deficiencies in the state-court proceedings. *Ante*, at 950 ("[I]t appears the state court on repeated occasions conveyed information to petitioner's counsel that turned out not to be true; provided at least one significant update to the State without providing the same notice to petitioner; and failed in general to keep petitioner informed as to the opportunity, if any, he would have to present his case"). The state court did request the name of mental health experts from the parties but ultimately chose experts without input from the parties. *Ante*, at 939–940. It canceled a status conference and failed to give Panetti notice. *Ante*, at 939. It also never explicitly ruled on Panetti's motions despite its statements that it would do so later. *Ante*, at 940–941. But Panetti does not argue that the court-appointed experts were not impartial nor does he explain how the canceled status conference caused him any harm. Finally, although it might have been better for the state court to rule explicitly on Panetti's outstanding motions, it implicitly denied them by dismissing his claim. As for the state court's "fail[ure] to keep petitioner informed," after the court-appointed experts' report was issued, the judge sent a letter to counsel that made it clear that Panetti had one last chance to submit information. 1 App. 77–78. In short, none of these perceived deficiencies qualifies as a violation of any "clearly established" federal law.

tent to be executed "was contrary to, or involved an unreasonable application of," Supreme Court precedent or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d). Not even Panetti argues that this standard is met here.

Applying Justice Powell's substantive standard for competency, the state court determined that Panetti was competent to be executed, 1 App. 99; see also Tex. Code Crim. Proc. Ann., Art. 46.05(h), a factual determination that is "presumed to be correct," § 2254(e)(1). That factual determination was based on an expert report by two doctors with almost no evidence to the contrary. See Part II–A, *supra.* Hence, Panetti is not entitled to federal habeas relief under § 2254.

III

Because we lack jurisdiction under AEDPA to consider Panetti's claim and because, even if jurisdiction were proper, the state court's decision constitutes a reasonable application of federal law, I will not address whether the Court of Appeals' standard for insanity is substantively correct. I do, however, reject the Court's approach to answering that question. The Court parses the opinions in *Ford* to impose an additional constitutional requirement without undertaking any Eighth Amendment analysis of its own. Because the Court quibbles over the precise meaning of *Ford*'s opinions with respect to an issue that was not presented in that case, what emerges is a half-baked holding that leaves the details of the insanity standard for the District Court to work out. See *ante,* at 960–962. As its sole justification for thrusting already muddled *Ford* determinations into such disarray, the Court asserts that *Ford* itself compels such a result. It does not.

The four-Justice plurality in *Ford* did not define insanity or create a substantive standard for determining competency. See 477 U. S., at 418 (Powell, J., concurring in part

and concurring in judgment) (stating that "[t]he Court's opinion does not address" "the meaning of insanity").[11] Only Justice Powell's concurrence set forth a standard:

> "[No State] disputes the need to require that those who are executed know the fact of their impending execution and the reason for it.
>
> "Such a standard appropriately defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition. If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.*, at 422.

Because the issue before the Court in *Ford* was actual knowledge, not rational understanding, *ibid.*, nothing in any of the *Ford* opinions addresses what to do when a prisoner knows the reason for his execution but does not "rationally understand" it.

Tracing the language of Justice Powell's concurrence, the Court of Appeals held that Panetti needed only to be "'aware' of" the stated reason for his execution. *Panetti* v. *Dretke*, 448 F. 3d 815, 819 (CA5 2006). Implicitly, the Court of Appeals also concluded that the fact that Panetti "disbelieves the State's stated reason for executing him," *Panetti* v. *Dretke*, 401 F. Supp. 2d 702, 708 (WD Tex. 2004), does not render him "unaware" of the reason for his execution. The Court challenges this approach based on an expansive inter-

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[11] Justice Marshall's plurality opinion in *Ford* did not even go so far as to state that there should be a uniform national substantive standard for insanity. It is thus an open question as to how much discretion the States have in setting the substantive standard for insanity.

pretation of Justice Powell's use of the word "aware." *Ante*, at 959–960. However, the Court does not and cannot deny that "awareness" is undefined in *Ford* and that *Ford* does not discuss whether "delusions [that] so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution" affect awareness in a constitutionally relevant manner.[12] *Ante*, at 958. Nevertheless, the Court cobbles together stray language from *Ford*'s multiple opinions and asserts that the Court of Appeals' test is somehow inconsistent with the spirit of *Ford*. Because that result does not follow naturally from *Ford*, today's opinion can be understood only as holding for the first time that the Eighth Amendment requires "rational understanding."

Although apparently imposing a new substantive Eighth Amendment requirement, the Court assiduously avoids applying our framework for analyzing Eighth Amendment claims. See *Ford*, *supra*, at 405 (first analyzing whether execution of the insane was among "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted" in 1791); *Roper* v. *Simmons*, 543 U. S. 551, 560–561 (2005) (considering also whether the punishment is deemed cruel and unusual according to modern "standards of decency"); *Atkins* v. *Virginia*, 536 U. S. 304, 312 (2002) (looking for "objective evidence of contemporary values," the "clearest and most reliable" of which is the "legislation enacted by the country's legislatures" (internal quotation marks omitted)). The Court

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[12] The Court points out that "the *Ford* opinions nowhere indicate that delusions are irrelevant to 'comprehen[sion]' or 'aware[ness]' if they so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution." *Ante*, at 958 (brackets in original). By the same token, nowhere in the *Ford* opinions is it suggested that "comprehen[sion]" or "aware[ness]" is necessarily affected when delusions impair a prisoner. The Court refuses to acknowledge that *Ford* simply does not resolve this question one way or the other.

likely avoided undertaking this analysis because there is no evidence to support its position.[13] See, *e. g.*, *id.*, at 340–342 (SCALIA, J., dissenting) (discussing the demanding standard employed at common law to show that a prisoner was too insane to be executed). The Court of Appeals at least took an approach based on what *Ford* actually says, an approach that was far from frivolous or unreasonable. By contrast, the Court's approach today—settling upon a preferred outcome without resort to the law—is foreign to the judicial role as I know it.

* * *

Because the Court's ruling misinterprets AEDPA, refuses to defer to the state court as AEDPA requires, and rejects the Court of Appeals' approach without any constitutional analysis, I respectfully dissent.

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[13] Contrary to the Court's suggestion, the state of the factual record is not a genuine impediment to analyzing the constitutional question. See *ante*, at 961–962. Our Eighth Amendment framework requires relatively academic, abstract analysis. Specific facts regarding Panetti's condition are simply irrelevant to what the Eighth Amendment requires.

REPORTER'S NOTE

The next page is purposely numbered 1101. The numbers between 981 and 1101 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 4 THROUGH
SEPTEMBER 28, 2007

JUNE 4, 2007

Certiorari Granted—Vacated and Remanded. (See also No. 06–7317, *ante,* p. 89.)

No. 06–10357. FLORES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist.;

No. 06–10406. NEWMAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist.; and

No. 06–10435. CRUZ FALCON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Cunningham* v. *California,* 549 U. S. 270 (2007).

Certiorari Dismissed

No. 06–10364. CRANE *v.* POTEAT ET AL. Ct. App. Ga. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari 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. Reported below: 282 Ga. App. 182, 638 S. E. 2d 335.

Miscellaneous Orders

No. 06M93. HERNANDEZ *v.* SHEAHAN, SHERIFF, COOK COUNTY, ILLINIOS, ET AL. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 06M94. POGO *v.* LACLAIR, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 06–1188. TECK COMINCO METALS, LTD. *v.* PAKOOTAS ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 06–1195. BOUMEDIENE ET AL. *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL.; and

No. 06–1196. AL ODAH, NEXT FRIEND OF AL ODAH, ET AL. *v.* UNITED STATES ET AL., 549 U. S. 1328. Respondents are invited to file a response to the petition for rehearing within 30 days.

No. 06–11154. IN RE ARMSTRONG; and

No. 06–11216. IN RE RICHMOND. Petitions for writs of habeas corpus denied.

No. 06–10389. IN RE DOCKERAY. Petition for writ of mandamus denied.

Certiorari Granted

No. 06–1322. FEDERAL EXPRESS CORP. *v.* HOLOWECKI ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 440 F. 3d 558.

Certiorari Denied

No. 05–10787. MURPHY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 124 P. 3d 1198.

No. 06–935. LAZO *v.* GONZALES, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 462 F. 3d 53.

No. 06–959. FLORES *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 467 F. 3d 484.

No. 06–1047. PAFFORD ET VIR, PARENTS AND NEXT FRIENDS OF PAFFORD, A MINOR, ET AL. *v.* LEAVITT, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 451 F. 3d 1352.

No. 06–1175. GRANITE STATE OUTDOOR ADVERTISING, INC. *v.* CITY OF FORT LAUDERDALE, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 194 Fed. Appx. 754.

No. 06–1232. CSX TRANSPORTATION, INC., ET AL. *v.* WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAMS. Sup. Ct. S. C. Certiorari denied.

No. 06–1306. GIBSON *v.* GIBSON. Sup. Ct. Nev. Certiorari denied. Reported below: 122 Nev. 35, 178 P. 3d 758.

No. 06–1313. ADAM *v.* HAWAII. Int. Ct. App. Haw. Certiorari denied. Reported below: 111 Haw. 510, 143 P. 3d 49.

No. 06–1314. JMC TELECOM, LLC *v.* AT&T CORP. C. A. 3d Cir. Certiorari denied. Reported below: 470 F. 3d 525.

No. 06–1317. LEONARD *v.* SIMPSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 450 F. 3d 224.

No. 06–1318. OVADAL *v.* CITY OF MADISON, WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 469 F. 3d 625.

No. 06–1320. SPENCER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 281 Ga. 533, 640 S. E. 2d 267.

No. 06–1324. DAVIS *v.* SIMMONS ET AL. Sup. Ct. Va. Certiorari denied.

No. 06–1329. CLINE, EXECUTRIX OF THE ESTATE OF CLINE, DECEASED *v.* ASHLAND, INC., ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 970 So. 2d 755.

No. 06–1330. SANTA BARBARA BANK & TRUST ET AL. *v.* HOOD ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 143 Cal. App. 4th 526, 49 Cal. Rptr. 3d 369.

No. 06–1358. MACDONALD *v.* ESTATE OF GAYTON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 469 F. 3d 1079.

No. 06–1383. NUCOR CORP. ET AL. *v.* GULF STATES REORGANIZATION GROUP, INC. C. A. 11th Cir. Certiorari denied. Reported below: 466 F. 3d 961.

No. 06–1395. SHAHBAZ *v.* AFC ENTERPRISES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 926.

No. 06–1403. SELGAS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 383.

No. 06–1447. TRUCCHIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–8663. SCOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 185 Fed. Appx. 292.

No. 06–9147. JAMES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 06–9783. ABDI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 463 F. 3d 547.

No. 06–9822. VICKERS *v.* FAIRFIELD MEDICAL CENTER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 453 F. 3d 757.

No. 06–10333. IHSAN, AKA MAYWEATHER *v.* WILKINSON, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 06–10336. OSBOURNE *v.* JOHNSON, INDIVIDUALLY AND AS DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 317.

No. 06–10340. CLOWER *v.* PENNELL ET AL. C. A. 6th Cir. Certiorari denied.

No. 06–10342. CAMBRELEN *v.* HOLMES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 06–10343. FOSTER *v.* JLG INDUSTRIES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 199 Fed. Appx. 90.

No. 06–10353. FAIRLEY, AKA FAIRLE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 06–10356. GARCIA *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 06–10361. DECKARD *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 272 Neb. 410, 722 N. W. 2d 55.

No. 06–10368. JONES *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–10370. SIMMS *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 06–10374. TREECE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 937 So. 2d 380.

No. 06–10375. CATO *v.* WATSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 212 Fed. Appx. 258.

No. 06–10378. HILLS *v.* CULPEPPER, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 06–10384. HANKINS *v.* JORDAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 264.

No. 06–10387. FLANAGAN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 198 Fed. Appx. 333.

No. 06–10390. CERF *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–10392. CHACON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 938 So. 2d 532.

No. 06–10395. GARDNER *v.* RUSHTON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 199 Fed. Appx. 254.

No. 06–10399. HICKEY *v.* METROWEST MEDICAL CENTER. C. A. 1st Cir. Certiorari denied. Reported below: 193 Fed. Appx. 4.

No. 06–10405. NORMAN *v.* MONTGOMERY COUNTY BOARD OF EDUCATION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 177 Fed. Appx. 939.

No. 06–10412. DE LA CERDA *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–10420. JOHNSON *v.* PIAZZA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–10421. RUSSELL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 366 Ill. App. 3d 1224, 927 N. E. 2d 892.

No. 06–10424. MARSHALL *v.* ORTIZ, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Colo. Certiorari denied.

No. 06–10426. PATTERSON *v.* KANE ET AL. C. A. 9th Cir. Certiorari denied.

No. 06–10427. ALANDER *v.* MCGRATH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 644.

No. 06–10432. WILLIAMS *v.* OLLISON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 06–10437. DALEY *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied.

No. 06–10439. BARLEY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 06–10440. BANKS *v.* ROMANOWSKI, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–10444. TSEHAI *v.* VEAL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 06–10452. SUSSMAN *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 945 So. 2d 523.

No. 06–10456. JOHNSON *v.* QUEENS ADMINISTRATION FOR CHILDREN'S SERVICES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 197 Fed. Appx. 33.

No. 06–10465. CODAY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 946 So. 2d 988.

No. 06–10519. SANCHEZ *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 589 Pa. 43, 907 A. 2d 477.

No. 06–10524. PEREZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 06–10542. WENZINGER *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: 155 P. 3d 415.

No. 06–10567. SUAREZ *v.* LAPPE, SUPERINTENDENT, COXSACKIE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 207 Fed. Appx. 114.

No. 06–10569. POWERS *v.* DEPARTMENT OF LABOR ET AL. C. A. 6th Cir. Certiorari denied.

No. 06–10585. McGee *v.* Smith, Warden. C. A. 7th Cir. Certiorari denied.

No. 06–10593. Buchanan *v.* California. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 143 Cal. App. 4th 139, 49 Cal. Rptr. 3d 137.

No. 06–10630. Lipham *v.* Maine. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 910 A. 2d 388.

No. 06–10632. Miller *v.* Wisconsin. Ct. App. Wis. Certiorari denied.

No. 06–10657. Doyle *v.* Maine. Sup. Jud. Ct. Me. Certiorari denied.

No. 06–10667. Trevino *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 319.

No. 06–10673. Kiltinivichious *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 210 Fed. Appx. 118.

No. 06–10698. Tucker *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 06–10749. Holbert *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 06–10753. Gullage *v.* Bowerman & Taylor Guertin P. C. Sup. Ct. R. I. Certiorari denied. Reported below: 915 A. 2d 743.

No. 06–10767. Mendes *v.* Williams, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 257.

No. 06–10992. Hewitt *v.* Smith, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 595.

No. 06–11004. McGee *v.* United States (two judgments). C. A. 6th Cir. Certiorari denied.

No. 06–11005. Santos *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 06–11014. Harris *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 06–11017. MARSHALL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 208 Fed. Appx. 481.

No. 06–11018. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 242.

No. 06–11025. WING ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 508.

No. 06–11027. BIRD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 219 Fed. Appx. 713.

No. 06–11029. BARRIENTOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–11030. BARBER *v.* LEBLANC, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 06–11032. UBELE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 971.

No. 06–11033. CROSS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 537.

No. 06–11042. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 467.

No. 06–11047. RUIZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 06–11048. RAMIREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 476 F. 3d 1231.

No. 06–11051. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 06–11054. SWEET *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 496.

No. 06–11055. PADGETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 963.

No. 06–11056. MOORE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 06–11057. CONDRIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 473 F. 3d 1283.

No. 06–11058. DANIEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 942.

No. 06–11066. MADISON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 477 Fed. Appx. 1312.

No. 06–11067. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 327.

No. 06–11068. JARA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 474 F. 3d 1018.

No. 06–11070. LEGRAND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 468 F. 3d 1077.

No. 06–11072. SUTTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 304.

No. 06–11077. OVIEDO-MEDINA *v.* UNITED STATES (Reported below: 169 Fed. Appx. 271); CASTILLO-SUAREZ *v.* UNITED STATES (215 Fed. Appx. 361); DOMINGUEZ *v.* UNITED STATES (479 F. 3d 345); MOLINA-CARMONA *v.* UNITED STATES (221 Fed. Appx. 374); ALCANTAR-GARZA *v.* UNITED STATES (224 Fed. Appx. 374); PEREZ-BRIONES *v.* UNITED STATES (224 Fed. Appx. 375); MELGARES-MARTINEZ *v.* UNITED STATES (224 Fed. Appx. 376); DAVILA-SOLIS, AKA GODOY *v.* UNITED STATES (217 Fed. Appx. 402); LOPEZ-ROJAS *v.* UNITED STATES (224 Fed. Appx. 380); DIAZ-AGUILERA, AKA LOPEZ-AGUILAR *v.* UNITED STATES (221 Fed. Appx. 360); ELIZONDO-GUTIERREZ *v.* UNITED STATES (224 Fed. Appx. 386); CALDERON-MEZA *v.* UNITED STATES (222 Fed. Appx. 373); PECINA-MENDOZA *v.* UNITED STATES (222 Fed. Appx. 372); LOPEZ-GONZALEZ *v.* UNITED STATES (222 Fed. Appx. 387); VILLARREAL-FUENTES *v.* UNITED STATES (222 Fed. Appx. 386); and SANCHEZ-GARCIA, AKA FAJARDO-NAVA *v.* UNITED STATES (222 Fed. Appx. 385). C. A. 5th Cir. Certiorari denied.

No. 06–11079. PEREIDO-CANAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 846.

No. 06–11081. MCPHATTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 216 Fed. Appx. 55.

No. 06–11095. HARRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 223 Fed. Appx. 747.

No. 06–11099. COOK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 228 Fed. Appx. 515.

No. 06–11101. WALDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 352.

No. 06–11102. MORGAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 369.

No. 06–11105. MIRANDA-SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 188 Fed. Appx. 645.

No. 06–11106. MEREDITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 3d 366.

No. 06–11107. MONTES-DIAZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 208 Fed. Appx. 565.

No. 06–11109. POWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 215 Fed. Appx. 143.

No. 06–11112. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 216 Fed. Appx. 184.

No. 06–11119. CRUMBLY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 983.

No. 06–11120. DUENAS-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 537.

No. 06–11129. POWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 279.

No. 06–11134. TRIANA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 477 F. 3d 1189.

No. 06–11135. KOON CHUNG WU *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 240.

No. 06–1298. BLAINE ET AL. *v.* PIERCE. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 467 F. 3d 362.

Rehearing Denied

No. 05–1508. ZUNI PUBLIC SCHOOL DISTRICT NO. 89 ET AL. *v.* DEPARTMENT OF EDUCATION ET AL., 550 U. S. 81;

No. 06–1080. O'HANDLEY *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 549 U. S. 1339;

No. 06–1120. HANFORD *v.* UNITED STATES, 549 U. S. 1341;

No. 06–1211. CATLETT *v.* MARYLAND, 549 U. S. 1342;

No. 06–8865. VANCRETE *v.* VANCRETE, 549 U. S. 1287;

No. 06–9156. SERRATORE *v.* NEW HAMPSHIRE DIVISION OF CHILDREN, YOUTH AND FAMILIES, 549 U. S. 1325;

No. 06–9186. VARTINELLI *v.* BURT, WARDEN, 549 U. S. 1325;

No. 06–9260. ANDERSON *v.* HARVEY, WARDEN, 549 U. S. 1345;

No. 06–9357. SMITH *v.* SIMPSON, WARDEN, 549 U. S. 1295;

No. 06–9387. IN RE DAVIS, 549 U. S. 1337;

No. 06–9547. MITCHAM *v.* ARIZONA, 550 U. S. 907;

No. 06–9617. HITES *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 550 U. S. 908;

No. 06–10012. ADKINS *v.* MCCOLLUM, ATTORNEY GENERAL OF FLORIDA, 549 U. S. 1357;

No. 06–10155. YOUNG *v.* UNITED STATES, 549 U. S. 1361; and

No. 06–10225. WADE *v.* UNITED STATES, 550 U. S. 924. Petitions for rehearing denied.

No. 06–5655. SANDERS *v.* BOEING CO., 549 U. S. 973. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

JUNE 11, 2007

Certiorari Granted—Vacated and Remanded

No. 06–101. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. *v.* WILLES. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Safeco Ins. Co. of America* v. *Burr*, *ante*, p. 47. Reported below: 143 Fed. Appx. 64.

No. 06–511. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* STEVENS. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Uttecht* v. *Brown*, *ante*, p. 1. Reported below: 187 Fed. Appx. 205.

No. 06–10571. MULDREW *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Motion of petitioner for leave to proceed *in forma*

pauperis granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cunningham* v. *California*, 549 U. S. 270 (2007).

Miscellaneous Orders

No. 06M95. BELTRAN *v.* QUARTERMAN, 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. 06M97. REID *v.* TENNESSEE. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. 06–1005. UNITED STATES *v.* SANTOS ET AL. C. A. 7th Cir. [Certiorari granted, 550 U. S. 902.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 06–1184. SPRINT NEXTEL CORP. ET AL. *v.* NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES ET AL. C. A. 11th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 06–1582. PFIZER INC. *v.* APOTEX, INC., FKA TORPHARM INC. C. A. Fed. Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 06–10725. BEARD *v.* JP MORGAN CHASE BANK. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 2, 2007, 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. 06–11395. IN RE CARTER. Petition for writ of habeas corpus denied.

No. 06–10477. IN RE GAY;
No. 06–10576. IN RE WARREN;
No. 06–10597. IN RE BELL; and
No. 06–11144. IN RE PROSPER. Petitions for writs of mandamus denied.

No. 06–10566. IN RE SKILLERN. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 06–1221. SPRINT/UNITED MANAGEMENT CO. *v.* MENDELSOHN. C. A. 10th Cir. Motions of Equal Employment Advisory Council et al. and AT&T Mobility LLC et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 466 F. 3d 1223.

No. 06–6330. KIMBROUGH *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 174 Fed. Appx. 798.

No. 06–7949. GALL *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 446 F. 3d 884.

Certiorari Denied

No. 06–929. RODRIGUEZ-ZAPATA *v.* GONZALES, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 193 Fed. Appx. 312.

No. 06–1094. SANUSI ET AL. *v.* GONZALES, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 188 Fed. Appx. 510.

No. 06–1140. WITTENBURG *v.* AMERICAN EXPRESS FINANCIAL ADVISORS, INC. C. A. 8th Cir. Certiorari denied. Reported below: 464 F. 3d 831.

No. 06–1155. ZOLTEK CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 442 F. 3d 1345.

No. 06–1206. J. H. FLETCHER & CO. *v.* DAVIS ET AL. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 220 W. Va. 18, 640 S. E. 2d 81.

No. 06–1207. DYSTAR TEXTILFARBEN GMBH & CO. DEUTSCHLAND KG *v.* C. H. PATRICK CO. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 464 F. 3d 1356.

No. 06–1333. FLORIDA *v.* SACHS. Sup. Ct. Fla. Certiorari denied. Reported below: 948 So. 2d 723.

No. 06–1336. COOPER *v.* AMERICAN AIRLINES, INC. C. A. 10th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 714.

No. 06–1339. YONG-QIAN SUN *v.* BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 473 F. 3d 799.

No. 06–1344. LAURENT *v.* HERKERT, UNITED STATES TRUSTEE, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 196 Fed. Appx. 740.

No. 06–1348. LAMB *v.* PIERCE. Sup. Ct. Alaska. Certiorari denied.

No. 06–1351. MERDJANIAN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MERDJANIAN, DECEASED, ET AL. *v.* NATIONWIDE MUTUAL INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 195 Fed. Appx. 78.

No. 06–1352. POSITIVE SOFTWARE SOLUTIONS, INC. *v.* NEW CENTURY MORTGAGE CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 476 F. 3d 278.

No. 06–1353. ISENHOUR ET AL. *v.* HARVEY'S CASINO ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 724 N. W. 2d 705.

No. 06–1354. SCOTT *v.* HILYER, JUDGE, SUPERIOR COURT OF WASHINGTON, KING COUNTY. C. A. 9th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 496.

No. 06–1355. BROOKS-MCCOLLUM *v.* DELAWARE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 213 Fed. Appx. 92.

No. 06–1356. DULAN *v.* HUNTSVILLE HOSPITAL ASSN., INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 668.

No. 06–1365. AVETISIAN *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 711.

No. 06–1376. VUSHAJ ET AL. *v.* GONZALES, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 199 Fed. Appx. 487.

No. 06–1386. SMIAROWSKI *v.* PHILIP MORRIS USA, INC. C. A. 2d Cir. Certiorari denied. Reported below: 197 Fed. Appx. 56.

No. 06–1394. HILL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 06–1433. UWAYDAH *v.* G. E. MEDICAL SYSTEMS EUROPE, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 418.

No. 06–1442. RUCKER *v.* POTTER, POSTMASTER GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 406.

No. 06–1443. OSHANA *v.* COCA-COLA CO. C. A. 7th Cir. Certiorari denied. Reported below: 472 F. 3d 506.

No. 06–1465. HOOK *v.* ROBINSON, ADMINISTRATOR, ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION. Sup. Ct. Ill. Certiorari denied.

No. 06–1485. SALVADOR MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 591.

No. 06–1508. STEWART *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 185 Fed. Appx. 276.

No. 06–8008. CLOUD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 194 Fed. Appx. 255.

No. 06–8088. MCGEE *v.* GODDELL ET AL. C. A. 6th Cir. Certiorari denied.

No. 06–8580. MEDINA *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 461 F. 3d 417.

No. 06–9097. OWENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 447 F. 3d 1345.

No. 06–9250. HENSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 808.

No. 06–9320. FLOWERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 221.

No. 06–9333. VASQUEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 576.

No. 06–9345. CAMARGO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 06–9353. SINGH *v.* BOARD OF IMMIGRATION APPEALS. C. A. 2d Cir. Certiorari denied. Reported below: 198 Fed. Appx. 97.

No. 06–9417. VALTIERRA-ROJAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 468 F. 3d 1235.

No. 06–9497. HAYES *v.* TEXAS. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 06–9592. TAYLOR *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 06–9686. GILMORE *v.* MICHIGAN. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 06–9885. TRICE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 456 F. 3d 996.

No. 06–9943. BYRD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 505.

No. 06–10135. GARCIA *v.* BERTSCH, DIRECTOR, NORTH DAKOTA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 8th Cir. Certiorari denied. Reported below: 470 F. 3d 748.

No. 06–10247. CUERO MOSQUERA *v.* UNITED STATES; and
No. 06–10270. CANDELO PERLAZA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 910.

No. 06–10391. EVANS *v.* KUHN ET AL. C. A. 6th Cir. Certiorari denied.

No. 06–10445. TSEHAI *v.* SCRIBNER ET AL. C. A. 9th Cir. Certiorari denied.

No. 06–10469. GILREATH *v.* L–M FUNDING LLC ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 742.

No. 06–10473. GIVENS *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 06–10474. HOWELL *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 295 Wis. 2d 841, 721 N. W. 2d 157.

No. 06–10475. HENRY *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 06–10476. HIBBERT *v.* POOLE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 06–10479. HELEVA *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 06–10483. GETZ *v.* THOMAS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 06–10485. GILES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 362 Ill. App. 3d 1232, 919 N. E. 2d 523.

No. 06–10487. GREEN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–10489. TRAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 06–10492. DAUGHERTY *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. Sup. Ct. Mo. Certiorari denied.

No. 06–10502. TURNPAUGH *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 06–10503. MCCOY *v.* SMITH, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 06–10506. WRIGHT *v.* BAKER, ATTORNEY GENERAL OF GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 06–10507. WRIGHT *v.* MEDDLETON ET AL. C. A. 9th Cir. Certiorari denied.

No. 06–10508. PERRY *v.* HONTON. C. A. 6th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 377.

No. 06–10509. WADE *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–10520. STALEY *v.* DONALD ET AL. Sup. Ct. Ga. Certiorari denied.

No. 06–10522. POWELL *v.* KELLY, WARDEN. Sup. Ct. Va. Certiorari denied. Reported below: 272 Va. 217, 634 S. E. 2d 289.

No. 06–10528. GREEN *v.* HERNANDEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 06–10529. HEATHCO *v.* TEXAS. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 06–10531. HOLLEY *v.* MOUNT OLIVE CORRECTIONAL COMPLEX ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 192 Fed. Appx. 185.

No. 06–10532. GALENTINE *v.* ANDREWS, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 06–10543. HALL *v.* YANAI, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 197 Fed. Appx. 459.

No. 06–10544. FINNEY *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 06–10548. SANJARI *v.* GRATZOL. Ct. App. Ind. Certiorari denied. Reported below: 849 N. E. 2d 177.

No. 06–10554. ALBERT *v.* STARBUCKS COFFEE CO., INC. C. A. D. C. Cir. Certiorari denied. Reported below: 213 Fed. Appx. 1.

No. 06–10555. ARNOLD *v.* MAROUS BROTHERS CONSTRUCTION, INC. C. A. 6th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 377.

No. 06–10557. BUSH *v.* BROOKS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–10558. LITTLE *v.* CRAWFORD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 449 F. 3d 1075.

No. 06–10562. REED *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 933 So. 2d 56.

No. 06–10565. RHODES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 06–10572. PATTERSON *v.* SUPERPUMPER INC. Ct. App. Ariz. Certiorari denied.

No. 06–10577. WOODS *v.* POOLE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 06–10588. ROWLETT *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 947 So. 2d 960.

No. 06–10595. BRANCH *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 06–10599. ANTHONY *v.* OWENS ET AL. C. A. 5th Cir. Certiorari denied.

No. 06–10609. MANIER *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON ET AL.; and MANIER *v.* SMITH ET AL. C. A. 9th Cir. Certiorari denied.

No. 06–10624. TOWNSEND *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 946 So. 2d 18.

No. 06–10646. DUNBAR *v.* PENNSYLVANIA STATE POLICE. Sup. Ct. Pa. Certiorari denied. Reported below: 591 Pa. 667, 916 A. 2d 635.

No. 06–10648. CADY *v.* SHEAHAN, SHERIFF, COOK COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 467 F. 3d 1057.

No. 06–10663. WILSON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 308.

No. 06–10668. PINNAVAIA *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. 9th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 646.

No. 06–10678. LEWIS *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 06–10684. DEAN *v.* PLILER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 897.

No. 06–10694. ALBRA *v.* MARRA, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 06–10704. TWITTY *v.* MOORE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–10726. WHEELER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 950 So. 2d 423.

No. 06–10773. MATTHEWS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 199 Fed. Appx. 823.

No. 06–10804. HERNANDEZ *v.* PIERCE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 06–10824. COMPEAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 428.

No. 06–10828. STOLLER *v.* PURE FISHING, INC., ET AL. C. A. 7th Cir. Certiorari denied.

No. 06–10838. WILLIAMS *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 741.

No. 06–10839. THOMAS *v.* PEARSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 275.

No. 06–10872. MISHOW *v.* HAINES, WARDEN. Cir. Ct. Mineral County, W. Va. Certiorari denied.

No. 06–10882. AGUILAR *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 06–10889. BROWN *v.* MONTGOMERY COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–10907. CUNNINGHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 214.

No. 06–10911. HATCHER *v.* MCBRIDE, WARDEN. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 221 W. Va. 5, 650 S. E. 2d 104.

No. 06–10922. VAZQUEZ-RIVERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 470 F. 3d 443.

No. 06–10926. LINO LEAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 363.

No. 06–10935. GORDON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 185 Fed. Appx. 192.

No. 06–10951. MOODY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 226 Fed. Appx. 162.

No. 06–10985. HALL *v.* JUVENILE JUSTICE COMMISSION. Super. Ct. N. J., App. Div. Certiorari denied.

No. 06–10990. HOLLOMAN *v.* JACKSONVILLE HOUSING AUTHORITY. C. A. 11th Cir. Certiorari denied.

No. 06–11045. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 552.

No. 06–11078. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 471 F. 3d 868.

No. 06–11083. TAKOW *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 06–11113. JACKSON *v.* SMITH, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 212 Fed. Appx. 161.

No. 06–11114. TRACY *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 06–11115. COCHRAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 199 Fed. Appx. 784.

No. 06–11116. CARDENAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 223 Fed. Appx. 387.

No. 06–11117. CHAVEZ-AVILA, AKA AVILAR-NOYOLA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 735.

No. 06–11125. SALDIVAR-AZUA *v.* UNITED STATES (Reported below: 216 Fed. Appx. 441); PLATA-FLORES, AKA BETENCOURT, AKA FLORES-PLATA *v.* UNITED STATES (217 Fed. Appx. 310);

PANG-RUIZ, AKA RUIZ, AKA GUZMAN, AKA PANG RAMIRO *v.* UNITED STATES (216 Fed. Appx. 460); ORTEGA-JARA, AKA JARA *v.* UNITED STATES (216 Fed. Appx. 449); ORDONEZ-RAMIREZ, AKA VILLANUEVAS-CARDENAS, AKA HERNANDEZ-JIMENEZ, AKA JOSTIN, AKA PALACIOS *v.* UNITED STATES (216 Fed. Appx. 428); and MUNOZ-RAMIREZ *v.* UNITED STATES (217 Fed. Appx. 305). C. A. 5th Cir. Certiorari denied.

No. 06–11141. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–11142. JOOST *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 226 Fed. Appx. 12.

No. 06–11143. THOMAS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 06–11146. ALVARADO-GARRIDO, AKA GARRIDO-ALVARADO *v.* UNITED STATES (Reported below: 216 Fed. Appx. 433); CORDERO-ESPINOZA *v.* UNITED STATES (216 Fed. Appx. 431); CRUZ-SANTILLANA *v.* UNITED STATES (217 Fed. Appx. 304); RAMIREZ-FLORES *v.* UNITED STATES (216 Fed. Appx. 421); and SANDOVAL-CORDERO, AKA CORDERO-SANDOVAL *v.* UNITED STATES (217 Fed. Appx. 330). C. A. 5th Cir. Certiorari denied.

No. 06–11148. BOHANNON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 476 F. 3d 1246.

No. 06–11151. BELT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 06–11156. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 832.

No. 06–11158. RIVERA-SANTIAGO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–11165. RODRIGUEZ MEDINA, AKA RODRIGUEZ-MEDIA *v.* UNITED STATES (Reported below: 227 Fed. Appx. 612); and MARTINIE, AKA ORTEGA, AKA MARTINEZ, ET AL. *v.* UNITED STATES (220 Fed. Appx. 690). C. A. 9th Cir. Certiorari denied.

No. 06–11166. PERSAUD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 243.

No. 06–11169. DONNELLY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 475 F. 3d 946.

No. 06–11171. KENDALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 475 F. 3d 961.

No. 06–11175. LAWS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 299.

No. 06–11176. ROBERTS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 916 A. 2d 199.

No. 06–11180. GAYLOR *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 1st Cir. Certiorari denied.

No. 06–11181. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 207 Fed. Appx. 133.

No. 06–11182. BEW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 06–11188. HARTMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 396.

No. 06–11189. HORNE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 474 F. 3d 1004.

No. 06–11190. FRANCISCO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–11199. WILBURN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 473 F. 3d 742.

No. 06–11201. NORIEGA-PUENTE, AKA SANCHEZ-GARCIA, AKA NORIEGA, AKA SALAS, AKA ARRIAGA *v.* UNITED STATES (Reported below: 217 Fed. Appx. 308); and SANCHEZ-GARCIA *v.* UNITED STATES (216 Fed. Appx. 451). C. A. 5th Cir. Certiorari denied.

No. 06–11203. MALDONADO-BALBUENA *v.* UNITED STATES (Reported below: 217 Fed. Appx. 312); and MUNOZ-GARZA *v.* UNITED STATES (216 Fed. Appx. 445). C. A. 5th Cir. Certiorari denied.

No. 06–11205. CONTRERAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–11214. PICANSO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–11215. RICE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 06–11217. RICHARDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 368.

No. 06–11220. TAPPS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 06–11224. BYRD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 208 Fed. Appx. 216.

No. 06–11225. BASS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 460 F. 3d 830.

No. 06–11226. ADAIR *v.* UNITED STATES (Reported below: 221 Fed. Appx. 344); ILLESCAS-DIAZ *v.* UNITED STATES (218 Fed. Appx. 353); LARA-BARAJAS *v.* UNITED STATES (215 Fed. Appx. 395); LISNEROS-GUERRERO *v.* UNITED STATES (218 Fed. Appx. 306); GARCIA-REYES *v.* UNITED STATES (218 Fed. Appx. 320); and CASTILLO-MARTINEZ *v.* UNITED STATES (218 Fed. Appx. 367). C. A. 5th Cir. Certiorari denied.

No. 06–11227. ARCHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–11231. ALEMAN-SALAS *v.* UNITED STATES (Reported below: 216 Fed. Appx. 439); ALONZO-MENDOZA *v.* UNITED STATES (216 Fed. Appx. 444); ALVIZU-CEDILLO *v.* UNITED STATES (216 Fed. Appx. 427); ARRENDONDO-JASSO *v.* UNITED STATES (216 Fed. Appx. 447); CASTANON-CORREA, AKA TORRES-CASTANEDA, AKA CORRERA-CASTENOS *v.* UNITED STATES (216 Fed. Appx. 440); CHAVARRIA-GALVAN *v.* UNITED STATES (216 Fed. Appx. 442); CORONA-RODRIGUEZ *v.* UNITED STATES (216 Fed. Appx. 432); DE LA CERDA-MENCHACA *v.* UNITED STATES (217 Fed. Appx. 312); DE LOS SANTOS-GARCIA, AKA MORENO *v.* UNITED STATES (216 Fed. Appx. 442); DURON-MORENO *v.* UNITED STATES (217 Fed. Appx. 332); ESCOBEDO-BALERO *v.* UNITED STATES (216 Fed. Appx. 436); GUEVARA-OLMOS *v.* UNITED STATES (217 Fed. Appx. 310); HERNANDEZ-DUBON, AKA MONTES-ANGELO *v.* UNITED STATES (218 Fed. Appx. 293); HERNANDEZ-FAVELA *v.* UNITED STATES (216 Fed. Appx. 450); MACEDONIO-GONZALEZ *v.* UNITED STATES (216 Fed. Appx. 438); MARTINEZ, AKA MARTINEZ-MANUEL *v.* UNITED STATES (216 Fed. Appx. 448); NINO-GARCIA *v.* UNITED

States (216 Fed. Appx. 438); Pacheco-Torres, aka Enrique-Rodriguez, aka Enriquez *v.* United States (216 Fed. Appx. 441); Perez-Martinez *v.* United States (216 Fed. Appx. 447); Pineda-Pavon *v.* United States (216 Fed. Appx. 437); Rodriguez-Paniagua *v.* United States (216 Fed. Appx. 439); Rojas-Gallegos *v.* United States (216 Fed. Appx. 445); Romero-Aquino *v.* United States (216 Fed. Appx. 448); Vasquez-Najera *v.* United States (216 Fed. Appx. 449); and Zavala, aka Lopez, aka Carbajal-Zavala *v.* United States (216 Fed. Appx. 437). C. A. 5th Cir. Certiorari denied.

No. 06–11234. Duc Nguyen *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 425.

No. 06–11235. Provencio-Martinez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 426.

No. 06–11239. Calderon-Rebeles *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 429.

No. 06–11241. Turrubiartes-Gonzalez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 307.

No. 06–11242. Whitehead *v.* United States (Reported below: 217 Fed. Appx. 405); Franklin *v.* United States (221 Fed. Appx. 364); and Fields *v.* United States (225 Fed. Appx. 292). C. A. 5th Cir. Certiorari denied.

No. 06–11244. Sanchez-Alvarez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 432.

No. 06–11245. Sanchez-Garcia *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 424.

No. 06–11246. Rios-Casio *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 423.

No. 06–11247. Morin-Nino *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 429.

No. 06–11248. Harper *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 432 F. 3d 1189.

No. 06–11249. Flores-Jaime *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 425.

No. 06–11255. Cueto-Parra, aka Santos Morales, aka Cueyo, aka Cueto Parva, aka Rodriguez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 422.

No. 06–11256. Dennis *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 196.

No. 06–11261. McCullough *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 06–11263. Dumas *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 298.

No. 06–11270. Babul *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 476 F. 3d 498.

No. 06–11272. Kidwell *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 441.

No. 06–11275. Linyard *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 243.

No. 06–11277. Perez-Oliveros *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 479 F. 3d 779.

No. 06–11282. Teeth *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 639.

No. 06–11286. Moreno-Mercado *v.* United States (Reported below: 217 Fed. Appx. 395); Ortega-Gonzalez, aka Ortega, aka Gonzales Ortega *v.* United States (218 Fed. Appx. 325); De Leon-Ledezma *v.* United States (218 Fed. Appx. 308); Paniagua-Maravilla, aka Chavez-Alejo *v.* United States (218 Fed. Appx. 322); Robles-Rodriguez *v.* United States (218 Fed. Appx. 324); Juarez-Suarez *v.* United States (218 Fed. Appx. 305); Reyes-Saldivar *v.* United States (221 Fed. Appx. 369); Perales-Gonzalez *v.* United States (220 Fed. Appx. 369); Cruz-Carballo, aka Carballo-Lara *v.* United States (222 Fed. Appx. 376); Morales-Hernandez *v.* United States (224 Fed. Appx. 388); Segoviano-Cruz *v.* United States (225 Fed. Appx. 308); Rosario, aka Mejia-De Selvallo, aka Ca-

BRERA *v.* UNITED STATES (222 Fed. Appx. 381); NAVA-GARCIA *v.* UNITED STATES (221 Fed. Appx. 364); GONZALES-CRUZ *v.* UNITED STATES; CANTU-FLORES *v.* UNITED STATES (222 Fed. Appx. 372); PEREZ-HERNANDEZ *v.* UNITED STATES (222 Fed. Appx. 370); MENA-VILLAMAR, AKA SANCHEZ *v.* UNITED STATES (221 Fed. Appx. 372); RAUDEZ-OROZCO *v.* UNITED STATES (221 Fed. Appx. 365); SOLIS-CAMPUZANO, AKA SOLIS-CAMPOZANO, AKA SOLIS-CAMPUSANO, AKA SOLIS-CAMPOSANO, AKA GAONA-VARGAS, AKA BERRONES-GARZA *v.* UNITED STATES (222 Fed. Appx. 390); GARCIA-NAJERA, AKA GARCIA *v.* UNITED STATES (226 Fed. Appx. 423); RETANA-QUIROZ, AKA RETANA, AKA QUIROZ *v.* UNITED STATES (224 Fed. Appx. 382); and ROJAS-GINES *v.* UNITED STATES (220 Fed. Appx. 298). C. A. 5th Cir. Certiorari denied.

No. 06–11287. OLIVARES MARILUZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 968.

No. 06–11288. BAKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 372.

No. 06–11290. ROSS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 476 F. 3d 719.

No. 06–11291. REYES-REYES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–11301. VIOLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 203 Fed. Appx. 366.

No. 06–11302. VALENCIA-CRIOLLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–11303. WILEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 475 F. 3d 908.

No. 06–1504. AKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 216 Fed. Appx. 711.

No. 06–10879. BAILEY *v.* BLAINE ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

Rehearing Denied

No. 05–9264. JAMES *v.* UNITED STATES, 550 U. S. 192;

No. 06–1023. RICHARDSON *v.* SAFEWAY ROCKY MOUNTAIN FEDERAL CREDIT UNION, 549 U. S. 1322;

No. 06–1234. BROWN *v.* UNITED STATES, 549 U. S. 1342;

No. 06–6488. HANEY *v.* UNITED STATES, 550 U. S. 905;

No. 06–6541. ADAMS *v.* UNITED STATES, 550 U. S. 905;

No. 06–8949. LACY *v.* FRANK ET AL., 549 U. S. 1307;

No. 06–9198. IN RE CONNER, 549 U. S. 1321;

No. 06–9374. JACKSON *v.* HENNESSY AUTO, 549 U. S. 1347;

No. 06–9390. COLES *v.* TRUE, WARDEN, 549 U. S. 1347;

No. 06–9392. CUESTA *v.* POLLARD, WARDEN, 549 U. S. 1347;

No. 06–9432. BUI *v.* HOILAND, 549 U. S. 1348;

No. 06–9471. MUHAMMAD *v.* MARYLAND ATTORNEY GRIEVANCE COMMISSION, 549 U. S. 1349;

No. 06–9487. PEREZ *v.* SHERRER, ADMINISTRATOR, NORTHERN STATE PRISON, ET AL., 549 U. S. 1350;

No. 06–9683. IN RE FOOSE, 550 U. S. 917;

No. 06–9930. PETERSON *v.* BROOKS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL., 549 U. S. 1354;

No. 06–10041. CARTER *v.* UNITED STATES, 549 U. S. 1358;

No. 06–10043. HORNE *v.* UNITED STATES, 549 U. S. 1358; and

No. 06–10081. CRAWFORD *v.* UNITED STATES, 549 U. S. 1359. Petitions for rehearing denied.

No. 06–1133. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTION PRACTICE ET AL. *v.* GONZALES, ATTORNEY GENERAL, ET AL., 550 U. S. 914. Motion of petitioners to defer consideration of petition for rehearing denied. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this motion and this petition.

JUNE 13, 2007

Miscellaneous Order

No. 06A1149 (06–11622). EMMETT *v.* KELLY, 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. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution.

JUNE 14, 2007

Certiorari Denied

No. 06–11792 (06A1161). LAMBERT *v.* INDIANA. Sup. Ct. Ind. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 867 N. E. 2d 134.

JUNE 18, 2007

Certiorari Granted—Vacated and Remanded

No. 06–726. E. I. DU PONT DE NEMOURS & CO. ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Atlantic Research Corp.*, *ante*, p. 128. Reported below: 460 F. 3d 515.

No. 06–9586. MITCHELL *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bowles* v. *Russell*, *ante*, p. 205. Reported below: 464 F. 3d 1149.

Certiorari Dismissed

No. 06–10689. VORA *v.* PENNSYLVANIA. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari 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. Reported below: 205 Fed. Appx. 953.

Miscellaneous Orders

No. 06A1061 (06–11172). GONZALEZ-DE ANDA *v.* UNITED STATES ET AL. C. A. 5th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 06M98. KROUNER *v.* UNITED STATES TAX COURT. Motion for leave to file petition for writ of certiorari under seal denied

without prejudice to filing a renewed motion together with a redacted petition for writ of certiorari within 30 days with redactions limited to confidential information.

No. 06M99. WILLIBY *v.* CAREY, WARDEN; and
No. 06M100. BURCH *v.* PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 06–11405. IN RE STANKO; and
No. 06–11415. IN RE POIRIER. Petitions for writs of habeas corpus denied.

No. 06–10699. IN RE ELMORE; and
No. 06–11420. IN RE KING. Petitions for writs of mandamus denied.

No. 06–10641. IN RE WASHINGTON. Petition for writ of mandamus and/or prohibition denied.

No. 06–10707. IN RE GHEE. Petition for writ of prohibition denied.

Certiorari Granted

No. 06–856. LARUE *v.* DEWOLFF, BOBERG & ASSOCIATES, INC., ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 450 F. 3d 570.

Certiorari Denied

No. 05–1323. UGI UTILITIES, INC. *v.* CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. C. A. 2d Cir. Certiorari denied. Reported below: 423 F. 3d 90.

No. 06–273. COX, ATTORNEY GENERAL OF MICHIGAN, ET AL. *v.* DAIMLERCHRYSLER CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 447 F. 3d 967.

No. 06–1132. ADKINS ET AL. *v.* GATES, SECRETARY OF DEFENSE. C. A. 4th Cir. Certiorari denied. Reported below: 464 F. 3d 456.

No. 06–1223. MERILLAT *v.* METAL SPINNERS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 470 F. 3d 685.

No. 06–1236. LANCO, INC. *v.* DIRECTOR, DIVISION OF TAXATION. Sup. Ct. N. J. Certiorari denied. Reported below: 188 N. J. 380, 908 A. 2d 176.

No. 06–1267. TAMASHIRO ET AL. *v.* HAWAII DEPARTMENT OF HUMAN SERVICES ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 112 Haw. 388, 146 P. 3d 103.

No. 06–1271. HEINRICH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 184 Fed. Appx. 542.

No. 06–1281. KENTUCKY *v.* KRAUSE. Sup. Ct. Ky. Certiorari denied. Reported below: 206 S. W. 3d 922.

No. 06–1359. CROSSWINDS COMMUNITIES, INC., ET AL. *v.* CHIRCO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 474 F. 3d 227.

No. 06–1362. NELSON *v.* NEW JERSEY DEPARTMENT OF CORRECTIONS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 214 Fed. Appx. 243.

No. 06–1363. JEFFERSON COUNTY RACING ASSN., INC., DBA THE BIRMINGHAM RACE COURSE *v.* BARBER, DISTRICT ATTORNEY, JEFFERSON COUNTY, ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 960 So. 2d 599.

No. 06–1364. AKEVA L. L. C. *v.* ADIDAS AMERICA, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 208 Fed. Appx. 861.

No. 06–1366. FIERROS *v.* TEXAS DEPARTMENT OF STATE HEALTH SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 321.

No. 06–1374. LASTING BEAUTY, L. L. C., ET AL. *v.* CITY OF CHESAPEAKE, VIRGINIA, ET AL. Sup. Ct. Va. Certiorari denied.

No. 06–1377. CHAGANTI & ASSOCIATES, P. C. *v.* NOWOTNY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 470 F. 3d 1215.

No. 06–1400. URSINI *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 496.

No. 06–1409. AMIR X. S., A JUVENILE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 371 S. C. 380, 639 S. E. 2d 144.

No. 06–1416. ACIERNO *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 2d Cir. Certiorari denied. Reported below: 475 F. 3d 77.

No. 06–1432. CHRISTIANSEN, INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF CHRISTIANSEN, DECEASED *v.* CHRISTIANSEN. Sup. Ct. Alaska. Certiorari denied. Reported below: 152 P. 3d 1144.

No. 06–1435. MICHIGAN FAMILY RESOURCES, INC. *v.* SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL NO. 517M. C. A. 6th Cir. Certiorari denied. Reported below: 475 F. 3d 746.

No. 06–1455. EML TECHNOLOGIES, LLC, ET AL. *v.* DESA IP, LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 211 Fed. Appx. 932.

No. 06–1480. DANESHJOU CO., INC., ET AL. *v.* MID-CONTINENT CASUALTY CO. C. A. 5th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 374.

No. 06–1515. EBERHART *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 467 F. 3d 659.

No. 06–1516. AHMED *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 472 F. 3d 427.

No. 06–1518. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–1520. LOCAL CHURCH ET AL. *v.* HARVEST HOUSE PUBLISHERS ET AL. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 190 S. W. 3d 204.

No. 06–1525. ALMONACID *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 476 F. 3d 518.

No. 06–1527. DESCENT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–1529. MUHAMMAD *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 64 M. J. 439.

No. 06–1536. FAMILY FARE, INC., DBA GLEN'S MARKET *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 403.

No. 06–1538. FUHRMAN *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 64 M. J. 437.

No. 06–8395. BERG *v.* RUNNELS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 198 Fed. Appx. 672.

No. 06–8508. WELCH *v.* SIRMONS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 451 F. 3d 675.

No. 06–9331. KRUEGER *v.* MICHIGAN STATE TREASURER. Ct. App. Mich. Certiorari denied.

No. 06–9421. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 06–9434. BISHOP *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 469 F. 3d 896.

No. 06–9465. KNOWLES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–9500. HARROD ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 464 F. 3d 1065.

No. 06–9889. ANDERSON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 367 Ark. 536, 242 S. W. 3d 229.

No. 06–9941. ELMORE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 111 Ohio St. 3d 515, 857 N. E. 2d 547.

No. 06–10056. PARR *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 3d 245.

No. 06–10084. RUSHING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 767.

No. 06–10104. ROGERS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied.

No. 06–10186. WRIGHT *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 3d 581.

No. 06–10605. BARBOUR ET AL. *v.* ALLEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 471 F. 3d 1222.

No. 06–10616. CRUZATA *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 06–10620. MOSLEY *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 06–10638. AIELLO *v.* CONNOLLY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 223 Fed. Appx. 603.

No. 06–10640. JENNER *v.* ORTIZ, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. Ct. App. Colo. Certiorari denied. Reported below: 155 P. 3d 563.

No. 06–10645. FRIERSON *v.* AYRES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 152.

No. 06–10649. CONGELOSI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 06–10650. VASQUEZ DIAZ *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–10659. SLAGLE *v.* BAGLEY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 457 F. 3d 501.

No. 06–10662. SISSOM *v.* PURDUE UNIVERSITY. C. A. 7th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 715.

No. 06–10665. RABBITT *v.* CORNERSTONE UNIVERSITY. C. A. 6th Cir. Certiorari denied.

No. 06–10669. STROUD *v.* POLK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 466 F. 3d 291.

No. 06–10687. JONES *v.* RICCI, ASSOCIATE ADMINISTRATOR, NEW JERSEY STATE PRISON. C. A. 3d Cir. Certiorari denied.

No. 06–10690. ALLEN *v.* MCBRIDE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 234.

No. 06–10691. BOONE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 06–10695. LANDEROS *v.* SOLEDAD STATE PRISON. C. A. 9th Cir. Certiorari denied.

No. 06–10697. CRUSE *v.* THOMPSON ET AL. C. A. 6th Cir. Certiorari denied.

No. 06–10701. CLARK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 366 Ill. App. 3d 1219, 927 N. E. 2d 889.

No. 06–10702. COLEMAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 365 Ill. App. 3d 1097, 927 N. E. 2d 332.

No. 06–10708. ODOM *v.* DUNLAP ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 212 Fed. Appx. 212.

No. 06–10713. SKINNER *v.* TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 06–10715. SIMMONS *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 06–10717. XIANGYUAN ZHU *v.* FIRST ATLANTIC BANK ET AL. C. A. 2d Cir. Certiorari denied.

No. 06–10724. SCHILLEREFF *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 159 Wash. 2d 649, 152 P. 3d 345.

No. 06–10727. ATWELL *v.* DEAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 211 Fed. Appx. 86.

No. 06–10728. AYERS *v.* OHIO. Ct. App. Ohio, Erie County. Certiorari denied.

No. 06–10760. TROY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 948 So. 2d 635.

No. 06–10768. PURVEEGIIN *v.* CHERTOFF, SECRETARY OF HOMELAND SECURITY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–10781. HOWELL *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 925 A. 2d 503.

No. 06–10846. QUINN *v.* PALAKOVICH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 204 Fed. Appx. 116.

No. 06–10862. TAYLOR *v.* EVANS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 208 Fed. Appx. 574.

No. 06–10871. MOORE *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 209.

No. 06–10874. BOEKHOFF *v.* FARWELL ET AL. C. A. 9th Cir. Certiorari denied.

No. 06–10910. CINTRON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 915 A. 2d 139.

No. 06–10956. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 943.

No. 06–10977. JONES *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 609.

No. 06–10984. DIXON *v.* TILTON, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 06–10996. GREENLEY *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–11009. PENNY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 336.

No. 06–11011. ROSARIO *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–11016. LANGLEY *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 265.

No. 06–11022. WALKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 251 Fed. Appx. 735.

No. 06–11023. WILSON *v.* WYNDER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–11049. SMITH *v.* TILTON, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 06–11061. CASTERLOW *v.* MILLS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–11082. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 176.

No. 06–11089. SMITH *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 224 Fed. Appx. 630.

No. 06–11092. BOISVERT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–11097. HICKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 859.

No. 06–11127. SPEARS *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 725 N. W. 2d 696.

No. 06–11157. TURNER *v.* DOTSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 219 Fed. Appx. 425.

No. 06–11196. DAVIS *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 246.

No. 06–11257. WEBER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 159 Wash. 2d 252, 149 P. 3d 646.

No. 06–11292. SOLANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 06–11297. PAYNE *v.* LOTT, UNITED STATES SENATOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 207 Fed. Appx. 4.

No. 06–11307. ROACH *v.* DEPARTMENT OF DEFENSE. C. A. Fed. Cir. Certiorari denied. Reported below: 208 Fed. Appx. 918.

No. 06–11314. CARTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 378.

No. 06–11316. LEMONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–11319. MILLIGAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 964.

No. 06–11320. WILLIAMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 06–11321. MICHAUD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 617.

No. 06–11324. STREET *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 472 F. 3d 1298.

No. 06–11325. RIVAS-MEDINA *v.* UNITED STATES; EGUIA-HERNANDEZ *v.* UNITED STATES; REYES-BAUTISTA *v.* UNITED STATES (Reported below: 220 Fed. Appx. 279); VILLA-GUTIERREZ *v.* UNITED STATES (222 Fed. Appx. 393); ANALCO-ANALCO *v.* UNITED STATES; CARRILLO-MONJEZ, AKA CAMPOS *v.* UNITED STATES; FLORES-HUERTA *v.* UNITED STATES (223 Fed. Appx. 389); TORRES-MARTINEZ *v.* UNITED STATES; CALLE-VILLAREAL, AKA CALLE *v.* UNITED STATES; SAUZO-IZAGUIRRE *v.* UNITED STATES; TORRES, AKA TORRES-VALLES, AKA TORRES-BAEZ, AKA OCHOA-GOMEZ, AKA PEREZ-MESA *v.* UNITED STATES (225 Fed. Appx. 245); OCHOA-PEREZ *v.* UNITED STATES; and REYES-OLVERA *v.* UNITED STATES (227 Fed. Appx. 366). C. A. 5th Cir. Certiorari denied.

No. 06–11326. ALLICOCK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 915.

No. 06–11327. ASKEW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 435.

No. 06–11329. LEPAGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 477 F. 3d 485.

No. 06–11334. WETENDORF *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 368 Ill. App. 3d 1241, 931 N. E. 2d 376.

No. 06–11342. STONE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 224 Fed. Appx. 720.

No. 06–11344. ASKARI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 222 Fed. Appx. 115.

No. 06–11348. DIAZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 618.

No. 06–11349. WISKIRCHEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 06–11356. PACHECO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 359.

No. 06–11364. CALLAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–11366. EDWARDS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 06–11369. COLLINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 06–11370. DAWSON *v.* DEWALT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–11371. CLOMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 398.

No. 06–11377. REFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 479 F. 3d 396.

No. 06–11378. SAENZ-GOMEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 472 F. 3d 791.

No. 06–11382. FRANCO-GUERRERO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–11387. PADILLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 669.

No. 06–11388. RODRIGUEZ-MONGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 352.

No. 06–11389. CHAN-ASTORGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 655.

No. 06–11392. NOLASCO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–11393. CAMPBELL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 463 F. 3d 1.

No. 06–11398. DIAZ-VELA *v.* UNITED STATES (Reported below: 224 Fed. Appx. 381); CAMACHO-MUNIZ *v.* UNITED STATES (224 Fed. Appx. 393); CASTRO-RODRIGUEZ *v.* UNITED STATES (222 Fed. Appx. 376); CLAROS-FIGUEROA, AKA SANCHEZ-PEREZ *v.* UNITED STATES (224 Fed. Appx. 391); CORTEZ-ANAYA *v.* UNITED STATES (224 Fed. Appx. 394); ESTRELLA-TAVERA *v.* UNITED STATES (225 Fed. Appx. 325); MACEDO-VALENCIA *v.* UNITED STATES (224 Fed. Appx. 393); MEJIA-BANDA, AKA MEJIA *v.* UNITED STATES (224 Fed. Appx. 391); MUNOZ-GUERRERO, AKA HERNANDEZ *v.* UNITED STATES (226 Fed. Appx. 420); OCHOA-MARTINEZ, AKA CORDOBA *v.* UNITED STATES (224 Fed. Appx. 375); PAZ-MARTINEZ, AKA CEDILLOS, AKA CEDILLO *v.* UNITED STATES (224 Fed. Appx. 390); QUINTERO-GUEVARA *v.* UNITED STATES (224 Fed. Appx. 392); RODRIGUEZ-CUEVAS *v.* UNITED STATES (224 Fed. Appx. 433); SAUCEDO-ROMAN *v.* UNITED STATES (202 Fed. Appx. 723); SEVILLA-ANDREW, AKA ANDRADE-MORENO *v.* UNITED STATES (221 Fed. Appx. 377); and ZARAGOZA-ZAVALA, AKA VALERA *v.* UNITED STATES (226 Fed. Appx. 420). C. A. 5th Cir. Certiorari denied.

No. 06–11408. BORQUEZ BORBON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 223 Fed. Appx. 672.

No. 06–11409. BAZAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 281.

No. 06–11423. MOSLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 06–888. CORAL POWER, L. L. C., ET AL. *v.* CALIFORNIA EX REL. BROWN, ATTORNEY GENERAL OF CALIFORNIA; and

No. 06–1100. CALIFORNIA EX REL. BROWN, ATTORNEY GENERAL OF CALIFORNIA *v.* CORAL POWER, L. L. C., ET AL. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE BREYER took no part in the consideration or decision of these petitions. Reported below: 383 F. 3d 1006.

No. 06–1141. SHIRANI *v.* DEPARTMENT OF LABOR ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE BREYER took no part

in the consideration or decision of this petition. Reported below: 187 Fed. Appx. 631.

No. 06–1228. FIA Card Services, N. A., fka MBNA America Bank, N. A. *v.* Tax Commissioner of the State of West Virginia. Sup. Ct. App. W. Va. Certiorari denied. Justice Breyer took no part in the consideration or decision of this petition. Reported below: 220 W. Va. 163, 640 S. E. 2d 226.

No. 06–1254. Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division *v.* Nelson. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 472 F. 3d 287.

No. 06–1294. Otero-Carrasquillo et al. *v.* Pfizer Pharmaceuticals LLC. C. A. 1st Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of this petition. Reported below: 466 F. 3d 13.

No. 06–1392. Garrett *v.* Oklahoma Panhandle State University. Ct. Civ. App. Okla. Motion of Professor Luke Meier for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 156 P. 3d 48.

No. 06–1491. Spencer *v.* Wal-Mart Stores, Inc. C. A. 3d Cir. Certiorari denied. Justice Breyer took no part in the consideration or decision of this petition. Reported below: 469 F. 3d 311.

No. 06–1552. Israel Bio-Engineering Project *v.* Amgen Inc. et al. C. A. Fed. Cir. Certiorari denied. Justice Breyer took no part in the consideration or decision of this petition. Reported below: 475 F. 3d 1256.

No. 06–10712. Short *v.* Department of the Army et al. C. A. 11th Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of this petition.

Rehearing Denied

No. 06–8226. Richards *v.* United States, 550 U. S. 905;
No. 06–8911. Nunez *v.* California, 549 U. S. 1307;
No. 06–8930. Jeter *v.* Jewish Vocational Services et al., 549 U. S. 1307;

No. 06–8990. WAGNER *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL., 550 U. S. 906;

No. 06–9056. OSBORNE *v.* OREGON ET AL., 549 U. S. 1309;

No. 06–9084. JOYNER *v.* CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL., 549 U. S. 1290;

No. 06–9391. EVANS *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 549 U. S. 1311;

No. 06–9641. HENRY *v.* UNITED STATES, 549 U. S. 1313;

No. 06–9665. HOUSLEY *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 549 U. S. 1351;

No. 06–9718. IN RE THOMPSON, 550 U. S. 902;

No. 06–9831. CARTER *v.* RMH TELESERVICES, INC., 550 U. S. 910;

No. 06–9890. DEANE *v.* MARSHALLS, INC., 550 U. S. 940;

No. 06–10068. WILSON *v.* POTTER, POSTMASTER GENERAL, 549 U. S. 1359; and

No. 06–10643. IN RE SIDDIQUE, 550 U. S. 956. Petitions for rehearing denied.

No. 06–8295. IN RE ROSS, 549 U. S. 1203. Motion for leave to file petition for rehearing denied.

JUNE 25, 2007

Certiorari Granted—Vacated and Remanded

No. 06–415. SELIG, DIRECTOR, ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL. *v.* PEDIATRIC SPECIALTY CARE, INC., ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated with respect to the individual capacity claims against Ray Hanley and Roy Jeffus, and case remanded with instructions to dismiss the appeal as moot with respect to these claims. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 443 F. 3d 1005.

No. 06–1172. JOHNSON *v.* POTTER, POSTMASTER GENERAL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Burlington N. & S. F. R. Co.* v. *White*, 548 U. S. 53 (2006). Reported below: 184 Fed. Appx. 138.

Certiorari Dismissed

No. 06–10842. THOMPSON *v.* INGHAM COUNTY CIRCUIT COURT CLERK. C. A. 6th 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. 06A1096 (06–1503). BAKER ET UX. *v.* SHAO-QIANG HE ET UX. Sup. Ct. Tenn.; and

No. 06A1110. PALFREY *v.* UNITED STATES. C. A. D. C. Cir. Applications for stays, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 06M101. TANNO *v.* CHAI HOUSE, INC., ET AL.; and

No. 06M103. TARVIN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 06M102. CARD *v.* IDAHO. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. 134, Orig. NEW JERSEY *v.* DELAWARE. Motion of the Special Master for allowance of fees and disbursements granted, and the Special Master is awarded a total of $225,217.79 for the period September 1, 2006, through May 17, 2007, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 550 U. S. 932.]

No. 05–1272. ROCKWELL INTERNATIONAL CORP. ET AL. *v.* UNITED STATES ET AL., 549 U. S. 457. Motion of respondent Virginia Belle Stone to retax costs granted. JUSTICE BREYER took no part in the consideration or decision of this motion.

No. 06–1194. IN RE ALI. Motion of petitioner for leave to file an opposition to respondents' motion to dismiss under seal granted.

No. 06–11604. IN RE SKILLERN; and

No. 06–11607. IN RE BEASLEY. Petitions for writs of habeas corpus denied.

No. 06–10737. IN RE ZINSOU;

No. 06–10763. IN RE WISE;

No. 06–10832. IN RE MARSHALL; and

No. 06–11563. IN RE LEASURE. Petitions for writs of mandamus denied.

No. 06–10752. IN RE HUBER-HAPPY. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 06–179. RIEGEL ET UX. *v.* MEDTRONIC, INC. C. A. 2d Cir. Certiorari granted. Reported below: 451 F. 3d 104.

No. 06–457. ROWE, ATTORNEY GENERAL OF MAINE *v.* NEW HAMPSHIRE MOTOR TRANSPORT ASSN. ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 448 F. 3d 66.

No. 06–1286. KNIGHT, TRUSTEE OF THE WILLIAM L. RUDKIN TESTAMENTARY TRUST *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari granted. Reported below: 467 F. 3d 149.

No. 06–10119. SNYDER *v.* LOUISIANA. Sup. Ct. La. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 942 So. 2d 484.

Certiorari Denied

No. 05–584. POWEREX CORP., DBA POWEREX ENERGY CORP. *v.* CALIFORNIA EX REL. BROWN, ATTORNEY GENERAL OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 06–830. JOBLOVE ET AL. *v.* BARR LABS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 466 F. 3d 187.

No. 06–994. CICCONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 459 F. 3d 296.

No. 06–1057. CORUS STAAL BV *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 186 Fed. Appx. 997.

No. 06–1073. BLIESNER *v.* COMMUNICATION WORKERS OF AMERICA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 464 F. 3d 910.

No. 06–1131. DAVIS *v.* DEPARTMENT OF JUSTICE. C. A. D. C. Cir. Certiorari denied. Reported below: 460 F. 3d 92.

No. 06–1307. JONES, ASSISTANT DEPUTY SUPERINTENDENT OF PROGRAM SERVICES, ET AL. *v.* PERALTA. C. A. 2d Cir. Certiorari denied. Reported below: 467 F. 3d 98.

No. 06–1360. MACY'S DEPARTMENT STORES, INC., ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 143 Cal. App. 4th 1444, 50 Cal. Rptr. 3d 79.

No. 06–1379. TAYLOR *v.* BATEMAN ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 927 So. 2d 1024.

No. 06–1387. HUTCHISON ET AL. *v.* FIFTH THIRD BANCORP. C. A. 6th Cir. Certiorari denied. Reported below: 469 F. 3d 583.

No. 06–1390. OGILVIE *v.* JOHNSON. C. A. 11th Cir. Certiorari denied. Reported below: 200 Fed. Appx. 948.

No. 06–1391. MCLENDON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 945 So. 2d 372.

No. 06–1393. CASTAWAYS BACKWATER CAFE, INC. *v.* FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATIONS DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 955.

No. 06–1405. NEUTRINO DEVELOPMENT CORP. *v.* SONOSITE, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 210 Fed. Appx. 991.

No. 06–1406. CHAI ET AL. *v.* DEPARTMENT OF STATE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 466 F. 3d 125.

No. 06–1407. DAVIS *v.* TERRY, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 465 F. 3d 1249.

No. 06–1408. BISHAY *v.* CITIZENS BANK OF MASSACHUSETTS. C. A. 1st Cir. Certiorari denied. Reported below: 213 Fed. Appx. 8.

No. 06–1414. STARK *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 06–1417. COHL, STOKER, TOSKEY & MCGLINCHEY, P. C. *v.* OTSEGO COUNTY, MICHIGAN, ET AL. Ct. App. Mich. Certiorari denied. Reported below: 266 Mich. App. 150, 702 N. W. 2d 588.

No. 06–1424. SANCHEZ-AYALA ET AL. *v.* GONZALES, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 944.

No. 06–1427. LEBEAU, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 474 F. 3d 1334.

No. 06–1428. KNIGHT ET AL. *v.* ALABAMA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 476 F. 3d 1219.

No. 06–1430. DEL LOS REYES AGUILUZ *v.* LEAVITT, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied.

No. 06–1440. LORILLARD TOBACCO CO. *v.* ENGIDA, DBA I AND G LIQUORS. C. A. 10th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 654.

No. 06–1452. MILLER *v.* FINNIN, GUARDIAN, ET AL. App. Ct. Mass. Certiorari denied. Reported below: 67 Mass. App. 1108, 854 N. E. 2d 463.

No. 06–1453. STARKS *v.* MICHIGAN. Cir. Ct. Oakland County, Mich. Certiorari denied.

No. 06–1460. GONZALEZ-RAMIREZ *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 06–1472. SWEENEY *v.* CITY OF NEW YORK, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 186 Fed. Appx. 84.

No. 06–1477. CHISHOLM *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied.

No. 06–1488. YOUNG ET AL. *v.* PUMMILL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 735.

No. 06–1503. BAKER ET UX. *v.* SHAO-QIANG HE ET UX. Sup. Ct. Tenn. Certiorari denied. Reported below: 215 S. W. 3d 793.

No. 06–1514. THOMAS *v.* POTTER, POSTMASTER GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 118.

No. 06–1531. MILLER *v.* DEPARTMENT OF AGRICULTURE. C. A. Fed. Cir. Certiorari denied. Reported below: 208 Fed. Appx. 902.

No. 06–1544. BANKER *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 64 M. J. 437.

No. 06–1551. HEINEMEYER *v.* TOWNSHIP OF SCOTCH PLAINS, NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 198 Fed. Appx. 254.

No. 06–1553. VENTRICE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–1554. LEVINE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 477 F. 3d 596.

No. 06–1557. LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 406.

No. 06–1568. COSSIO *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 64 M. J. 254.

No. 06–9143. WADHWA *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–9181. STATEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 601.

No. 06–9212. ARREOLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 467 F. 3d 1153.

No. 06–9232. FULKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 454 F. 3d 410.

No. 06–9562. SIMMONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 3d 1115.

No. 06–9566. BOONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 458 F. 3d 321.

No. 06–9600. DAVIS *v.* HAMIDULLAH, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 200 Fed. Appx. 188.

No. 06–9601. GOMEZ-OLMEDA *v.* UNITED STATES; and

No. 06–10207. FORTEZA-GARCIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–9681. BROOKS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–9829. CONTEH *v.* GONZALES, ATTORNEY GENERAL. C. A. 1st Cir. Certiorari denied. Reported below: 461 F. 3d 45.

No. 06–9912. O'SHEA *v.* LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 317.

No. 06–10019. MARTINEZ *v.* WARDEN, METROPOLITAN DETENTION CENTER. C. A. 9th Cir. Certiorari denied.

No. 06–10072. KARAWI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 06–10134. GRIFFIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 303.

No. 06–10148. JONES *v.* MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 194 Fed. Appx. 114.

No. 06–10149. KENNARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 472 F. 3d 851.

No. 06–10161. RIVERA RODRIGUEZ *v.* BENINATO ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 469 F. 3d 1.

No. 06–10164. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 415.

No. 06–10166. ARCHANIAN *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 122 Nev. 1019, 145 P. 3d 1008.

No. 06–10260. SPELLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 06–10298. CLAIBORNE *v.* FAMILY DOLLAR STORES OF LOUISIANA. C. A. 5th Cir. Certiorari denied.

No. 06–10534. HENDERSON-EL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 642.

No. 06–10658. POWERS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 945 So. 2d 386.

No. 06–10721. CLARK *v.* OKLAHOMA. C. A. 10th Cir. Certiorari denied. Reported below: 468 F. 3d 711.

No. 06–10729. AGNEW *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 283.

No. 06–10733. CICHOWSKI ET AL. *v.* GENERAL CASUALTY INSURANCE CO. ET AL. Ct. App. Wis. Certiorari denied. Reported below: 297 Wis. 2d 583, 724 N. W. 2d 702.

No. 06–10744. SLOTTO *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 06–10745. COLE *v.* MITCHELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 06–10746. FERNANDEZ *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 724.

No. 06–10748. RODRIGUEZ HERNANDEZ *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 06–10762. TREECE *v.* LOMBARD, JUDGE, COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT, ET AL. Sup. Ct. La. Certiorari denied. Reported below: 937 So. 2d 874.

No. 06–10764. MIKE H. *v.* LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 06–10776. NELLUM *v.* HOREL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 208 Fed. Appx. 526.

No. 06–10778. O'DONNELL *v.* SHEETS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–10789. EDWARDS *v.* SOUTH CAROLINA. Ct. App. S. C. Certiorari denied.

No. 06–10790. EARLY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 06–10791. GOINS *v.* SAUNDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 497.

No. 06–10797. HESDEN *v.* GRACE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–10798. HURD *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 144 Cal. App. 4th 1100, 50 Cal. Rptr. 3d 893.

No. 06–10802. FRAZIER *v.* ORTIZ, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 06–10805. HUGHES *v.* MILLS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–10808. GRAY *v.* WHITMIRE ET AL. C. A. 5th Cir. Certiorari denied.

No. 06–10809. HANDY *v.* MCCANN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 06–10810. HARRELL *v.* GAINES. C. A. 4th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 492.

No. 06–10812. HOUFF, AKA BAXTER *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 207 Ore. App. 766, 143 P. 3d 570.

No. 06–10820. JOHNSON *v.* CARROLL, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–10825. CHRISMAN *v.* MULLINS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 683.

No. 06–10830. ANDERSON *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 479.

No. 06–10834. LEWIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 06–10848. JOHNSON *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 06–10869. SPAAN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 208 Fed. Appx. 898.

No. 06–10878. BONILLA *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 06–10887. BROOKS *v.* LUOMA. C. A. 6th Cir. Certiorari denied.

No. 06–10888. GARRETT *v.* CHARLESTON COUNTY DEPARTMENT OF SOCIAL SERVICES. Ct. App. S. C. Certiorari denied.

No. 06–10898. HEYDEMANS *v.* GONZALES, ATTORNEY GENERAL. C. A. 1st Cir. Certiorari denied. Reported below: 196 Fed. Appx. 2.

No. 06–10906. FORSTEIN *v.* HENRY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 185 Fed. Appx. 656.

No. 06–10913. TREECE *v.* WILSON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 212 Fed. Appx. 948.

No. 06–10918. SHEHATA ET UX. *v.* VILLACANA. Super. Ct. Pa. Certiorari denied.

No. 06–10928. BLACKWELL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 06–10942. HARVEY *v.* POTTER, POSTMASTER GENERAL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 2.

No. 06–10952. GONZALES OLVERA *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 06–10963. DELGADO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 948 So. 2d 681.

No. 06–10968. YOUNG *v.* JONES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 484.

No. 06–10976. TALAMANTE MADRID *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 193 Fed. Appx. 717.

No. 06–10978. MALOOF *v.* JACKSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–10991. HENNEY *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–11002. SMITH *v.* KNIGHT, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 06–11006. CORNETT *v.* LINDAMOOD, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 691.

No. 06–11020. WHEELER *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 297 Wis. 2d 584, 724 N. W. 2d 703.

No. 06–11044. HECKARD *v.* ULIBARRI, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 817.

No. 06–11053. RODRIGUEZ *v.* LAFLORE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 230 Fed. Appx. 351.

No. 06–11065. DAVIS *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 210 S. W. 3d 229.

No. 06–11088. RIVERA *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 67 Mass. App. 1103, 852 N. E. 2d 136.

No. 06–11118. CARROLL *v.* RENICO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 475 F. 3d 708.

No. 06–11131. MARKHAM *v.* BRANDT. C. A. 6th Cir. Certiorari denied.

No. 06–11139. MITCHELL *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 06–11149. BOLTE *v.* SUPREME COURT OF WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 230 Fed. Appx. 586.

No. 06–11162. RIVERA *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 06–11191. FIFE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 471 F. 3d 750.

No. 06–11194. KHATIBI *v.* TRACY. C. A. 2d Cir. Certiorari denied.

No. 06–11218. SLOAN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 312.

No. 06–11253. DOBBINS *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 725 N. W. 2d 492.

No. 06–11258. LYNCH *v.* POLK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 167.

No. 06–11259. WINDRIX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 787.

No. 06–11274. MATTERN *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 151 P. 3d 1116.

No. 06–11281. WELLS *v.* KANSAS. Ct. App. Kan. Certiorari denied.

No. 06–11289. ALFORD *v.* KOVACS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH. C. A. 3d Cir. Certiorari denied.

No. 06–11293. SEYMOUR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 472 F. 3d 969.

No. 06–11310. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 212 Fed. Appx. 922.

No. 06–11313. CAMP *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 36 Kan. App. 2d xix, 142 P. 3d 752.

No. 06–11335. TARTAGLIONE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 06–11345. ZARABIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 906.

No. 06–11373. CLARK *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied.

No. 06–11384. SILVA *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 156 P. 3d 1164.

No. 06–11407. RINICK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 219 Fed. Appx. 238.

No. 06–11410. BATES ET VIR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 221 Fed. Appx. 538.

No. 06–11422. MWAMBA *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 917 A. 2d 696.

No. 06–11426. ST. JOHN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 222 Fed. Appx. 379.

No. 06–11427. VARGAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 204 Fed. Appx. 92.

No. 06–11428. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 263.

No. 06–11430. AUSTIN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 902 A. 2d 972.

No. 06–11431. BEST *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 279.

No. 06–11433. TOTARO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 221 Fed. Appx. 472.

No. 06–11434. MUNOZ-CRUZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 539.

No. 06–11436. MCCARRIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 06–11437. PATTERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 477 F. 3d 933.

No. 06–11439. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–11441. DANIELS *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 64 M. J. 431.

No. 06–11444. REYES-REYNOSO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 595.

No. 06–11445. RIVERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 958.

No. 06–11447. LOWE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 222 Fed. Appx. 220.

No. 06–11448. WILLIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 476 F. 3d 1121.

No. 06–11454. HEVENER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 208 Fed. Appx. 156.

No. 06–11455. Flores-Sanchez, aka Mendoza-Sanchez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 477 F. 3d 1089.

No. 06–11456. Garcia-Esparza *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 484 F. 3d 745.

No. 06–11458. Gillon *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 06–11459. Halteh *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 224 Fed. Appx. 210.

No. 06–11460. Gibson *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 06–11463. Gates *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 743.

No. 06–11471. Mwabira-Simera *v.* Sodexho Marriott Management Services et al. C. A. D. C. Cir. Certiorari denied. Reported below: 204 Fed. Appx. 902.

No. 06–11473. Ramirez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 368.

No. 06–11477. Taylor *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 06–11482. Barron *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 223 Fed. Appx. 673.

No. 06–11483. Bagbee *v.* United States Postal Service. C. A. Fed. Cir. Certiorari denied. Reported below: 217 Fed. Appx. 952.

No. 06–11489. McDonald *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 06–11492. Botello *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 219 Fed. Appx. 294.

No. 06–11496. Amu *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 203.

No. 06–11497. Buchanan *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 06–11498. PENA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 214 Fed. Appx. 145.

No. 06–11500. MACIAS-FUENTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 742.

No. 06–11504. SLADE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 230 Fed. Appx. 338.

No. 06–11505. RUFFIN-THOMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 221 Fed. Appx. 622.

No. 06–11506. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–11509. LEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 06–11511. TUCHAWENA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 222 Fed. Appx. 659.

No. 06–11515. RICHARDS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 828.

No. 06–11517. MAPP *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 476 F. 3d 1012.

No. 06–11519. DEGANTE-CORONA, AKA CARCANO-MEJIA *v.* UNITED STATES (Reported below: 221 Fed. Appx. 366); MORALES-VEGA, AKA BEGA MORALES, AKA MORALES, AKA VEGA MORALES *v.* UNITED STATES (221 Fed. Appx. 376); TREVINO-DAVILA, AKA DAVILA TREVINO, AKA TREVINO *v.* UNITED STATES (222 Fed. Appx. 378); PADILLA-RAMOS, AKA PADILLA, AKA RAMOS, AKA RAMOS PADILLA *v.* UNITED STATES (222 Fed. Appx. 380); AVALOS-RODRIGUEZ, AKA RODRIGUEZ-CORREA *v.* UNITED STATES (221 Fed. Appx. 361); RODRIGUEZ-ROMERO *v.* UNITED STATES (222 Fed. Appx. 375); SERVIN-TERRAZAS *v.* UNITED STATES (222 Fed. Appx. 371); GUARDADO-CORDOVA, AKA CORDOVA-GUARDADO *v.* UNITED STATES (222 Fed. Appx. 370); CHAPA-GARCIA *v.* UNITED STATES (222 Fed. Appx. 379); BRACAMONTE-ROSALES, AKA BRACAMONTE-RACIALES *v.* UNITED STATES (221 Fed. Appx. 374); GUTIERREZ-BALLEZ, AKA BAEZ-GUTIERREZ *v.* UNITED STATES (221 Fed. Appx. 373); GALVEZ-GARCIA *v.* UNITED STATES (221 Fed. Appx. 372); GUERRERO-ALMANZAR, AKA GUERRERO-ALMANZA *v.* UNITED STATES (222 Fed. Appx. 377); HERNANDEZ-

Gurusciata, aka Hernandez, aka Hernandez-Gurugiente, aka Lopez-Hernandez *v.* United States (220 Fed. Appx. 372); Gutierrez-Quintanilla *v.* United States (220 Fed. Appx. 368); Cavazos-Rodriguez *v.* United States (221 Fed. Appx. 371); Castro-Alvarez *v.* United States (221 Fed. Appx. 355); Ibarra-Cervantes, aka Hernandez-Benitez, aka Lopez *v.* United States (220 Fed. Appx. 371); Amador-Anariva *v.* United States (220 Fed. Appx. 370); Noel Saenz *v.* United States (221 Fed. Appx. 365); Balam-Un, aka Balam *v.* United States (222 Fed. Appx. 374); Camarillo-Andaverde *v.* United States (221 Fed. Appx. 370); Portillo-Cervantes *v.* United States (221 Fed. Appx. 369); De La Cruz-De La Cruz *v.* United States (222 Fed. Appx. 387); Vazquez-Perez *v.* United States (222 Fed. Appx. 377); Rivera-Ramirez, aka Melgoza-Camacho *v.* United States (222 Fed. Appx. 385); Contreras-Vasquez *v.* United States (222 Fed. Appx. 375); Betancourt-Guillen, aka Cervantes, aka Gonzalez *v.* United States (221 Fed. Appx. 361); and Gonzales *v.* United States (484 F. 3d 712). C. A. 5th Cir. Certiorari denied.

No. 06–11520. Carpenter *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 221 Fed. Appx. 517.

No. 06–11521. Covington *v.* Wisconsin. Sup. Ct. Wis. Certiorari denied.

No. 06–11528. Midgette *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 478 F. 3d 616.

No. 06–11529. Johnson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 268.

No. 06–11532. Smith *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 222 Fed. Appx. 391.

No. 06–11533. Sturgis *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 230 Fed. Appx. 336.

No. 06–11534. Sou *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 704.

No. 06–11535. Shabazz *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 221 Fed. Appx. 529.

No. 06–11536. Logan *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 219 Fed. Appx. 317.

No. 06–11539. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 278.

No. 06–11545. MOORE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 919 A. 2d 1173.

No. 06–11547. PECINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 320.

No. 06–11548. WILLIAMSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 359.

No. 06–11549. MCLYMONT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 251.

No. 06–11550. PALAFOX-BARAJAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 222 Fed. Appx. 654.

No. 06–11552. PEDRAZA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 853.

No. 06–11553. STONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 425.

No. 06–11557. KEEPER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 06–11558. MILLER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 478 F. 3d 48.

No. 06–11565. ESTRELLA-ACOSTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 222 Fed. Appx. 580.

No. 06–11569. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–1645. WALLACE ET AL. *v.* CALOGERO, CHIEF JUSTICE, SUPREME COURT OF LOUISIANA, ET AL. C. A. 5th Cir. Motions of Coalition of Service Industries, Inc., National Asian Pacific American Bar Association et al., and Tulane University School of Law for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 419 F. 3d 405.

No. 06–11. LECLERC ET AL. *v.* WEBB ET AL. C. A. 5th Cir. Motion of Innocence Network for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 419 F. 3d 405.

No. 06–728. MURPHY, INDIVIDUALLY AND AS A MEMBER OF AK CAPITAL LLC *v.* KOREA ASSET MANAGEMENT CORP. C. A. 2d Cir. Motion of Powerex Corp. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 190 Fed. Appx. 43.

No. 06–1385. RENDEROS *v.* RYAN, WARDEN. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 469 F. 3d 788.

No. 06–1389. GOODISON *v.* MADONNA ET AL. C. A. 11th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 06–1423. RES-CARE, INC., ET AL. *v.* OMEGA HEALTHCARE INVESTORS, INC. C. A. 7th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 475 F. 3d 853.

No. 06–1429. BURHLRE, SUPERINTENDENT, GREENE CORRECTIONAL FACILITY *v.* EARLEY. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 451 F. 3d 71.

Rehearing Denied

No. 06–1104. OSTOPOSIDES ET AL. *v.* GLIMP ET AL., 549 U. S. 1340;

No. 06–1259. NASCIMENTO *v.* SUPREME COURT OF MONTANA, 550 U. S. 919;

No. 06–1292. MORETON ROLLESTON, JR., LIVING TRUST *v.* PERRY, 550 U. S. 936;

No. 06–1299. BAXTER *v.* UNITED STATES, 550 U. S. 957;

No. 06–9026. NASH *v.* POLLARD, WARDEN, 549 U. S. 1289;

No. 06–9192. IN RE JACKSON, 549 U. S. 1251;

No. 06–9412. MERLA *v.* SAN ANTONIO INDEPENDENT SCHOOL DISTRICT ET AL., 549 U. S. 1348;

No. 06–9677. EARP *v.* LAVAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL., 550 U. S. 921;

No. 06–9766. BURDEN *v.* COLORADO DEPARTMENT OF CORRECTIONS, 550 U. S. 923;

No. 06–9803. TASKER *v.* MICHIGAN DEPARTMENT OF HUMAN SERVICES, 550 U. S. 923; and

No. 06–9897. HOLTZ *v.* SHEAHAN, SHERIFF, COOK COUNTY, ILLINOIS, ET AL., 550 U. S. 940. Petitions for rehearing denied.

JUNE 26, 2007

Certiorari Denied

No. 06–12011 (06A1215). BLAND *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Certiorari denied. Reported below: 164 P. 3d 1076.

Rehearing Denied

No. 06–1209 (06A1191). HIGHTOWER *v.* TERRY, WARDEN, 550 U. S. 952. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for rehearing denied.

JUNE 28, 2007

Dismissal Under Rule 46

No. 06–7352. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 456 F. 3d 1353.

JUNE 29, 2007

Vacated and Remanded on Appeal

No. 06–589. CHRISTIAN CIVIC LEAGUE OF MAINE, INC. *v.* FEDERAL ELECTION COMMISSION ET AL. Appeal from D. C. D. C. Judgment vacated, and case remanded for further consideration in light of *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, *ante*, p. 449.

Certiorari Granted—Vacated and Remanded

No. 06–582. UNIVERSITY OF NOTRE DAME *v.* LASKOWSKI ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hein* v. *Freedom From Religion Foundation, Inc.*, *ante*, p. 587. Reported below: 443 F. 3d 930.

Certiorari Granted

No. 06–1195. BOUMEDIENE ET AL. *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL.; and

No. 06–1196. AL ODAH, NEXT FRIEND OF AL ODAH, ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Petitions for rehearing granted, and orders entered April 2, 2007 [549 U. S. 1328], denying petitions for writs of certiorari are vacated. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. As it would be of material assistance to consult any decision in No. 06–1197, *Bismullah et al.* v. *Gates*, and No. 06–1397, *Parhat et al.* v. *Gates et al.*, currently pending in the United States Court of Appeals for the District of Columbia Circuit, supplemental briefing will be scheduled upon the issuance of any decision in those cases. Reported below: 476 F. 3d 981.

Certiorari Denied

No. 05–1257. LISTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 432 F. 3d 754.

No. 05–1379. BOSCARINO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 437 F. 3d 634.

No. 05–8615. RODRIGUEZ-ALVAREZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 425 F. 3d 1041.

No. 05–8654. WESLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 561.

No. 05–8865. CASTENADA-ROJAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 681.

No. 05–9410. SKAGGS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 156 Fed. Appx. 850.

No. 05–10381. VASQUEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 433 F. 3d 666.

No. 05–10397. NGO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 603.

No. 05–10431. ARTIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 627.

No. 05–11310. HERNANDEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 167 Fed. Appx. 56.

No. 05–11336. HEINTZELMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 170 Fed. Appx. 427.

No. 05–11395. ANDRLIK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 173 Fed. Appx. 455.

No. 05–11582. LEWIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 436 F. 3d 939.

No. 05–11751. GILES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 170 Fed. Appx. 414.

No. 05–11764. MARES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 05–11770. BOYD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 172 Fed. Appx. 841.

No. 06–111. ELLIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 440 F. 3d 434.

No. 06–757. MARINEAU ET AL. *v.* GUILES, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS GUILES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 461 F. 3d 320.

No. 06–1157. GALE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 468 F. 3d 929.

No. 06–1375. OKORO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 348.

No. 06–1420. MILLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 630.

No. 06–5015. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 172 Fed. Appx. 599.

No. 06–5152. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 444 F. 3d 250.

No. 06–5166. ALLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 177 Fed. Appx. 304.

No. 06–5190. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 175 Fed. Appx. 768.

No. 06–5205. MCKEE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 182 Fed. Appx. 593.

No. 06–5217. LOPEZ-FLORES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 444 F. 3d 1218.

No. 06–5263. GANT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 176 Fed. Appx. 520.

No. 06–5275. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 436 F. 3d 706.

No. 06–5439. MONTES-PINEDA, AKA PINEDA MUNTEZ, AKA MONTEZ-PINEDA, AKA PINEDA-MONTES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 445 F. 3d 375.

No. 06–5559. DUCKETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–5595. ALLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 178 Fed. Appx. 227.

No. 06–5633. BOWMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 178 Fed. Appx. 234.

No. 06–5731. ANNIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 446 F. 3d 852.

No. 06–5845. REYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 180 Fed. Appx. 501.

No. 06–5853. HOPE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 167 Fed. Appx. 531.

No. 06–5907. WARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 447 F. 3d 869.

No. 06–6007. DOWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 180 Fed. Appx. 483.

No. 06–6018. MANCILLAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 180 Fed. Appx. 820.

No. 06–6155. BUCHANAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 449 F. 3d 731.

No. 06–6158. MCWHIRTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 184 Fed. Appx. 467.

No. 06–6160. EAVES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 182 Fed. Appx. 259.

No. 06–6245. CURRIE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 183 Fed. Appx. 536.

No. 06–6270. SKIBO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 188 Fed. Appx. 373.

No. 06–6301. ROCKEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 449 F. 3d 1099.

No. 06–6323. MEZA-SORIA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–6379. TIMMONS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 184 Fed. Appx. 291.

No. 06–6391. LAW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 184 Fed. Appx. 298.

No. 06–6583. DRINNON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 06–6587. ADAIR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 06–6612. REYNOLDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 185 Fed. Appx. 410.

No. 06–6646. BENAVIDES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 186 Fed. Appx. 339.

No. 06–6690. CORONA ULLOA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 187 Fed. Appx. 367.

No. 06–6843. DELANEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 185 Fed. Appx. 492.

No. 06–6854. TERRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–6868. OVERTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 186 Fed. Appx. 607.

No. 06–6893. LEPPEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 187 Fed. Appx. 504.

No. 06–6902. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 187 Fed. Appx. 285.

No. 06–6905. GOFF *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–7006. MARRS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 189 Fed. Appx. 178.

No. 06–7025. POORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 188 Fed. Appx. 245.

No. 06–7037. SHULL, AKA CHAPMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 189 Fed. Appx. 180.

No. 06–7045. DAILEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 189 Fed. Appx. 212.

No. 06–7052. ALLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 188 Fed. Appx. 277.

No. 06–7106. CERVANTES-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 191 Fed. Appx. 262.

No. 06–7110. SEHEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 188 Fed. Appx. 220.

No. 06–7194. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 189 Fed. Appx. 922.

No. 06–7343. LLANAS-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 192 Fed. Appx. 280.

No. 06–7363. FARRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 448 F. 3d 965.

No. 06–7368. HARNESS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 453 F. 3d 752.

No. 06–7385. MCDONALD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 191 Fed. Appx. 224.

No. 06–7389. SANTOYO-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 191 Fed. Appx. 325.

No. 06–7423. MCLEAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 192 Fed. Appx. 234.

No. 06–7478. PAYAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 182 Fed. Appx. 560.

No. 06–7506. ZIMMERMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 192 Fed. Appx. 234.

No. 06–7518. GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 189 Fed. Appx. 819.

No. 06–7623. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–7625. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 193 Fed. Appx. 333.

No. 06–7682. LOPEZ-CAMAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 190 Fed. Appx. 658.

No. 06–7740. SOUTHERN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 194 Fed. Appx. 141.

No. 06–7748. JUAREZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 454 F. 3d 717.

No. 06–7753. KNOX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 193 Fed. Appx. 780.

No. 06–7792. AGUIRRE-VILLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 460 F. 3d 681.

No. 06–7876. PORTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 181 Fed. Appx. 545.

No. 06–7926. JIMINEZ-GALAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 195 Fed. Appx. 881.

No. 06–7990. TORRES-DUENAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 461 F. 3d 1178.

No. 06–8049. MORRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 193 Fed. Appx. 475.

No. 06–8089. GLADNEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 184 Fed. Appx. 586.

No. 06–8108. MURILLO-TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 196 Fed. Appx. 280.

No. 06–8117. ARIAS-RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 195 Fed. Appx. 257.

No. 06–8313. ADOLPHUS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 187 Fed. Appx. 269.

No. 06–8324. HALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 194 Fed. Appx. 393.

No. 06–8362. HARDIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–8377. DEMAREE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 459 F. 3d 791.

No. 06–8379. NARANJO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 499.

No. 06–8392. JIMENEZ-NAJERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 195 Fed. Appx. 911.

No. 06–8468. GUARDADO-MEZEN *v.* UNITED STATES; and
No. 06–8471. GEOVANY-MEZEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 3d 596.

No. 06–8538. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–8546. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 942.

No. 06–8553. MALLOY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 923.

No. 06–8556. LUCK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 200 Fed. Appx. 263.

No. 06–8643. VELASQUEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 197 Fed. Appx. 788.

No. 06–8675. JORDAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 199 Fed. Appx. 566.

No. 06–8678. REYES-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 27.

No. 06–8717. HARRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 568.

No. 06–8753. BARRETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 462.

No. 06–8759. RUSH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 190 Fed. Appx. 505.

No. 06–8781. ROUSSOS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 06–8793. ANTHONY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 617.

No. 06–8802. WASHINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 1001.

No. 06–8810. RUTLAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 435.

No. 06–8814. OCHOA-VILLARRUEL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 200 Fed. Appx. 789.

No. 06–8828. LEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 624.

No. 06–8852. MCNEILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 444.

No. 06–8871. ANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 649.

No. 06–8872. KAFKA-BANDERAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 936.

No. 06–8882. CARTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 653.

No. 06–8954. CLARK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 594.

No. 06–8977. BROOKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–8978. BRIDGES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 297.

No. 06–8979. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 474.

No. 06–9011. THORNTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 463 F. 3d 693.

No. 06–9035. MOSS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 197 Fed. Appx. 233.

No. 06–9042. CARDONA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 803.

No. 06–9047. MINTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 475.

No. 06–9049. NASH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 203 Fed. Appx. 389.

No. 06–9067. STANBACK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 138.

No. 06–9086. DENNIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 639.

No. 06–9104. RUIZ-DIAZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 274.

No. 06–9114. MENDOZA-GALVAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 394.

No. 06–9166. VARGAS-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 382.

No. 06–9217. VARGAS-MEDINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 298.

No. 06–9230. ALVAREZ-CEDILLO *v.* UNITED STATES (Reported below: 206 Fed. Appx. 374); GARCIA-HERNANDEZ *v.* UNITED STATES (205 Fed. Appx. 224); and LUGO-REGALADO *v.* UNITED STATES (204 Fed. Appx. 431). C. A. 5th Cir. Certiorari denied.

No. 06–9236. GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 679.

No. 06–9263. MELVIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 208 Fed. Appx. 261.

No. 06–9267. WALKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 584.

No. 06–9321. HORSTING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 441.

No. 06–9335. PETISCA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 475.

No. 06–9347. HERNANDEZ-PONCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 469.

No. 06–9381. COLLINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 196.

No. 06–9394. DOMINGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 253.

No. 06–9404. SACHS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 800.

No. 06–9416. TURBIDES-LEONARDO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 468 F. 3d 34.

No. 06–9489. MURRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 690.

No. 06–9496. DUMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 142.

No. 06–9505. MURRIEGA-SANTOS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 703.

No. 06–9508. STEWART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 462 F. 3d 960.

No. 06–9509. ROMAN-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 354.

No. 06–9526. GARCIA-FRANCO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 273.

No. 06–9589. VANEGAS-SOTO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 367.

No. 06–9591. TURNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 572.

No. 06–9604. ALVARADO-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 208 Fed. Appx. 341.

No. 06–9629. LANGLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 277.

No. 06–9706. WURZINGER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 467 F. 3d 649.

No. 06–9800. PORTILLO-QUEZADA, AKA QUEZADA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 469 F. 3d 1345.

No. 06–9819. SANDERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 602.

No. 06–9823. MCSWAIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 355.

No. 06–9826. DEXTA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 470 F. 3d 612.

No. 06–9832. JENKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 351.

No. 06–9857. SUTTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 208 Fed. Appx. 195.

No. 06–9891. HAYES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 332.

No. 06–9936. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 212 Fed. Appx. 181.

No. 06–9955. MOSER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 195 Fed. Appx. 541.

No. 06–9970. NOMAR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 283.

No. 06–9979. EANES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 208 Fed. Appx. 242.

No. 06–9981. VILLALOBOS-RIOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 208 Fed. Appx. 348.

No. 06–9985. ZARAGOZA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 783.

No. 06–9986. THORNTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 297.

No. 06–9995. RAMOS-CISNEROS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 427.

No. 06–10001. PETERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 464 F. 3d 811.

No. 06–10023. PEREZ-DE CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 382.

No. 06–10032. TOWNLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 472 F. 3d 1267.

No. 06–10048. GALLATIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 623.

No. 06–10093. CARRILLO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 583.

No. 06–10094. COLEMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 200 Fed. Appx. 360.

No. 06–10121. SHUB *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 547.

No. 06–10131. GONZALEZ-GARIBAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 440.

No. 06–10136. GONZALEZ-RUIZ, AKA GONZALEZ *v.* UNITED STATES (Reported below: 209 Fed. Appx. 419); and RUIZ *v.* UNITED STATES (210 Fed. Appx. 384). C. A. 5th Cir. Certiorari denied.

No. 06–10205. FRANCIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 751.

No. 06–10259. STUCK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 227 Fed. Appx. 219.

No. 06–10266. DRAKULICH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 599.

No. 06–10267. DRAPEAU *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 616.

No. 06–10294. ANCHONDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 262.

No. 06–10296. ADAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 530.

No. 06–10303. CARDENAS-ROSAS, AKA RODRIGUEZ-FERNANDEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 342.

No. 06–10311. PASCHAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 06–10324. ADAIR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–10346. LEFT HAND BULL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 477 F. 3d 518.

No. 06–10425. DE LA ROSA-MASCORRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 223 Fed. Appx. 324.

No. 06–10450. SEVERANCE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 212 Fed. Appx. 937.

No. 06–10486. HOWELL, AKA MORGAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 199 Fed. Appx. 697.

No. 06–10583. ESTRADA-LOZANO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 221 Fed. Appx. 742.

No. 06–10602. MASSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 06–10637. BANKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 155.

No. 06–10681. OLSHINSKI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 236.

No. 06–10693. BEASLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–10741. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 221 Fed. Appx. 496.

No. 06–10788. GALLOWAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 214.

No. 06–10816. McPHATTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 212.

No. 06–10829. BRITTIAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–10840. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 216.

No. 06–10877. ALVAREZ-GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 477.

No. 06–10915. McCUTCHEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–10921. SWAIM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–10932. GAITHER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 725.

No. 06–10954. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–10957. VALLES-JUAREZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 510.

No. 06–11046. SCHULLO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 476 F. 3d 476.

No. 06–11074. VITTITOE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 353.

No. 06–11075. GIBSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 257.

No. 06–11124. RUIZ-CHAVEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 224 Fed. Appx. 467.

No. 06–11130. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 362.

No. 06–11167. CABALLERO-ZARATE, AKA ZARATE CABALLERO *v.* UNITED STATES (Reported below: 226 Fed. Appx. 413); ROMERO *v.* UNITED STATES (225 Fed. Appx. 321); ESTRADA-MARTINEZ, AKA GONZALEZ, AKA ZAVALA, AKA PENA *v.* UNITED STATES (226 Fed. Appx. 417); LAZO *v.* UNITED STATES (226 Fed. Appx. 412);

TORRES-RIVAS *v.* UNITED STATES (226 Fed. Appx. 423); ALMANZA-GONZALEZ *v.* UNITED STATES (226 Fed. Appx. 421); MALDONADO-VASQUEZ *v.* UNITED STATES (226 Fed. Appx. 416); TULIO ZAYAS, AKA PINADO-MARTINEZ *v.* UNITED STATES (225 Fed. Appx. 328); DAMIAN-SERRANO *v.* UNITED STATES (226 Fed. Appx. 424); JARQUIN-ESPINOSA *v.* UNITED STATES (225 Fed. Appx. 329); MORENO-VELASQUEZ *v.* UNITED STATES (226 Fed. Appx. 425); MARTINEZ-SELEDON, AKA MARTINEZ-MONTANTE *v.* UNITED STATES (226 Fed. Appx. 426); VALDES, AKA NESTOR *v.* UNITED STATES (226 Fed. Appx. 427); GONZALEZ-PENUELOS, AKA PEREZ-GONZALEZ *v.* UNITED STATES (225 Fed. Appx. 325); and MACIAS-HERMOSILLO *v.* UNITED STATES (225 Fed. Appx. 326). C. A. 5th Cir. Certiorari denied.

No. 06–11174. MELENDEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 467 F. 3d 606.

No. 06–11195. PHILLIPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 230.

No. 06–11211. FRANCIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 751.

No. 06–11212. HERRERA-MENDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 377.

No. 06–11228. SAFFORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 531.

No. 06–11236. MEJIA-RUIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 424.

No. 06–11268. ARREDONDO-RODRIGUEZ *v.* UNITED STATES (Reported below: 227 Fed. Appx. 376); and GOMEZ-YANEZ *v.* UNITED STATES (227 Fed. Appx. 375). C. A. 5th Cir. Certiorari denied.

Rehearing Granted. (See Nos. 06–1195 and 06–1196, *supra.*)

JULY 10, 2007

Miscellaneous Order

No. 07–5223 (07A32). IN RE RUIZ. 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.

Certiorari Denied

No. 07–5201 (07A27). RUIZ *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.

JULY 17, 2007

Miscellaneous Order. (For the Court's order approving revisions to the Rules of this Court, see *post*, p. 1196.)

JULY 20, 2007

Dismissal Under Rule 46

No. 06–1126. CITY OF LAKE ELSINORE, CALIFORNIA, ET AL. *v.* ELSINORE CHRISTIAN CENTER ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 197 Fed. Appx. 718.

JULY 24, 2007

Certiorari Denied

No. 07–5514 (07A68). JOHNSON *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.

JULY 26, 2007

Certiorari Denied

No. 07–5457 (07A62). GRAYSON *v.* ALLEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 491 F. 3d 1318.

JULY 30, 2007

Dismissals Under Rule 46

No. 06–1182. CAROLINA CARE PLAN INC. *v.* MCKENZIE; and No. 06–1436. MCKENZIE *v.* CAROLINA CARE PLAN INC. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 467 F. 3d 383.

Miscellaneous Orders

No. 06A1136 (06–9804). SODIPO *v.* CAYMAS SYSTEMS, INC. C. A. 9th Cir. Application for restraining order, addressed to JUSTICE STEVENS and referred to the Court, denied. JUSTICE BREYER took no part in the consideration or decision of this application.

No. 06A1222. MACKINNON *v.* MACKINNON. Sup. Ct. N. J. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

Rehearing Denied

No. 05–1575. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* LANDRIGAN, AKA HILL, 550 U. S. 465;

No. 06–1185. MICKENS *v.* POLK COUNTY SCHOOL BOARD ET AL., 550 U. S. 919;

No. 06–1252. HOPKINS ET UX. *v.* NORTHBROOK MOBILE HOME PARK CORP. ET AL., 550 U. S. 936;

No. 06–1272. SCOCCA *v.* CENDANT MORTGAGE CORP., 550 U. S. 957;

No. 06–1313. ADAM *v.* HAWAII, *ante,* p. 1103;

No. 06–1344. LAURENT *v.* HERKERT, UNITED STATES TRUSTEE, ET AL., *ante,* p. 1114;

No. 06–8144. CULBERT *v.* PENNINGTON ET AL., 549 U. S. 1220;

No. 06–8677. RICHARD *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 549 U. S. 1269;

No. 06–8839. WILKINSON-OKOTIE *v.* GONZALES, ATTORNEY GENERAL, 550 U. S. 958;

No. 06–8901. AKINRO *v.* DEPARTMENT OF HOMELAND SECURITY ET AL., 549 U. S. 1306;

No. 06–9126. IN RE PAGE, 549 U. S. 1321;

No. 06–9190. MCQUIRTER *v.* MICHIGAN, 550 U. S. 970;

No. 06–9323. HOOD *v.* NORTH CAROLINA, 549 U. S. 1293;

No. 06–9327. IN RE FIELDS, 549 U. S. 1277;

No. 06–9410. SIVAK *v.* SARGENT ET AL., 549 U. S. 1348;

No. 06–9431. SABB *v.* SANCHEZ ET AL., 549 U. S. 1348;

No. 06–9464. COX *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 550 U. S. 906;

No. 06–9481. PEREZ *v.* TEXAS, 549 U. S. 1349;

No. 06–9638. TAYLOR *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 550 U. S. 909;

No. 06–9670. COPLEY *v.* MOORE, SUPERINTENDENT, NORTHEAST CORRECTIONAL CENTER, 550 U. S. 921;

No. 06–9678. MITCHELL *v.* MICHIGAN, 550 U. S. 921;

No. 06–9704. KING *v.* LIVINGSTON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL., 550 U. S. 921;

No. 06–9711. MCBRIDE *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 550 U. S. 922;

No. 06–9733. GIMENEZ *v.* MORGAN STANLEY DW, INC., 549 U. S. 1352;

No. 06–9798. LACEFIELD *v.* NEW YORK TIMES ET AL., 550 U. S. 923;

No. 06–9802. MCGEE *v.* UNITED STATES, 549 U. S. 1327;

No. 06–9806. IN RE RIGGINS, 550 U. S. 917;

No. 06–9812. GORDON *v.* SIBLEY MEMORIAL HOSPITAL ET AL., 550 U. S. 938;

No. 06–9907. HAMILTON *v.* FLORIDA ET AL., 550 U. S. 941;

No. 06–9908. GALLOWAY *v.* JOHNSON METROPOLITAN TERMITE & PEST CONTROL SERVICE CO. ET AL., 550 U. S. 941;

No. 06–9928. ROBERTS *v.* FLORIDA, 550 U. S. 941;

No. 06–9931. CURTIS *v.* UNITED STATES, 549 U. S. 1355;

No. 06–9932. PUGH *v.* WILSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL., 550 U. S. 941;

No. 06–9947. KELLEY *v.* UNITED STATES, 549 U. S. 1355;

No. 06–9972. KLEINSCHMIDT *v.* THREE HORIZONS NORTH CONDOMINIUMS, INC., 550 U. S. 942;

No. 06–10052. HICKS *v.* FENTY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL., 550 U. S. 923;

No. 06–10110. LUCKETT *v.* ADAMS, WARDEN, ET AL., 550 U. S. 943;

No. 06–10114. TREECE *v.* TERRELL, WARDEN, 550 U. S. 960;

No. 06–10177. MOORE *v.* ILLINOIS, 550 U. S. 961;

No. 06–10181. DIXON *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 550 U. S. 961;

No. 06–10191. RICHIE *v.* ARIZONA, 550 U. S. 970;

No. 06–10204. FARRELL *v.* ARIZONA, 550 U. S. 971;

No. 06–10212. COOK *v.* TILTON, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL., 550 U. S. 971;

No. 06–10213. CLIFFORD *v.* REDMANN, WARDEN, 550 U. S. 944;
No. 06–10232. COLEMAN-BEY *v.* DOVE ET AL., 550 U. S. 971;
No. 06–10292. SKILLERN *v.* GEORGIA ET AL., 550 U. S. 972;
No. 06–10306. ANAYA *v.* CALIFORNIA, 550 U. S. 945;
No. 06–10333. IHSAN, AKA MAYWEATHER *v.* WILKINSON, WARDEN, ET AL., *ante*, p. 1104;
No. 06–10374. TREECE *v.* LOUISIANA, *ante*, p. 1104;
No. 06–10376. HOLLOMAN *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 550 U. S. 962;
No. 06–10388. CASILLAS *v.* UNITED STATES, 550 U. S. 927;
No. 06–10391. EVANS *v.* KUHN ET AL., *ante*, p. 1116;
No. 06–10436. CHIA *v.* FIDELITY INVESTMENTS, AKA FIDELITY BROKERAGE SERVICES, 550 U. S. 962;
No. 06–10449. SEARCY *v.* UNITED STATES, 550 U. S. 946;
No. 06–10451. SALAZAR-CHICA *v.* GONZALES, ATTORNEY GENERAL, 550 U. S. 962;
No. 06–10454. IN RE ROGERS, 550 U. S. 933;
No. 06–10589. STRALEY *v.* UTAH BOARD OF PARDONS, 550 U. S. 963;
No. 06–10617. CONAWAY *v.* UNITED STATES, 550 U. S. 950;
No. 06–10657. DOYLE *v.* MAINE, *ante*, p. 1107;
No. 06–10700. DECRISTOFARO *v.* SOCIAL SECURITY ADMINISTRATION, 550 U. S. 963;
No. 06–10713. SKINNER *v.* TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 1135;
No. 06–10740. ARNOLD *v.* UNITED STATES, 550 U. S. 964;
No. 06–10758. DAHLER *v.* THORSON, 550 U. S. 965;
No. 06–10792. HAVNER *v.* UNITED STATES, 550 U. S. 966;
No. 06–10801. FLOWERS *v.* UNITED STATES, 550 U. S. 975;
No. 06–10845. MCLENDON *v.* UNITED STATES, 550 U. S. 976;
No. 06–10858. COLEMAN *v.* SAMUELS, WARDEN, 550 U. S. 976;
No. 06–11004. MCGEE *v.* UNITED STATES (two judgments), *ante*, p. 1107; and
No. 06–11027. BIRD *v.* UNITED STATES, *ante*, p. 1108. Petitions for rehearing denied.

No. 06–1303. YANNA-TROMBLEY *v.* SATURN CORP., 550 U. S. 980; and
No. 06–9804. SODIPO *v.* CAYMAS SYSTEMS, INC., 549 U. S. 1362. Petitions for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of these petitions.

No. 06–10712. SHORT *v.* DEPARTMENT OF THE ARMY ET AL., *ante,* p. 1141. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 06–7132. HUNTER *v.* HOWARD COUNTY HOUSING COMMISSION, 549 U. S. 1122. Motion for leave to file petition for rehearing denied.

AUGUST 10, 2007

Dismissal Under Rule 46

No. 05–333. MUTUAL BENEFITS CORP. ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46.2. Reported below: 408 F. 3d 737.

Miscellaneous Order

No. 07A98. BELBACHA *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Application for injunction, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

AUGUST 15, 2007

Certiorari Denied

No. 07–5834 (07A104). PARR *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 20, 2007

Miscellaneous Orders

No. 06–43. STONERIDGE INVESTMENT PARTNERS, LLC *v.* SCIENTIFIC-ATLANTA, INC., ET AL. C. A. 8th Cir. [Certiorari granted, 549 U. S. 1304.] Motions of Former SEC Commissioners and John Conyers, Jr., et al. for leave to file briefs as *amici curiae* out of time granted. THE CHIEF JUSTICE and JUSTICE BREYER took no part in the consideration or decision of these motions.

No. 06–637. BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK *v.* TOM F., ON BEHALF OF GILBERT F., A MINOR CHILD. C. A. 2d Cir. [Certiorari granted, 549 U. S. 1251.] Motion of the Solicitor General for leave to par-

ticipate in oral argument as *amicus curiae* and for divided argument granted.

No. 06–766. NEW YORK STATE BOARD OF ELECTIONS ET AL. *v.* LOPEZ TORRES ET AL. C. A. 2d Cir. [Certiorari granted, 549 U. S. 1204.] Motion of petitioners for divided argument granted.

No. 06–856. LaRUE *v.* DeWOLFF, BOBERG & ASSOCIATES, INC., ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 1130.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 06–984. MEDELLIN *v.* TEXAS. Ct. Crim. App. Tex. [Certiorari granted, 550 U. S. 917.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 06–6330. KIMBROUGH *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, *ante*, p. 1113.] Motion of petitioner to file volume II of the joint appendix under seal granted.

No. 06–7949. GALL *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, *ante*, p. 1113.] Motion of petitioner to file volume II of the joint appendix under seal granted.

Rehearing Denied

No. 05–10243. CALDWELL *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, 547 U. S. 1183;

No. 05–11582. LEWIS *v.* UNITED STATES, *ante*, p. 1162;

No. 06–728. MURPHY, INDIVIDUALLY AND AS A MEMBER OF AK CAPITAL LLC *v.* KOREA ASSET MANAGEMENT CORP., *ante*, p. 1159;

No. 06–1394. HILL *v.* VIRGINIA, *ante*, p. 1115;

No. 06–1472. SWEENEY *v.* CITY OF NEW YORK, NEW YORK, *ante*, p. 1146;

No. 06–1514. THOMAS *v.* POTTER, POSTMASTER GENERAL, *ante*, p. 1146;

No. 06–1527. DESCENT *v.* UNITED STATES, *ante*, p. 1132;

No. 06–5247. FRY *v.* PLILER, WARDEN, *ante*, p. 112;

No. 06–5754. RITA *v.* UNITED STATES, *ante*, p. 338;

No. 06–7588. RIVERA *v.* PENNSYLVANIA ET AL., 550 U. S. 937;

No. 06–8663. SCOTT *v.* UNITED STATES, *ante*, p. 1104;

No. 06–9556. PIWOWARSKI *v.* GREEN ET AL., 550 U. S. 907;

No. 06–9686. GILMORE *v.* MICHIGAN, *ante*, p. 1116;

No. 06–9739. HOLLEY *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 550 U. S. 922;

No. 06–9879. LYNCH *v.* JONES, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, 550 U. S. 940;

No. 06–9948. LAURY *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 550 U. S. 941;

No. 06–9968. MOORE *v.* CINGULAR WIRELESS CORP., 550 U. S. 942;

No. 06–10104. ROGERS *v.* IMMIGRATION AND NATURALIZATION SERVICE, *ante*, p. 1133;

No. 06–10154. JONES *v.* MISSISSIPPI, 550 U. S. 960;

No. 06–10209. HACKNER *v.* CAIN, WARDEN, 550 U. S. 971;

No. 06–10257. POMEROY *v.* WALLACE, 550 U. S. 944;

No. 06–10304. DURHAM *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 550 U. S. 972;

No. 06–10387. FLANAGAN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 1105;

No. 06–10390. CERF *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 1105;

No. 06–10412. DE LA CERDA *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 1105;

No. 06–10477. IN RE GAY, *ante*, p. 1112;

No. 06–10479. HELEVA *v.* PENNSYLVANIA, *ante*, p. 1117;

No. 06–10548. SANJARI *v.* GRATZOL, *ante*, p. 1118;

No. 06–10554. ALBERT *v.* STARBUCKS COFFEE CO., INC., *ante*, p. 1118;

No. 06–10638. AIELLO *v.* CONNOLLY ET AL., *ante*, p. 1134;

No. 06–10727. ATWELL *v.* DEAN ET AL., *ante*, p. 1135;

No. 06–10728. AYERS *v.* OHIO, *ante*, p. 1135;

No. 06–10729. AGNEW *v.* UNITED STATES ET AL., *ante*, p. 1149;

No. 06–10762. TREECE *v.* LOMBARD, JUDGE, COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT, ET AL., *ante*, p. 1149;

No. 06–10783. KELLEY *v.* OFFICE OF PERSONNEL MANAGEMENT, 550 U. S. 975;

No. 06–10832. IN RE MARSHALL, *ante*, p. 1143;

No. 06–10855. CARRAWAY *v.* UNITED STATES, 550 U. S. 976;

No. 06–10913. TREECE *v.* WILSON ET AL., *ante*, p. 1151;
No. 06–11037. IN RE BROOKS, 550 U. S. 967;
No. 06–11149. BOLTE *v.* SUPREME COURT OF WISCONSIN ET AL., *ante*, p. 1152;
No. 06–11225. BASS *v.* UNITED STATES, *ante*, p. 1124;
No. 06–11471. MWABIRA-SIMERA *v.* SODEXHO MARRIOTT MANAGEMENT SERVICES ET AL., *ante*, p. 1155;
No. 06–11506. SMITH *v.* UNITED STATES, *ante*, p. 1156; and
No. 06–11604. IN RE SKILLERN, *ante*, p. 1143. Petitions for rehearing denied.

No. 06–1317. LEONARD *v.* SIMPSON, WARDEN, *ante*, p. 1103. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

AUGUST 22, 2007

Certiorari Denied

No. 06–10979 (07A54). CONNER *v.* QUARTERMAN, 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. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 477 F. 3d 287.

AUGUST 23, 2007

Miscellaneous Order

No. 07–6034 (07A141). WILLIAMS *v.* ALLEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, 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.

AUGUST 28, 2007

Miscellaneous Order

No. 07A179. MOSLEY *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

AUGUST 29, 2007

Certiorari Denied

No. 07–6184 (07A182). AMADOR *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 31, 2007

Miscellaneous Orders

No. 06A1142 (06–1591). REICH *v.* UNITED STATES. C. A. 2d Cir. Application for bail, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 07A19 (06–11931). REHBERGER *v.* CRAIG, CHIEF JUDGE, SUPERIOR COURT OF GEORGIA, FLINT COUNTY. C. A. 11th Cir. Application for stay, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. 07A26 (06–11508). SCHERER *v.* MERCK & CO. INC. ET AL. C. A. 10th Cir. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

Rehearing Denied

No. 06–1453. STARKS *v.* MICHIGAN, *ante*, p. 1146;
No. 06–5731. ANNIS *v.* UNITED STATES, *ante*, p. 1163;
No. 06–7687. TAYLOR *v.* BELL, WARDEN, 549 U. S. 1135;
No. 06–8088. MCGEE *v.* GODDELL ET AL., *ante*, p. 1115;
No. 06–10353. FAIRLEY, AKA FAIRLE *v.* MISSISSIPPI, *ante*, p. 1104;
No. 06–10507. WRIGHT *v.* MEDDLETON ET AL., *ante*, p. 1117;
No. 06–10555. ARNOLD *v.* MAROUS BROTHERS CONSTRUCTION, INC., *ante*, p. 1118;
No. 06–10887. BROOKS *v.* LUOMA, *ante*, p. 1151;
No. 06–10898. HEYDEMANS *v.* GONZALES, ATTORNEY GENERAL, *ante*, p. 1151;
No. 06–11211. FRANCIS *v.* UNITED STATES, *ante*, p. 1175; and
No. 06–11327. ASKEW *v.* UNITED STATES, *ante*, p. 1138. Petitions for rehearing denied.

No. 06–10469. GILREATH *v.* L–M FUNDING LLC ET AL., *ante*, p. 1116; and

No. 06–10569. POWERS *v.* DEPARTMENT OF LABOR ET AL., *ante*, p. 1106. Motions for leave to file petitions for rehearing denied.

SEPTEMBER 5, 2007

Dismissal Under Rule 46

No. 07–40. HONEYWELL INTERNATIONAL, INC. *v.* AMERICAN HIGH-INCOME TRUST ET AL. Ct. App. Cal., 2d App. Dist. Certiorari dismissed under this Court's Rule 46.

SEPTEMBER 14, 2007

Dismissal Under Rule 46

No. 06–1196. AL ODAH, NEXT FRIEND OF AL ODAH, ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 1161.] Writ of certiorari dismissed as to petitioner David M. Hicks under this Court's Rule 46.

SEPTEMBER 18, 2007

Miscellaneous Orders

No. 07A224. NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* NOONER. Application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eighth Circuit on September 14, 2007, presented to JUSTICE ALITO, and by him referred to the Court, denied.

No. 07A232. NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* NOONER. Application to vacate the stay of execution of sentence of death entered by the United States District Court for the Eastern District of Arkansas on September 10, 2007, presented to JUSTICE ALITO, and by him referred to the Court, denied.

SEPTEMBER 25, 2007

Miscellaneous Orders

No. 07A265. IN RE RICHARD. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. 06–43. STONERIDGE INVESTMENT PARTNERS, LLC *v.* SCIENTIFIC-ATLANTA, INC., ET AL. C. A. 8th Cir. [Certiorari granted, 549 U. S. 1304.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE BREYER took no part in the consideration or decision of this motion.

No. 06–713. WASHINGTON STATE GRANGE *v.* WASHINGTON STATE REPUBLICAN PARTY ET AL.; and

No. 06–730. WASHINGTON ET AL. *v.* WASHINGTON STATE REPUBLICAN PARTY ET AL. C. A. 9th Cir. [Certiorari granted, 549 U. S. 1251.] Motion of petitioners for divided argument denied.

No. 06–856. LARUE *v.* DEWOLFF, BOBERG & ASSOCIATES, INC., ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 1130.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of respondents to dismiss the writ of certiorari denied.

No. 06–984. MEDELLIN *v.* TEXAS. Ct. Crim. App. Tex. [Certiorari granted, 550 U. S. 917.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 06–7949. GALL *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, *ante*, p. 1113.] Motion of petitioner for appointment of counsel granted. Jeffrey T. Green, Esq., of Washington, D. C., is appointed to serve as counsel for petitioner in this case.

No. 06–8273. DANFORTH *v.* MINNESOTA. Sup. Ct. Minn. [Certiorari granted, 550 U. S. 956.] Motion of Kansas for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 06–9130. ALI *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 11th Cir. [Certiorari granted, 550 U. S. 968.] Motion of petitioner for appointment of counsel granted. Jean-Claude Andre, Esq., of Los Angeles, Cal., is appointed to serve as counsel for petitioner in this case.

No. 07–6705 (07A259). IN RE RICHARD. 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.

No. 07–6706 (07A260). IN RE RICHARD. 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 mandamus and/or prohibition denied.

Certiorari Granted

No. 06–937. QUANTA COMPUTER, INC., ET AL. *v.* LG ELECTRONICS, INC. C. A. Fed. Cir. Certiorari granted. Petitioners' brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. *Amici curiae* briefs are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is filed, or if in support of neither party, within seven days after petitioners' brief is filed. Reported below: 453 F. 3d 1364.

No. 06–1037. KENTUCKY RETIREMENT SYSTEMS ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari granted. Petitioners' brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. *Amici curiae* briefs are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is filed, or if in support of neither party, within seven days after petitioners' brief is filed. Reported below: 467 F. 3d 571.

No. 06–1082. VIRGINIA *v.* MOORE. Sup. Ct. Va. Certiorari granted. Petitioner's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. *Amici curiae* briefs are to be filed with

the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is filed, or if in support of neither party, within seven days after petitioner's brief is filed. Reported below: 272 Va. 717, 636 S. E. 2d 395.

No. 06–1181. DADA *v.* KEISLER, ACTING ATTORNEY GENERAL. C. A. 5th Cir. Certiorari granted limited to the following question: "Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure." Petitioner's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. *Amici curiae* briefs are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is filed, or if in support of neither party, within seven days after petitioner's brief is filed. Reported below: 207 Fed. Appx. 425.

No. 06–1321. GOMEZ-PEREZ *v.* POTTER, POSTMASTER GENERAL. C. A. 1st Cir. Certiorari granted. Petitioner's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. *Amici curiae* briefs are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is filed, or if in support of neither party, within seven days after petitioner's brief is filed. Reported below: 476 F. 3d 54.

No. 06–1346. ALI *v.* ACHIM ET AL. C. A. 7th Cir. Certiorari granted. Petitioner's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. Respondents' brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Fri-

day, December 28, 2007. *Amici curiae* briefs are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is filed, or if in support of neither party, within seven days after petitioner's brief is filed. Reported below: 468 F. 3d 462.

No. 06–1413. MeadWestvaco Corp., Successor in Interest to Mead Corp. *v.* Illinois Department of Revenue et al. App. Ct. Ill., 1st Dist. Certiorari granted. Petitioner's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. Respondents' brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. *Amici curiae* briefs are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is filed, or if in support of neither party, within seven days after petitioner's brief is filed. Reported below: 371 Ill. App. 3d 108, 861 N. E. 2d 1131.

No. 06–1431. CBOCS West, Inc. *v.* Humphries. C. A. 7th Cir. Certiorari granted. Petitioner's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. *Amici curiae* briefs are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is filed, or if in support of neither party, within seven days after petitioner's brief is filed. Reported below: 474 F. 3d 387.

No. 06–1457. Morgan Stanley Capital Group Inc. *v.* Public Utility District No. 1 of Snohomish County, Washington, et al.; and

No. 06–1462. Calpine Energy Services, L. P., et al. *v.* Public Utility District No. 1 of Snohomish County, Washington, et al. C. A. 9th Cir. Motion of Golden State Water Company for disqualification of counsel in No. 06–1457 denied. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Petitioners' brief is to be filed with

the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. Respondents' brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. *Amici curiae* briefs are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is filed, or if in support of neither party, within seven days after petitioners' brief is filed. THE CHIEF JUSTICE and JUSTICE BREYER took no part in the consideration or decision of this motion and these petitions. Reported below: 471 F. 3d 1053.

No. 06–1463. PRESTON *v.* FERRER. Ct. App. Cal., 2d App. Dist. Certiorari granted. Petitioner's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. *Amici curiae* briefs are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is filed, or if in support of neither party, within seven days after petitioner's brief is filed. Reported below: 145 Cal. App. 4th 440, 51 Cal. Rptr. 3d 628.

No. 06–1498. WARNER-LAMBERT CO., LLC, ET AL. *v.* KENT ET AL. C. A. 2d Cir. Certiorari granted. Petitioners' brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. Respondents' brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. *Amici curiae* briefs are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is filed, or if in support of neither party, within seven days after petitioners' brief is filed. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 467 F. 3d 85.

No. 06–1509. BOULWARE *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted limited to the following question: "Whether the diversion of corporate funds to a shareholder of a corporation without earnings and profits automatically qualifies as a nontaxable return of capital up to the shareholder's stock basis, see 26 U. S. C. § 301(c)(2), even if the diversion was not intended as a return of capital." Petitioner's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. *Amici curiae* briefs are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is filed, or if in support of neither party, within seven days after petitioner's brief is filed. Reported below: 470 F. 3d 931.

No. 06–1646. UNITED STATES *v.* RODRIQUEZ. C. A. 9th Cir. Certiorari granted. Petitioner's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. *Amici curiae* briefs are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is filed, or if in support of neither party, within seven days after petitioner's brief is filed. Reported below: 464 F. 3d 1072.

No. 06–11543. BEGAY *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Petitioner's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. *Amici curiae* briefs are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is

filed, or if in support of neither party, within seven days after petitioner's brief is filed. Reported below: 470 F. 3d 964.

No. 06–11612. GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following questions: "(1) Must a federal criminal defendant explicitly and personally waive his right to have an Article III judge preside over *voir dire?* (2) Did the Court of Appeals err when it reviewed petitioner's objection for plain error?" Petitioner's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. *Amici curiae* briefs are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is filed, or if in support of neither party, within seven days after petitioner's brief is filed. Reported below: 483 F. 3d 390.

No. 07–21. CRAWFORD ET AL. *v.* MARION COUNTY ELECTION BOARD ET AL.; and

No. 07–25. INDIANA DEMOCRATIC PARTY ET AL. *v.* ROKITA, SECRETARY OF STATE OF INDIANA, ET AL. C. A. 7th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Petitioners' brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. Respondents' brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. *Amici curiae* briefs are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is filed, or if in support of neither party, within seven days after petitioners' brief is filed. Reported below: 472 F. 3d 949.

No. 07–5439. BAZE ET AL. *v.* REES, COMMISSIONER, KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Ky. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted. Petitioners' brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday,

November 5, 2007. Respondents' brief is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. *Amici curiae* briefs are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., seven days after the brief for the party supported is filed, or if in support of neither party, within seven days after petitioners' brief is filed. Reported below: 217 S. W. 3d 207.

Certiorari Denied

No. 07–5058. CHI *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 223 Fed. Appx. 435.

No. 07–5425. TURNER *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 3d 292.

SEPTEMBER 27, 2007

Miscellaneous Order

No. 07A272. TURNER *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending the timely filing and disposition of a 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.

SEPTEMBER 28, 2007

Dismissal Under Rule 46

No. 06–1578. ANDALUSIA DISTRIBUTING CO., INC., ET AL. *v.* R. J. REYNOLDS TOBACCO CO. (Reported below: 477 F. 3d 854); and ANDALUSIA DISTRIBUTING CO., INC., ET AL. *v.* PHILIP MORRIS USA, INC. C. A. 6th Cir. Certiorari dismissed as to petitioner George Wholesale Company, Ltd., under this Court's Rule 46.

RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED JULY 17, 2007

EFFECTIVE OCTOBER 1, 2007

The following are the Rules of the Supreme Court of the United States as revised on July 17, 2007. See *post*, p. 1196. The amended Rules became effective October 1, 2007, as provided in Rule 48, *post*, p. 1256.

For previous revisions of the Rules of the Supreme Court see 346 U. S. 949, 388 U. S. 931, 398 U. S. 1013, 445 U. S. 985, 493 U. S. 1099, 515 U. S. 1197, 519 U. S. 1161, 525 U. S. 1191, 537 U. S. 1249, and 544 U. S. 1073.

ORDER ADOPTING REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, JULY 17, 2007

IT IS ORDERED that the revised Rules of this Court, today approved by the Court and lodged with the Clerk, shall be effective October 1, 2007, and be printed as an appendix to the United States Reports.

IT IS FURTHER ORDERED that the Rules promulgated May 2, 2005, see 544 U. S. 1071, shall be rescinded as of September 30, 2007, and that the revised Rules shall govern all proceedings in cases commenced after that date and, to the extent feasible and just, cases then pending.

RULES OF THE SUPREME COURT OF THE UNITED STATES

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RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED JULY 14, 2007—EFFECTIVE OCTOBER 1, 2007

PART I. THE COURT

Rule 1. Clerk

1. The Clerk receives documents for filing with the Court and has authority to reject any submitted filing that does not comply with these Rules.

2. The Clerk maintains the Court's records and will not permit any of them to be removed from the Court building except as authorized by the Court. Any document filed with the Clerk and made a part of the Court's records may not thereafter be withdrawn from the official Court files. After the conclusion of proceedings in this Court, original records and documents transmitted to this Court by any other court will be returned to the court from which they were received.

3. Unless the Court or the Chief Justice orders otherwise, the Clerk's office is open from 9 a.m. to 5 p.m., Monday through Friday, except on federal legal holidays listed in 5 U. S. C. § 6103.

Rule 2. Library

1. The Court's library is available for use by appropriate personnel of this Court, members of the Bar of this Court, Members of Congress and their legal staffs, and attorneys for the United States and for federal departments and agencies.

2. The library's hours are governed by regulations made by the Librarian with the approval of the Chief Justice or the Court.

3. Library books may not be removed from the Court building, except by a Justice or a member of a Justice's staff.

Rule 3. Term

The Court holds a continuous annual Term commencing on the first Monday in October and ending on the day before the first Monday in October of the following year. See 28 U. S. C. §2. At the end of each Term, all cases pending on the docket are continued to the next Term.

Rule 4. Sessions and Quorum

1. Open sessions of the Court are held beginning at 10 a.m. on the first Monday in October of each year, and thereafter as announced by the Court. Unless it orders otherwise, the Court sits to hear arguments from 10 a.m. until noon and from 1 p.m. until 3 p.m.

2. Six Members of the Court constitute a quorum. See 28 U. S. C. §1. In the absence of a quorum on any day appointed for holding a session of the Court, the Justices attending—or if no Justice is present, the Clerk or a Deputy Clerk—may announce that the Court will not meet until there is a quorum.

3. When appropriate, the Court will direct the Clerk or the Marshal to announce recesses.

Part II. Attorneys and Counselors

Rule 5. Admission to the Bar

1. To qualify for admission to the Bar of this Court, an applicant must have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for a period of at least three years immediately before the date of application; must not have been the subject of any adverse disciplinary action pronounced or in effect during that 3-year period; and must appear to the Court to be of good moral and professional character.

2. Each applicant shall file with the Clerk (1) a certificate from the presiding judge, clerk, or other authorized official

of that court evidencing the applicant's admission to practice there and the applicant's current good standing, and (2) a completely executed copy of the form approved by this Court and furnished by the Clerk containing (a) the applicant's personal statement, and (b) the statement of two sponsors endorsing the correctness of the applicant's statement, stating that the applicant possesses all the qualifications required for admission, and affirming that the applicant is of good moral and professional character. Both sponsors must be members of the Bar of this Court who personally know, but are not related to, the applicant.

3. If the documents submitted demonstrate that the applicant possesses the necessary qualifications, and if the applicant has signed the oath or affirmation and paid the required fee, the Clerk will notify the applicant of acceptance by the Court as a member of the Bar and issue a certificate of admission. An applicant who so wishes may be admitted in open court on oral motion by a member of the Bar of this Court, provided that all other requirements for admission have been satisfied.

4. Each applicant shall sign the following oath or affirmation: I, ..., do solemnly swear (or affirm) that as an attorney and as a counselor of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States.

5. The fee for admission to the Bar and a certificate bearing the seal of the Court is $200, payable to the United States Supreme Court. The Marshal will deposit such fees in a separate fund to be disbursed by the Marshal at the direction of the Chief Justice for the costs of admissions, for the benefit of the Court and its Bar, and for related purposes.

6. The fee for a duplicate certificate of admission to the Bar bearing the seal of the Court is $15, and the fee for a certificate of good standing is $10, payable to the United States Supreme Court. The proceeds will be maintained by the Marshal as provided in paragraph 5 of this Rule.

Rule 6. Argument *Pro Hac Vice*

1. An attorney not admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for the requisite three years, but otherwise eligible for admission to practice in this Court under Rule 5.1, may be permitted to argue *pro hac vice.*

2. An attorney qualified to practice in the courts of a foreign state may be permitted to argue *pro hac vice.*

3. Oral argument *pro hac vice* is allowed only on motion of the counsel of record for the party on whose behalf leave is requested. The motion shall state concisely the qualifications of the attorney who is to argue *pro hac vice.* It shall be filed with the Clerk, in the form required by Rule 21, no later than the date on which the respondent's or appellee's brief on the merits is due to be filed, and it shall be accompanied by proof of service as required by Rule 29.

Rule 7. Prohibition Against Practice

No employee of this Court shall practice as an attorney or counselor in any court or before any agency of government while employed by the Court; nor shall any person after leaving such employment participate in any professional capacity in any case pending before this Court or in any case being considered for filing in this Court, until two years have elapsed after separation; nor shall a former employee ever participate in any professional capacity in any case that was pending in this Court during the employee's tenure.

Rule 8. Disbarment and Disciplinary Action

1. Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, the Court will enter an order suspending that member from practice before this Court and affording the member an opportunity to show cause, within 40 days, why a disbarment order should not be entered. Upon response, or if no response is timely filed, the Court will enter an appropriate order.

2. After reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court.

Rule 9. Appearance of Counsel

1. An attorney seeking to file a document in this Court in a representative capacity must first be admitted to practice before this Court as provided in Rule 5, except that admission to the Bar of this Court is not required for an attorney appointed under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute. The attorney whose name, address, and telephone number appear on the cover of a document presented for filing is considered counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record shall be clearly identified. See Rule 34.1(f).

2. An attorney representing a party who will not be filing a document shall enter a separate notice of appearance as counsel of record indicating the name of the party represented. A separate notice of appearance shall also be entered whenever an attorney is substituted as counsel of record in a particular case.

Part III. Jurisdiction on Writ of Certiorari

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Rule 11. Certiorari to a United States Court of Appeals Before Judgment

A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. See 28 U. S. C. § 2101(e).

Rule 12. Review on Certiorari: How Sought; Parties

1. Except as provided in paragraph 2 of this Rule, the petitioner shall file 40 copies of a petition for a writ of certiorari, prepared as required by Rule 33.1, and shall pay the Rule 38(a) docket fee.

2. A petitioner proceeding *in forma pauperis* under Rule 39 shall file an original and 10 copies of a petition for a writ of certiorari prepared as required by Rule 33.2, together with an original and 10 copies of the motion for leave to proceed *in forma pauperis*. A copy of the motion shall precede and be attached to each copy of the petition. An inmate confined in an institution, if proceeding *in forma pauperis* and not represented by counsel, need file only an original petition and motion.

3. Whether prepared under Rule 33.1 or Rule 33.2, the petition shall comply in all respects with Rule 14 and shall be submitted with proof of service as required by Rule 29. The case then will be placed on the docket. It is the petitioner's duty to notify all respondents promptly, on a form supplied by the Clerk, of the date of filing, the date the case was placed on the docket, and the docket number of the case. The notice shall be served as required by Rule 29.

4. Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party not shown on the petition as joined therein at the time the petition is filed may not later join in that petition. When two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices. A petition for a writ of certiorari may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached.

5. No more than 30 days after a case has been placed on the docket, a respondent seeking to file a conditional cross-petition (*i. e.*, a cross-petition that otherwise would be untimely) shall file, with proof of service as required by Rule 29, 40 copies of the cross-petition prepared as required by Rule 33.1, except that a cross-petitioner proceeding *in forma pauperis* under Rule 39 shall comply with Rule 12.2. The cross-petition shall comply in all respects with this Rule and Rule 14, except that material already reproduced in the ap-

pendix to the opening petition need not be reproduced again. A cross-petitioning respondent shall pay the Rule 38(a) docket fee or submit a motion for leave to proceed *in forma pauperis*. The cover of the cross-petition shall indicate clearly that it is a conditional cross-petition. The cross-petition then will be placed on the docket, subject to the provisions of Rule 13.4. It is the cross-petitioner's duty to notify all cross-respondents promptly, on a form supplied by the Clerk, of the date of filing, the date the cross-petition was placed on the docket, and the docket number of the cross-petition. The notice shall be served as required by Rule 29. A cross-petition for a writ of certiorari may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The time to file a conditional cross-petition will not be extended.

6. All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be served as required by Rule 29 on all parties to the proceeding below. A party noted as no longer interested may remain a party by notifying the Clerk promptly, with service on the other parties, of an intention to remain a party. All parties other than the petitioner are considered respondents, but any respondent who supports the position of a petitioner shall meet the petitioner's time schedule for filing documents, except that a response supporting the petition shall be filed within 20 days after the case is placed on the docket, and that time will not be extended. Parties who file no document will not qualify for any relief from this Court.

7. The clerk of the court having possession of the record shall keep it until notified by the Clerk of this Court to certify and transmit it. In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court. When requested by the

Clerk of this Court to certify and transmit the record, or any part of it, the clerk of the court having possession of the record shall number the documents to be certified and shall transmit therewith a numbered list specifically identifying each document transmitted. If the record, or stipulated portions, have been printed for the use of the court below, that printed record, plus the proceedings in the court below, may be certified as the record unless one of the parties or the Clerk of this Court requests otherwise. The record may consist of certified copies, but if the lower court is of the view that original documents of any kind should be seen by this Court, that court may provide by order for the transport, safekeeping, and return of such originals.

Rule 13. Review on Certiorari: Time for Petitioning

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, *e. g.*, 28 U. S. C. § 2101(c).

3. 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, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, 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 rehearing or, if rehearing is granted, the subsequent entry of judgment.

4. A cross-petition for a writ of certiorari is timely when it is filed with the Clerk as provided in paragraphs 1, 3, and 5 of this Rule, or in Rule 12.5. However, a conditional cross-petition (which except for Rule 12.5 would be untimely) will not be granted unless another party's timely petition for a writ of certiorari is granted.

5. For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. An application to extend the time to file shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified. The application must be filed with the Clerk at least 10 days before the date the petition is due, except in extraordinary circumstances. For the time and manner of presenting the application, see Rules 21, 22, 30, and 33.2. An application to extend the time to file a petition for a writ of certiorari is not favored.

Rule 14. Content of a Petition for a Writ of Certiorari

1. A petition for a writ of certiorari shall contain, in the order indicated:

(a) The questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. If the petitioner or respondent is under a death sentence that may be affected by the disposition of the petition, the notation "capital case" shall precede the questions presented. The questions shall be set out on the first page following the cover, and no other information may appear on that page. The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed (unless the caption of the case contains the names of all the parties), and a corporate disclosure statement as required by Rule 29.6.

(c) If the petition exceeds five pages or 1,500 words, a table of contents and a table of cited authorities. The table of contents shall include the items contained in the appendix.

(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies.

(e) A concise statement of the basis for jurisdiction in this Court, showing:

(i) the date the judgment or order sought to be reviewed was entered (and, if applicable, a statement that the petition is filed under this Court's Rule 11);

(ii) the date of any order respecting rehearing, and the date and terms of any order granting an extension of time to file the petition for a writ of certiorari;

(iii) express reliance on Rule 12.5, when a cross-petition for a writ of certiorari is filed under that Rule, and the date of docketing of the petition for a writ of certiorari in connection with which the cross-petition is filed;

(iv) the statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question; and

(v) if applicable, a statement that the notifications required by Rule 29.4(b) or (c) have been made.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text shall be set out in the appendix referred to in subparagraph 1(i).

(g) A concise statement of the case setting out the facts material to consideration of the questions presented, and also containing the following:

(i) If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e. g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

(ii) If review of a judgment of a United States court of appeals is sought, the basis for federal jurisdiction in the court of first instance.

(h) A direct and concise argument amplifying the reasons relied on for allowance of the writ. See Rule 10.

(i) An appendix containing, in the order indicated:

(i) the opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed;

(ii) any other relevant opinions, orders, findings of fact, and conclusions of law entered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment, of those in companion cases (each document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry);

(iii) any order on rehearing, including the caption showing the name of the issuing court, the title and number of the case, and the date of entry;

(iv) the judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in sub-subparagraph (i) of this subparagraph;

(v) material required by subparagraphs 1(f) or 1(g)(i); and

(vi) any other material the petitioner believes essential to understand the petition.

If the material required by this subparagraph is voluminous, it may be presented in a separate volume or volumes with appropriate covers.

2. All contentions in support of a petition for a writ of certiorari shall be set out in the body of the petition, as provided in subparagraph 1(h) of this Rule. No separate brief in support of a petition for a writ of certiorari may be filed, and the Clerk will not file any petition for a writ of certiorari to which any supporting brief is annexed or appended.

3. A petition for a writ of certiorari should be stated briefly and in plain terms and may not exceed the word or page limitations specified in Rule 33.

4. The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.

5. If the Clerk determines that a petition submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition submitted in accordance with Rule 29.2 no more than 60 days after the date of the Clerk's letter will be deemed timely.

Rule 15. Briefs in Opposition; Reply Briefs; Supplemental Briefs

1. A brief in opposition to a petition for a writ of certiorari may be filed by the respondent in any case, but is not manda-

tory except in a capital case, see Rule 14.1(a), or when ordered by the Court.

2. A brief in opposition should be stated briefly and in plain terms and may not exceed the word or page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

3. Any brief in opposition shall be filed within 30 days after the case is placed on the docket, unless the time is extended by the Court or a Justice, or by the Clerk under Rule 30.4. Forty copies shall be filed, except that a respondent proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the brief in opposition. If the petitioner is proceeding *in forma pauperis*, the respondent shall prepare its brief in opposition, if any, as required by Rule 33.2, and shall file an original and 10 copies of that brief. Whether prepared under Rule 33.1 or Rule 33.2, the brief in opposition shall comply with the requirements of Rule 24 governing a respondent's brief, except that no summary of the argument is required. A brief in opposition may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The brief in opposition shall be served as required by Rule 29.

4. No motion by a respondent to dismiss a petition for a writ of certiorari may be filed. Any objections to the jurisdiction of the Court to grant a petition for a writ of certiorari shall be included in the brief in opposition.

5. The Clerk will distribute the petition to the Court for its consideration upon receiving an express waiver of the right to file a brief in opposition, or, if no waiver or brief in opposition is filed, upon the expiration of the time allowed for filing. If a brief in opposition is timely filed, the Clerk will distribute the petition, brief in opposition, and any reply brief to the Court for its consideration no less than 10 days after the brief in opposition is filed.

6. Any petitioner may file a reply brief addressed to new points raised in the brief in opposition, but distribution and consideration by the Court under paragraph 5 of this Rule will not be deferred pending its receipt. Forty copies shall be filed, except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The reply brief shall be served as required by Rule 29.

7. If a cross-petition for a writ of certiorari has been docketed, distribution of both petitions will be deferred until the cross-petition is due for distribution under this Rule.

8. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by this Rule. Forty copies shall be filed, except that a party proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

Rule 16. Disposition of a Petition for a Writ of Certiorari

1. After considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

2. Whenever the Court grants a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment is to be reviewed. The case then will be scheduled for briefing and oral argument. If the record has not previously been filed in this Court, the Clerk will request the clerk of the court having possession of the record to certify and transmit it. A formal writ will not issue unless specially directed.

3. Whenever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.

Part IV. Other Jurisdiction

Rule 17. Procedure in an Original Action

1. This Rule applies only to an action invoking the Court's original jurisdiction under Article III of the Constitution of the United States. See also 28 U. S. C. § 1251 and U. S. Const., Amdt. 11. A petition for an extraordinary writ in aid of the Court's appellate jurisdiction shall be filed as provided in Rule 20.

2. The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides.

3. The initial pleading shall be preceded by a motion for leave to file, and may be accompanied by a brief in support of the motion. Forty copies of each document shall be filed,

with proof of service. Service shall be as required by Rule 29, except that when an adverse party is a State, service shall be made on both the Governor and the Attorney General of that State.

4. The case will be placed on the docket when the motion for leave to file and the initial pleading are filed with the Clerk. The Rule 38(a) docket fee shall be paid at that time.

5. No more than 60 days after receiving the motion for leave to file and the initial pleading, an adverse party shall file 40 copies of any brief in opposition to the motion, with proof of service as required by Rule 29. The Clerk will distribute the filed documents to the Court for its consideration upon receiving an express waiver of the right to file a brief in opposition, or, if no waiver or brief is filed, upon the expiration of the time allowed for filing. If a brief in opposition is timely filed, the Clerk will distribute the filed documents to the Court for its consideration no less than 10 days after the brief in opposition is filed. A reply brief may be filed, but consideration of the case will not be deferred pending its receipt. The Court thereafter may grant or deny the motion, set it for oral argument, direct that additional documents be filed, or require that other proceedings be conducted.

6. A summons issued out of this Court shall be served on the defendant 60 days before the return day specified therein. If the defendant does not respond by the return day, the plaintiff may proceed *ex parte*.

7. Process against a State issued out of this Court shall be served on both the Governor and the Attorney General of that State.

Rule 18. Appeal from a United States District Court

1. When a direct appeal from a decision of a United States district court is authorized by law, the appeal is commenced by filing a notice of appeal with the clerk of the district court within the time provided by law after entry of the judgment sought to be reviewed. The time to file may not be extended. The notice of appeal shall specify the parties taking

the appeal, designate the judgment, or part thereof, appealed from and the date of its entry, and specify the statute or statutes under which the appeal is taken. A copy of the notice of appeal shall be served on all parties to the proceeding as required by Rule 29, and proof of service shall be filed in the district court together with the notice of appeal.

2. All parties to the proceeding in the district court are deemed parties entitled to file documents in this Court, but a party having no interest in the outcome of the appeal may so notify the Clerk of this Court and shall serve a copy of the notice on all other parties. Parties interested jointly, severally, or otherwise in the judgment may appeal separately, or any two or more may join in an appeal. When two or more judgments involving identical or closely related questions are sought to be reviewed on appeal from the same court, a notice of appeal for each judgment shall be filed with the clerk of the district court, but a single jurisdictional statement covering all the judgments suffices. Parties who file no document will not qualify for any relief from this Court.

3. No more than 60 days after filing the notice of appeal in the district court, the appellant shall file 40 copies of a jurisdictional statement and shall pay the Rule 38 docket fee, except that an appellant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the jurisdictional statement. The jurisdictional statement shall follow, insofar as applicable, the form for a petition for a writ of certiorari prescribed by Rule 14, and shall be served as required by Rule 29. The case will then be placed on the docket. It is the appellant's duty to notify all appellees promptly, on a form supplied by the Clerk, of the date of filing, the date the case was placed on the docket, and the docket number of the case. The notice shall be served as required by Rule 29. The appendix shall include a copy of the notice of appeal showing the date

it was filed in the district court. For good cause, a Justice may extend the time to file a jurisdictional statement for a period not exceeding 60 days. An application to extend the time to file a jurisdictional statement shall set out the basis for jurisdiction in this Court; identify the judgment sought to be reviewed; include a copy of the opinion, any order respecting rehearing, and the notice of appeal; and set out specific reasons why an extension of time is justified. For the time and manner of presenting the application, see Rules 21, 22, and 30. An application to extend the time to file a jurisdictional statement is not favored.

4. No more than 30 days after a case has been placed on the docket, an appellee seeking to file a conditional cross-appeal (*i. e.*, a cross-appeal that otherwise would be untimely) shall file, with proof of service as required by Rule 29, a jurisdictional statement that complies in all respects (including number of copies filed) with paragraph 3 of this Rule, except that material already reproduced in the appendix to the opening jurisdictional statement need not be reproduced again. A cross-appealing appellee shall pay the Rule 38 docket fee or submit a motion for leave to proceed *in forma pauperis.* The cover of the cross-appeal shall indicate clearly that it is a conditional cross-appeal. The cross-appeal then will be placed on the docket. It is the cross-appellant's duty to notify all cross-appellees promptly, on a form supplied by the Clerk, of the date of filing, the date the cross-appeal was placed on the docket, and the docket number of the cross-appeal. The notice shall be served as required by Rule 29. A cross-appeal may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The time to file a cross-appeal will not be extended.

5. After a notice of appeal has been filed in the district court, but before the case is placed on this Court's docket, the parties may dismiss the appeal by stipulation filed in the district court, or the district court may dismiss the appeal on the appellant's motion, with notice to all parties. If a notice of appeal has been filed, but the case has not been

placed on this Court's docket within the time prescribed for docketing, the district court may dismiss the appeal on the appellee's motion, with notice to all parties, and may make any just order with respect to costs. If the district court has denied the appellee's motion to dismiss the appeal, the appellee may move this Court to docket and dismiss the appeal by filing an original and 10 copies of a motion presented in conformity with Rules 21 and 33.2. The motion shall be accompanied by proof of service as required by Rule 29, and by a certificate from the clerk of the district court, certifying that a notice of appeal was filed and that the appellee's motion to dismiss was denied. The appellant may not thereafter file a jurisdictional statement without special leave of the Court, and the Court may allow costs against the appellant.

6. Within 30 days after the case is placed on this Court's docket, the appellee may file a motion to dismiss, to affirm, or in the alternative to affirm or dismiss. Forty copies of the motion shall be filed, except that an appellee proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the motion to dismiss, to affirm, or in the alternative to affirm or dismiss. The motion shall follow, insofar as applicable, the form for a brief in opposition prescribed by Rule 15, and shall comply in all respects with Rule 21.

7. The Clerk will distribute the jurisdictional statement to the Court for its consideration upon receiving an express waiver of the right to file a motion to dismiss or to affirm or, if no waiver or motion is filed, upon the expiration of the time allowed for filing. If a motion to dismiss or to affirm is timely filed, the Clerk will distribute the jurisdictional statement, motion, and any brief opposing the motion to the Court for its consideration no less than 10 days after the motion is filed.

8. Any appellant may file a brief opposing a motion to dismiss or to affirm, but distribution and consideration by the

Court under paragraph 7 of this Rule will not be deferred pending its receipt. Forty copies shall be filed, except that an appellant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The brief shall be served as required by Rule 29.

9. If a cross-appeal has been docketed, distribution of both jurisdictional statements will be deferred until the cross-appeal is due for distribution under this Rule.

10. Any party may file a supplemental brief at any time while a jurisdictional statement is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by Rule 15. Forty copies shall be filed, except that a party proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

11. The clerk of the district court shall retain possession of the record until notified by the Clerk of this Court to certify and transmit it. See Rule 12.7.

12. After considering the documents distributed under this Rule, the Court may dispose summarily of the appeal on the merits, note probable jurisdiction, or postpone consideration of jurisdiction until a hearing of the case on the merits. If not disposed of summarily, the case stands for briefing and oral argument on the merits. If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and at oral argument, shall address the question of jurisdiction. If the record has not previously been filed in this Court, the Clerk of this Court will request the clerk of the court in possession of the record to certify and transmit it.

13. If the Clerk determines that a jurisdictional statement submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk

will return it with a letter indicating the deficiency. If a corrected jurisdictional statement is submitted in accordance with Rule 29.2 no more than 60 days after the date of the Clerk's letter, it will be deemed timely.

Rule 19. Procedure on a Certified Question

1. A United States court of appeals may certify to this Court a question or proposition of law on which it seeks instruction for the proper decision of a case. The certificate shall contain a statement of the nature of the case and the facts on which the question or proposition of law arises. Only questions or propositions of law may be certified, and they shall be stated separately and with precision. The certificate shall be prepared as required by Rule 33.2 and shall be signed by the clerk of the court of appeals.

2. When a question is certified by a United States court of appeals, this Court, on its own motion or that of a party, may consider and decide the entire matter in controversy. See 28 U. S. C. § 1254(2).

3. When a question is certified, the Clerk will notify the parties and docket the case. Counsel shall then enter their appearances. After docketing, the Clerk will submit the certificate to the Court for a preliminary examination to determine whether the case should be briefed, set for argument, or dismissed. No brief may be filed until the preliminary examination of the certificate is completed.

4. If the Court orders the case briefed or set for argument, the parties will be notified and permitted to file briefs. The Clerk of this Court then will request the clerk of the court in possession of the record to certify and transmit it. Any portion of the record to which the parties wish to direct the Court's particular attention should be printed in a joint appendix, prepared in conformity with Rule 26 by the appellant or petitioner in the court of appeals, but the fact that any part of the record has not been printed does not prevent the parties or the Court from relying on it.

5. A brief on the merits in a case involving a certified question shall comply with Rules 24, 25, and 33.1, except that

the brief for the party who is the appellant or petitioner below shall be filed within 45 days of the order requiring briefs or setting the case for argument.

Rule 20. Procedure on a Petition for an Extraordinary Writ

1. Issuance by the Court of an extraordinary writ authorized by 28 U. S. C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

2. A petition seeking a writ authorized by 28 U. S. C. § 1651(a), § 2241, or § 2254(a) shall be prepared in all respects as required by Rules 33 and 34. The petition shall be captioned "*In re* [name of petitioner]" and shall follow, insofar as applicable, the form of a petition for a writ of certiorari prescribed by Rule 14. All contentions in support of the petition shall be included in the petition. The case will be placed on the docket when 40 copies of the petition are filed with the Clerk and the docket fee is paid, except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the petition. The petition shall be served as required by Rule 29 (subject to subparagraph 4(b) of this Rule).

3. (a) A petition seeking a writ of prohibition, a writ of mandamus, or both in the alternative shall state the name and office or function of every person against whom relief is sought and shall set out with particularity why the relief sought is not available in any other court. A copy of the judgment with respect to which the writ is sought, including any related opinion, shall be appended to the petition to-

gether with any other document essential to understanding the petition.

(b) The petition shall be served on every party to the proceeding with respect to which relief is sought. Within 30 days after the petition is placed on the docket, a party shall file 40 copies of any brief or briefs in opposition thereto, which shall comply fully with Rule 15. If a party named as a respondent does not wish to respond to the petition, that party may so advise the Clerk and all other parties by letter. All persons served are deemed respondents for all purposes in the proceedings in this Court.

4. (a) A petition seeking a writ of habeas corpus shall comply with the requirements of 28 U. S. C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242, which requires a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U. S. C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.

(b) Habeas corpus proceedings, except in capital cases, are *ex parte*, unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. A response, if ordered, or in a capital case, shall comply fully with Rule 15. Neither the denial of the petition, without more, nor an order of transfer to a district court under the authority of 28 U. S. C. § 2241(b), is an adjudication on the merits, and therefore does not preclude further application to another court for the relief sought.

5. The Clerk will distribute the documents to the Court for its consideration when a brief in opposition under subparagraph 3(b) of this Rule has been filed, when a response

under subparagraph 4(b) has been ordered and filed, when the time to file has expired, or when the right to file has been expressly waived.

6. If the Court orders the case set for argument, the Clerk will notify the parties whether additional briefs are required, when they shall be filed, and, if the case involves a petition for a common-law writ of certiorari, that the parties shall prepare a joint appendix in accordance with Rule 26.

Part V. Motions and Applications

Rule 21. Motions to the Court

1. Every motion to the Court shall clearly state its purpose and the facts on which it is based and may present legal argument in support thereof. No separate brief may be filed. A motion should be concise and shall comply with any applicable page limits. Rule 22 governs an application addressed to a single Justice.

2. (a) A motion in any action within the Court's original jurisdiction shall comply with Rule 17.3.

(b) A motion to dismiss as moot (or a suggestion of mootness), a motion for leave to file a brief as *amicus curiae*, and any motion the granting of which would dispose of the entire case or would affect the final judgment to be entered (other than a motion to docket and dismiss under Rule 18.5 or a motion for voluntary dismissal under Rule 46) shall be prepared as required by Rule 33.1, and 40 copies shall be filed, except that a movant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file a motion prepared as required by Rule 33.2, and shall file the number of copies required for a petition by such a person under Rule 12.2. The motion shall be served as required by Rule 29.

(c) Any other motion to the Court shall be prepared as required by Rule 33.2; the moving party shall file an original and 10 copies. The Court subsequently may order the moving party to prepare the motion as required by Rule 33.1; in that event, the party shall file 40 copies.

3. A motion to the Court shall be filed with the Clerk and shall be accompanied by proof of service as required by Rule 29. No motion may be presented in open Court, other than a motion for admission to the Bar, except when the proceeding to which it refers is being argued. Oral argument on a motion will not be permitted unless the Court so directs.

4. Any response to a motion shall be filed as promptly as possible considering the nature of the relief sought and any asserted need for emergency action, and, in any event, within 10 days of receipt, unless the Court or a Justice, or the Clerk under Rule 30.4, orders otherwise. A response to a motion prepared as required by Rule 33.1, except a response to a motion for leave to file an *amicus curiae* brief (see Rule 37.5), shall be prepared in the same manner if time permits. In an appropriate case, the Court may act on a motion without waiting for a response.

Rule 22. Applications to Individual Justices

1. An application addressed to an individual Justice shall be filed with the Clerk, who will transmit it promptly to the Justice concerned if an individual Justice has authority to grant the sought relief.

2. The original and two copies of any application addressed to an individual Justice shall be prepared as required by Rule 33.2, and shall be accompanied by proof of service as required by Rule 29.

3. An application shall be addressed to the Justice allotted to the Circuit from which the case arises. An application arising from the United States Court of Appeals for the Armed Forces shall be addressed to the Chief Justice. When the Circuit Justice is unavailable for any reason, the application addressed to that Justice will be distributed to the Justice then available who is next junior to the Circuit Justice; the turn of the Chief Justice follows that of the most junior Justice.

4. A Justice denying an application will note the denial thereon. Thereafter, unless action thereon is restricted by law to the Circuit Justice or is untimely under Rule 30.2,

the party making an application, except in the case of an application for an extension of time, may renew it to any other Justice, subject to the provisions of this Rule. Except when the denial is without prejudice, a renewed application is not favored. Renewed application is made by a letter to the Clerk, designating the Justice to whom the application is to be directed, and accompanied by 10 copies of the original application and proof of service as required by Rule 29.

5. A Justice to whom an application for a stay or for bail is submitted may refer it to the Court for determination.

6. The Clerk will advise all parties concerned, by appropriately speedy means, of the disposition made of an application.

Rule 23. Stays

1. A stay may be granted by a Justice as permitted by law.

2. A party to a judgment sought to be reviewed may present to a Justice an application to stay the enforcement of that judgment. See 28 U. S. C. § 2101(f).

3. An application for a stay shall set out with particularity why the relief sought is not available from any other court or judge. Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof. An application for a stay shall identify the judgment sought to be reviewed and have appended thereto a copy of the order and opinion, if any, and a copy of the order, if any, of the court or judge below denying the relief sought, and shall set out specific reasons why a stay is justified. The form and content of an application for a stay are governed by Rules 22 and 33.2.

4. A judge, court, or Justice granting an application for a stay pending review by this Court may condition the stay on the filing of a supersedeas bond having an approved surety or sureties. The bond will be conditioned on the satisfaction of the judgment in full, together with any costs, interest, and damages for delay that may be awarded. If a part of the

judgment sought to be reviewed has already been satisfied, or is otherwise secured, the bond may be conditioned on the satisfaction of the part of the judgment not otherwise secured or satisfied, together with costs, interest, and damages.

Part VI. Briefs on the Merits and Oral Argument

Rule 24. Briefs on the Merits: In General

1. A brief on the merits for a petitioner or an appellant shall comply in all respects with Rules 33.1 and 34 and shall contain in the order here indicated:

(a) The questions presented for review under Rule 14.1(a). The questions shall be set out on the first page following the cover, and no other information may appear on that page. The phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.

(b) A list of all parties to the proceeding in the court whose judgment is under review (unless the caption of the case in this Court contains the names of all parties). Any amended corporate disclosure statement as required by Rule 29.6 shall be placed here.

(c) If the brief exceeds five pages, a table of contents and a table of cited authorities.

(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts and administrative agencies.

(e) A concise statement of the basis for jurisdiction in this Court, including the statutory provisions and time factors on which jurisdiction rests.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are

lengthy, their citation alone suffices at this point, and their pertinent text, if not already set out in the petition for a writ of certiorari, jurisdictional statement, or an appendix to either document, shall be set out in an appendix to the brief.

(g) A concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, *e. g.*, App. 12, or to the record, *e. g.*, Record 12.

(h) A summary of the argument, suitably paragraphed. The summary should be a clear and concise condensation of the argument made in the body of the brief; mere repetition of the headings under which the argument is arranged is not sufficient.

(i) The argument, exhibiting clearly the points of fact and of law presented and citing the authorities and statutes relied on.

(j) A conclusion specifying with particularity the relief the party seeks.

2. A brief on the merits for a respondent or an appellee shall conform to the foregoing requirements, except that items required by subparagraphs 1(a), (b), (d), (e), (f), and (g) of this Rule need not be included unless the respondent or appellee is dissatisfied with their presentation by the opposing party.

3. A brief on the merits may not exceed the word limitations specified in Rule 33.1(g). An appendix to a brief may include only relevant material, and counsel are cautioned not to include in an appendix arguments or citations that properly belong in the body of the brief.

4. A reply brief shall conform to those portions of this Rule applicable to the brief for a respondent or an appellee, but, if appropriately divided by topical headings, need not contain a summary of the argument.

5. A reference to the joint appendix or to the record set out in any brief shall indicate the appropriate page number. If the reference is to an exhibit, the page numbers at which the exhibit appears, at which it was offered in evidence, and

at which it was ruled on by the judge shall be indicated, *e. g.*, Pl. Exh. 14, Record 199, 2134.

6. A brief shall be concise, logically arranged with proper headings, and free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief that does not comply with this paragraph.

Rule 25. Briefs on the Merits: Number of Copies and Time to File

1. The petitioner or appellant shall file 40 copies of the brief on the merits within 45 days of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction. Any respondent or appellee who supports the petitioner or appellant shall meet the petitioner's or appellant's time schedule for filing documents.

2. The respondent or appellee shall file 40 copies of the brief on the merits within 30 days after the brief for the petitioner or appellant is filed.

3. The petitioner or appellant shall file 40 copies of the reply brief, if any, within 30 days after the brief for the respondent or appellee is filed, but any reply brief must actually be received by the Clerk not later than 2 p.m. one week before the date of oral argument. Any respondent or appellee supporting the petitioner or appellant may file a reply brief.

4. The time periods stated in paragraphs 1, 2, and 3 of this Rule may be extended as provided in Rule 30. An application to extend the time to file a brief on the merits is not favored. If a case is advanced for hearing, the time to file briefs on the merits may be abridged as circumstances require pursuant to an order of the Court on its own motion or that of a party.

5. A party wishing to present late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included in a brief may file 40 copies of a supplemental brief, restricted to such new matter and otherwise presented in conformity with these Rules, up to

the time the case is called for oral argument or by leave of the Court thereafter.

6. After a case has been argued or submitted, the Clerk will not file any brief, except that of a party filed by leave of the Court.

7. The Clerk will not file any brief that is not accompanied by proof of service as required by Rule 29.

8. An electronic version of every brief on the merits shall be transmitted to the Clerk of Court and to opposing counsel of record at the time the brief is filed in accordance with guidelines established by the Clerk. The electronic transmission requirement is in addition to the requirement that booklet-format briefs be timely filed.

Rule 26. Joint Appendix

1. Unless the Clerk has allowed the parties to use the deferred method described in paragraph 4 of this Rule, the petitioner or appellant, within 45 days after entry of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction, shall file 40 copies of a joint appendix, prepared as required by Rule 33.1. The joint appendix shall contain: (1) the relevant docket entries in all the courts below; (2) any relevant pleadings, jury instructions, findings, conclusions, or opinions; (3) the judgment, order, or decision under review; and (4) any other parts of the record that the parties particularly wish to bring to the Court's attention. Any of the foregoing items already reproduced in a petition for a writ of certiorari, jurisdictional statement, brief in opposition to a petition for a writ of certiorari, motion to dismiss or affirm, or any appendix to the foregoing, that was prepared as required by Rule 33.1, need not be reproduced again in the joint appendix. The petitioner or appellant shall serve three copies of the joint appendix on each of the other parties to the proceeding as required by Rule 29.

2. The parties are encouraged to agree on the contents of the joint appendix. In the absence of agreement, the petitioner or appellant, within 10 days after entry of the order

granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction, shall serve on the respondent or appellee a designation of parts of the record to be included in the joint appendix. Within 10 days after receiving the designation, a respondent or appellee who considers the parts of the record so designated insufficient shall serve on the petitioner or appellant a designation of additional parts to be included in the joint appendix, and the petitioner or appellant shall include the parts so designated. If the Court has permitted the respondent or appellee to proceed *in forma pauperis*, the petitioner or appellant may seek by motion to be excused from printing portions of the record the petitioner or appellant considers unnecessary. In making these designations, counsel should include only those materials the Court should examine; unnecessary designations should be avoided. The record is on file with the Clerk and available to the Justices, and counsel may refer in briefs and in oral argument to relevant portions of the record not included in the joint appendix.

3. When the joint appendix is filed, the petitioner or appellant immediately shall file with the Clerk a statement of the cost of printing 50 copies and shall serve a copy of the statement on each of the other parties as required by Rule 29. Unless the parties agree otherwise, the cost of producing the joint appendix shall be paid initially by the petitioner or appellant; but a petitioner or appellant who considers that parts of the record designated by the respondent or appellee are unnecessary for the determination of the issues presented may so advise the respondent or appellee, who then shall advance the cost of printing the additional parts, unless the Court or a Justice otherwise fixes the initial allocation of the costs. The cost of printing the joint appendix is taxed as a cost in the case, but if a party unnecessarily causes matter to be included in the joint appendix or prints excessive copies, the Court may impose these costs on that party.

4. (a) On the parties' request, the Clerk may allow preparation of the joint appendix to be deferred until after the

briefs have been filed. In that event, the petitioner or appellant shall file the joint appendix no more than 14 days after receiving the brief for the respondent or appellee. The provisions of paragraphs 1, 2, and 3 of this Rule shall be followed, except that the designations referred to therein shall be made by each party when that party's brief is served. Deferral of the joint appendix is not favored.

(b) If the deferred method is used, the briefs on the merits may refer to the pages of the record. In that event, the joint appendix shall include in brackets on each page thereof the page number of the record where that material may be found. A party wishing to refer directly to the pages of the joint appendix may serve and file copies of its brief prepared as required by Rule 33.2 within the time provided by Rule 25, with appropriate references to the pages of the record. In that event, within 10 days after the joint appendix is filed, copies of the brief prepared as required by Rule 33.1 containing references to the pages of the joint appendix in place of, or in addition to, the initial references to the pages of the record, shall be served and filed. No other change may be made in the brief as initially served and filed, except that typographical errors may be corrected.

5. The joint appendix shall be prefaced by a table of contents showing the parts of the record that it contains, in the order in which the parts are set out, with references to the pages of the joint appendix at which each part begins. The relevant docket entries shall be set out after the table of contents, followed by the other parts of the record in chronological order. When testimony contained in the reporter's transcript of proceedings is set out in the joint appendix, the page of the transcript at which the testimony appears shall be indicated in brackets immediately before the statement that is set out. Omissions in the transcript or in any other document printed in the joint appendix shall be indicated by asterisks. Immaterial formal matters (*e. g.*, captions, subscriptions, acknowledgments) shall be omitted. A question and its answer may be contained in a single paragraph.

6. Exhibits designated for inclusion in the joint appendix may be contained in a separate volume or volumes suitably indexed. The transcript of a proceeding before an administrative agency, board, commission, or officer used in an action in a district court or court of appeals is regarded as an exhibit for the purposes of this paragraph.

7. The Court, on its own motion or that of a party, may dispense with the requirement of a joint appendix and may permit a case to be heard on the original record (with such copies of the record, or relevant parts thereof, as the Court may require) or on the appendix used in the court below, if it conforms to the requirements of this Rule.

8. For good cause, the time limits specified in this Rule may be shortened or extended by the Court or a Justice, or by the Clerk under Rule 30.4.

Rule 27. Calendar

1. From time to time, the Clerk will prepare a calendar of cases ready for argument. A case ordinarily will not be called for argument less than two weeks after the brief on the merits for the respondent or appellee is due.

2. The Clerk will advise counsel when they are required to appear for oral argument and will publish a hearing list in advance of each argument session for the convenience of counsel and the information of the public.

3. The Court, on its own motion or that of a party, may order that two or more cases involving the same or related questions be argued together as one case or on such other terms as the Court may prescribe.

Rule 28. Oral Argument

1. Oral argument should emphasize and clarify the written arguments in the briefs on the merits. Counsel should assume that all Justices have read the briefs before oral argument. Oral argument read from a prepared text is not favored.

2. The petitioner or appellant shall open and may conclude the argument. A cross-writ of certiorari or cross-appeal

will be argued with the initial writ of certiorari or appeal as one case in the time allowed for that one case, and the Court will advise the parties who shall open and close.

3. Unless the Court directs otherwise, each side is allowed one-half hour for argument. Counsel is not required to use all the allotted time. Any request for additional time to argue shall be presented by motion under Rule 21 in time to be considered at a schedule Conference prior to the date of oral argument and no later than 7 days after the respondent's or appellee's brief on the merits is filed, and shall set out specifically and concisely why the case cannot be presented within the half-hour limitation. Additional time is rarely accorded.

4. Only one attorney will be heard for each side, except by leave of the Court on motion filed in time to be considered at a schedule Conference prior to the date of oral argument and no later than 7 days after the respondent's or appellee's brief on the merits is filed. Any request for divided argument shall be presented by motion under Rule 21 and shall set out specifically and concisely why more than one attorney should be allowed to argue. Divided argument is not favored.

5. Regardless of the number of counsel participating in oral argument, counsel making the opening argument shall present the case fairly and completely and not reserve points of substance for rebuttal.

6. Oral argument will not be allowed on behalf of any party for whom a brief has not been filed.

7. By leave of the Court, and subject to paragraph 4 of this Rule, counsel for an *amicus curiae* whose brief has been filed as provided in Rule 37 may argue orally on the side of a party, with the consent of that party. In the absence of consent, counsel for an *amicus curiae* may seek leave of the Court to argue orally by a motion setting out specifically and concisely why oral argument would provide assistance to the Court not otherwise available. Such a motion will be granted only in the most extraordinary circumstances.

Part VII. Practice and Procedure

Rule 29. Filing and Service of Documents; Special Notifications; Corporate Listing

1. Any document required or permitted to be presented to the Court or to a Justice shall be filed with the Clerk.

2. A document is timely filed if it is received by the Clerk within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days. If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid. If the postmark is missing or not legible, or if the third-party commercial carrier does not provide the date the document was received by the carrier, the Clerk will require the person who sent the document to submit a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting out the details of the filing and stating that the filing took place on a particular date within the permitted time.

3. Any document required by these Rules to be served may be served personally, by mail, or by third-party commercial carrier for delivery within 3 calendar days on each party to the proceeding at or before the time of filing. If the document has been prepared as required by Rule 33.1, three copies shall be served on each other party separately represented in the proceeding. If the document has been prepared as required by Rule 33.2, service of a single copy on each other separately represented party suffices. If personal service is made, it shall consist of delivery at the office

of the counsel of record, either to counsel or to an employee therein. If service is by mail or third-party commercial carrier, it shall consist of depositing the document with the United States Postal Service, with no less than first-class postage prepaid, or delivery to the carrier for delivery within 3 calendar days, addressed to counsel of record at the proper address. When a party is not represented by counsel, service shall be made on the party, personally, by mail, or by commercial carrier. Ordinarily, service on a party must be by a manner at least as expeditious as the manner used to file the document with the Court.

4. (a) If the United States or any federal department, office, agency, officer, or employee is a party to be served, service shall be made on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530–0001. When an agency of the United States that is a party is authorized by law to appear before this Court on its own behalf, or when an officer or employee of the United States is a party, the agency, officer, or employee shall be served in addition to the Solicitor General.

(b) In any proceeding in this Court in which the constitutionality of an Act of Congress is drawn into question, and neither the United States nor any federal department, office, agency, officer, or employee is a party, the initial document filed in this Court shall recite that 28 U. S. C. § 2403(a) may apply and shall be served on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530–0001. In such a proceeding from any court of the United States, as defined by 28 U. S. C. § 451, the initial document also shall state whether that court, pursuant to 28 U. S. C. § 2403(a), certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question. See Rule 14.1(e)(v).

(c) In any proceeding in this Court in which the constitutionality of any statute of a State is drawn into question, and neither the State nor any agency, officer, or employee thereof

is a party, the initial document filed in this Court shall recite that 28 U. S. C. § 2403(b) may apply and shall be served on the Attorney General of that State. In such a proceeding from any court of the United States, as defined by 28 U. S. C. § 451, the initial document also shall state whether that court, pursuant to 28 U. S. C. § 2403(b), certified to the State Attorney General the fact that the constitutionality of a statute of that State was drawn into question. See Rule 14.1(e)(v).

5. Proof of service, when required by these Rules, shall accompany the document when it is presented to the Clerk for filing and shall be separate from it. Proof of service shall contain, or be accompanied by, a statement that all parties required to be served have been served, together with a list of the names, addresses, and telephone numbers of counsel indicating the name of the party or parties each counsel represents. It is not necessary that service on each party required to be served be made in the same manner or evidenced by the same proof. Proof of service may consist of any one of the following:

(a) an acknowledgment of service, signed by counsel of record for the party served, and bearing the address and telephone number of such counsel;

(b) a certificate of service, reciting the facts and circumstances of service in compliance with the appropriate paragraph or paragraphs of this Rule, and signed by a member of the Bar of this Court representing the party on whose behalf service is made or by an attorney appointed to represent that party under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute; or

(c) a notarized affidavit or declaration in compliance with 28 U. S. C. § 1746, reciting the facts and circumstances of service in accordance with the appropriate paragraph or paragraphs of this Rule, whenever service is made by any person not a member of the Bar of this Court and not an attorney appointed to represent a party under the Criminal

Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute.

6. Every document, except a joint appendix or *amicus curiae* brief, filed by or on behalf of a nongovernmental corporation shall contain a corporate disclosure statement identifying the parent corporations and listing any publicly held company that owns 10% or more of the corporation's stock. If there is no parent or publicly held company owning 10% or more of the corporation's stock, a notation to this effect shall be included in the document. If a statement has been included in a document filed earlier in the case, reference may be made to the earlier document (except when the earlier statement appeared in a document prepared under Rule 33.2), and only amendments to the statement to make it current need be included in the document being filed.

Rule 30. Computation and Extension of Time

1. In the computation of any period of time prescribed or allowed by these Rules, by order of the Court, or by an applicable statute, the day of the act, event, or default from which the designated period begins to run is not included. The last day of the period shall be included, unless it is a Saturday, Sunday, federal legal holiday listed in 5 U. S. C. § 6103, or day on which the Court building is closed by order of the Court or the Chief Justice, in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed.

2. Whenever a Justice or the Clerk is empowered by law or these Rules to extend the time to file any document, an application seeking an extension shall be filed within the period sought to be extended. An application to extend the time to file a petition for a writ of certiorari or to file a jurisdictional statement must be filed at least 10 days before the specified final filing date as computed under these Rules; if filed less than 10 days before the final filing date, such application will not be granted except in the most extraordinary circumstances.

3. An application to extend the time to file a petition for a writ of certiorari, to file a jurisdictional statement, to file a reply brief on the merits, or to file a petition for rehearing shall be made to an individual Justice and presented and served on all other parties as provided by Rule 22. Once denied, such an application may not be renewed.

4. An application to extend the time to file any document or paper other than those specified in paragraph 3 of this Rule may be presented in the form of a letter to the Clerk setting out specific reasons why an extension of time is justified. The letter shall be served on all other parties as required by Rule 29. The application may be acted on by the Clerk in the first instance, and any party aggrieved by the Clerk's action may request that the application be submitted to a Justice or to the Court. The Clerk will report action under this paragraph to the Court as instructed.

Rule 31. Translations

Whenever any record to be transmitted to this Court contains material written in a foreign language without a translation made under the authority of the lower court, or admitted to be correct, the clerk of the court transmitting the record shall advise the Clerk of this Court immediately so that this Court may order that a translation be supplied and, if necessary, printed as part of the joint appendix.

Rule 32. Models, Diagrams, Exhibits, and Lodgings

1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case and brought to this Court for its inspection shall be placed in the custody of the Clerk at least two weeks before the case is to be heard or submitted.

2. All models, diagrams, exhibits, and other items placed in the custody of the Clerk shall be removed by the parties no more than 40 days after the case is decided. If this is not done, the Clerk will notify counsel to remove the articles forthwith. If they are not removed within a reasonable time thereafter, the Clerk will destroy them or dispose of them in any other appropriate way.

3. Any party or *amicus curiae* desiring to lodge non-record material with the Clerk must set out in a letter, served on all parties, a description of the material proposed for lodging and the reasons why the non-record material may properly be considered by the Court. The material proposed for lodging may not be submitted until and unless requested by the Clerk.

Rule 33. Document Preparation: Booklet Format; 8½- by 11-Inch Paper Format

1. *Booklet Format:* (a) Except for a document expressly permitted by these Rules to be submitted on 8½- by 11-inch paper, see, *e. g.*, Rules 21, 22, and 39, every document filed with the Court shall be prepared in a 6⅛- by 9¼-inch booklet format using a standard typesetting process (*e. g.*, hot metal, photocomposition, or computer typesetting) to produce text printed in typographic (as opposed to typewriter) characters. The process used must produce a clear, black image on white paper. The text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(b) The text of every booklet-format document, including any appendix thereto, shall be typeset in a Century family (*e. g.*, Century Expanded, New Century Schoolbook, or Century Schoolbook) 12-point type with 2-point or more leading between lines. Quotations in excess of 50 words shall be indented. The typeface of footnotes shall be 10-point type with 2-point or more leading between lines. The text of the document must appear on both sides of the page.

(c) Every booklet-format document shall be produced on paper that is opaque, unglazed, and not less than 60 pounds in weight, and shall have margins of at least three-fourths of an inch on all sides. The text field, including footnotes, may not exceed 4⅛ by 7⅛ inches. The document shall be bound firmly in at least two places along the left margin (saddle stitch or perfect binding preferred) so as to permit easy opening, and no part of the text should be obscured by the binding. Spiral, plastic, metal, or string bindings may not be used. Copies of patent documents, except opinions, may

be duplicated in such size as is necessary in a separate appendix.

(d) Every booklet-format document, shall comply with the word limits shown on the chart in subparagraph 1(g) of this Rule. The word limits do not include the questions presented, the list of parties and the corporate disclosure statement, the table of contents, the table of cited authorities, the listing of counsel at the end of the document, or any appendix. The word limits include footnotes. Verbatim quotations required under Rule 14.1(f), if set out in the text of a brief rather than in the appendix, are also excluded. For good cause, the Court or a Justice may grant leave to file a document in excess of the word limits, but application for such leave is not favored. An application to exceed word limits shall comply with Rule 22 and must be received by the Clerk at least 15 days before the filing date of the document in question, except in the most extraordinary circumstances.

(e) Every booklet-format document, shall have a suitable cover consisting of 65-pound weight paper in the color indicated on the chart in subparagraph 1(g) of this Rule. If a separate appendix to any document is filed, the color of its cover shall be the same as that of the cover of the document it supports. The Clerk will furnish a color chart upon request. Counsel shall ensure that there is adequate contrast between the printing and the color of the cover. A document filed by the United States, or by any other federal party represented by the Solicitor General, shall have a gray cover. A joint appendix, answer to a bill of complaint, motion for leave to intervene, and any other document not listed in subparagraph 1(g) of this Rule shall have a tan cover.

(f) Forty copies of a booklet-format document shall be filed.

(g) Word limits and cover colors for booklet-format documents are as follows:

Type of Document	Word Limits	Color of Cover
(i) Petition for a Writ of Certiorari (Rule 14); Motion for Leave to File a Bill of Complaint and Brief in Support (Rule 17.3); Jurisdictional		

	Statement (Rule 18.3); Petition for an Extraordinary Writ (Rule 20.2)	9,000	white
(ii)	Brief in Opposition (Rule 15.3); Brief in Opposition to Motion for Leave to File an Original Action (Rule 17.5); Motion to Dismiss or Affirm (Rule 18.6); Brief in Opposition to Mandamus or Prohibition (Rule 20.3(b)); Response to a Petition for Habeas Corpus (Rule 20.4)	9,000	orange
(iii)	Reply to Brief in Opposition (Rules 15.6 and 17.5); Brief Opposing a Motion to Dismiss or Affirm (Rule 18.8)	3,000	tan
(iv)	Supplemental Brief (Rules 15.8, 17, 18.10, and 25.5)	3,000	tan
(v)	Brief on the Merits for Petitioner or Appellant (Rule 24); Exceptions by Plaintiff to Report of Special Master (Rule 17)	15,000	light blue
(vi)	Brief on the Merits for Respondent or Appellee (Rule 24.2); Brief on the Merits for Respondent or Appellee Supporting Petitioner or Appellant (Rule 12.6); Exceptions by Party Other Than Plaintiff to Report of Special Master (Rule 17)	15,000	light red
(vii)	Reply Brief on the Merits (Rule 24.4)	7,500	yellow
(viii)	Reply to Plaintiff's Exceptions to Report of Special Master (Rule 17)	15,000	orange
(ix)	Reply to Exceptions by Party Other Than Plaintiff to Report of Special Master (Rule 17)	15,000	yellow
(x)	Brief for an *Amicus Curiae* at the Petition Stage or pertaining to a Motion for Leave to file a Bill of Complaint (Rule 37.2)	6,000	cream
(xi)	Brief for an *Amicus Curiae* in Support of the Plaintiff, Petitioner, or Appellant, or in Support of Neither Party, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	9,000	light green
(xii)	Brief for an *Amicus Curiae* in Support of the Defendant, Respondent, or Appellee, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	9,000	dark green
(xiii)	Petition for Rehearing (Rule 44)	3,000	tan

(h) A document prepared under Rule 33.1 must be accompanied by a certificate signed by the attorney, the unrepresented party, or the preparer of the document stating that the brief complies with the word limitations. The person preparing the certificate may rely on the word count of the

word-processing system used to prepare the document. The word-processing system must be set to include footnotes in the word count. The certificate must state the number of words in the document. The certificate shall accompany the document when it is presented to the Clerk for filing and shall be separate from it. If the certificate is signed by a person other than a member of the Bar of this Court, the counsel of record, or the unrepresented party, it must contain a notarized affidavit or declaration in compliance with 28 U. S. C. § 1746.

2. *8½- by 11-Inch Paper Format:* (a) The text of every document, including any appendix thereto, expressly permitted by these Rules to be presented to the Court on 8½- by 11-inch paper shall appear double spaced, except for indented quotations, which shall be single spaced, on opaque, unglazed, white paper. The document shall be stapled or bound at the upper left-hand corner. Copies, if required, shall be produced on the same type of paper and shall be legible. The original of any such document (except a motion to dismiss or affirm under Rule 18.6) shall be signed by the party proceeding *pro se* or by counsel of record who must be a member of the Bar of this Court or an attorney appointed under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute. Subparagraph 1(g) of this Rule does not apply to documents prepared under this paragraph.

(b) Page limits for documents presented on 8½- by 11-inch paper are: 40 pages for a petition for a writ of certiorari, jurisdictional statement, petition for an extraordinary writ, brief in opposition, or motion to dismiss or affirm; and 15 pages for a reply to a brief in opposition, brief opposing a motion to dismiss or affirm, supplemental brief, or petition for rehearing. The exclusions specified in subparagraph 1(d) of this Rule apply.

Rule 34. Document Preparation: General Requirements

Every document, whether prepared under Rule 33.1 or Rule 33.2, shall comply with the following provisions:

1. Each document shall bear on its cover, in the order indicated, from the top of the page:

(a) the docket number of the case or, if there is none, a space for one;

(b) the name of this Court;

(c) the caption of the case as appropriate in this Court;

(d) the nature of the proceeding and the name of the court from which the action is brought (*e. g.*, "On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit"; or, for a merits brief, "On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit");

(e) the title of the document (*e. g.*, "Petition for Writ of Certiorari," "Brief for Respondent," "Joint Appendix");

(f) the name of the attorney who is counsel of record for the party concerned (who must be a member of the Bar of this Court except as provided in Rule 9.1), and on whom service is to be made, with a notation directly thereunder identifying the attorney as counsel of record and setting out counsel's office address and telephone number. Only one counsel of record may be noted on a single document. The names of other members of the Bar of this Court or of the bar of the highest court of a State acting as counsel, and, if desired, their addresses, may be added, but counsel of record shall be clearly identified. Names of persons other than attorneys admitted to a state bar may not be listed, unless the party is appearing *pro se*, in which case the party's name, address, and telephone number shall appear. The foregoing shall be displayed in an appropriate typographic manner and, except for the identification of counsel, may not be set in type smaller than standard 11-point, if the document is prepared as required by Rule 33.1.

2. Every document exceeding five pages (other than a joint appendix), whether prepared under Rule 33.1 or Rule 33.2, shall contain a table of contents and a table of cited authorities (*i. e.*, cases alphabetically arranged, constitutional provisions, statutes, treatises, and other materials) with references to the pages in the document where such authorities are cited.

3. The body of every document shall bear at its close the name of counsel of record and such other counsel, identified on the cover of the document in conformity with subparagraph 1(f) of this Rule, as may be desired.

Rule 35. Death, Substitution, and Revivor; Public Officers

1. If a party dies after the filing of a petition for a writ of certiorari to this Court, or after the filing of a notice of appeal, the authorized representative of the deceased party may appear and, on motion, be substituted as a party. If the representative does not voluntarily become a party, any other party may suggest the death on the record and, on motion, seek an order requiring the representative to become a party within a designated time. If the representative then fails to become a party, the party so moving, if a respondent or appellee, is entitled to have the petition for a writ of certiorari or the appeal dismissed, and if a petitioner or appellant, is entitled to proceed as in any other case of nonappearance by a respondent or appellee. If the substitution of a representative of the deceased is not made within six months after the death of the party, the case shall abate.

2. Whenever a case cannot be revived in the court whose judgment is sought to be reviewed, because the deceased party's authorized representative is not subject to that court's jurisdiction, proceedings will be conducted as this Court may direct.

3. When a public officer who is a party to a proceeding in this Court in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate and any successor in office is automatically substituted as a party. The parties shall notify the Clerk in writing of any such successions. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting substantial rights of the parties will be disregarded.

4. A public officer who is a party to a proceeding in this Court in an official capacity may be described as a party by

the officer's official title rather than by name, but the Court may require the name to be added.

Rule 36. Custody of Prisoners in Habeas Corpus Proceedings

1. Pending review in this Court of a decision in a habeas corpus proceeding commenced before a court, Justice, or judge of the United States, the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule.

2. Upon application by a custodian, the court, Justice, or judge who entered the decision under review may authorize transfer and the substitution of a successor custodian as a party.

3. (a) Pending review of a decision failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought or in other appropriate custody or may be enlarged on personal recognizance or bail, as may appear appropriate to the court, Justice, or judge who entered the decision, or to the court of appeals, this Court, or a judge or Justice of either court.

(b) Pending review of a decision ordering release, the prisoner shall be enlarged on personal recognizance or bail, unless the court, Justice, or judge who entered the decision, or the court of appeals, this Court, or a judge or Justice of either court, orders otherwise.

4. An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall continue in effect pending review in the court of appeals and in this Court unless for reasons shown to the court of appeals, this Court, or a judge or Justice of either court, the order is modified or an independent order respecting custody, enlargement, or surety is entered.

Rule 37. Brief for an *Amicus Curiae*

1. An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.

An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

2. (a) An *amicus curiae* brief submitted before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 2(b) of this Rule. An *amicus curiae* brief in support of a petitioner or appellant shall be filed within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later, and that time will not be extended. An *amicus curiae* brief in support of a motion of a plaintiff for leave to file a bill of complaint in an original action shall be filed within 60 days after the case is placed on the docket, and that time will not be extended. An *amicus curiae* brief in support of a respondent, an appellee, or a defendant shall be submitted within the time allowed for filing a brief in opposition or a motion to dismiss or affirm. An *amicus curiae* shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief, unless the *amicus curiae* brief is filed earlier than 10 days before the due date. Only one signatory to any *amicus curiae* brief filed jointly by more than one *amicus curiae* must timely notify the parties of its intent to file that brief. The *amicus curiae* brief shall indicate that counsel of record received timely notice of the intent to file the brief under this Rule and shall specify whether consent was granted, and its cover shall identify the party supported.

(b) When a party to the case has withheld consent, a motion for leave to file an *amicus curiae* brief before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an

amicus curiae brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest. Such a motion is not favored.

3. (a) An *amicus curiae* brief in a case before the Court for oral argument may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 3(b) of this Rule. The brief shall be submitted within 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the time allowed for filing the petitioner's or appellant's brief. An electronic version of every *amicus curiae* brief in a case before the Court for oral argument shall be transmitted to the Clerk of Court and to counsel for the parties at the time the brief is filed in accordance with guidelines established by the Clerk. The electronic transmission requirement is in addition to the requirement that booklet-format briefs be timely filed. The *amicus curiae* brief shall specify whether consent was granted, and its cover shall identify the party supported or indicate whether it suggests affirmance or reversal. The Clerk will not file a reply brief for an *amicus curiae*, or a brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing.

(b) When a party to a case before the Court for oral argument has withheld consent, a motion for leave to file an *amicus curiae* brief may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest.

4. No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf

of a city, county, town, or similar entity when submitted by its authorized law officer.

5. A brief or motion filed under this Rule shall be accompanied by proof of service as required by Rule 29, and shall comply with the applicable provisions of Rules 21, 24, and 33.1 (except that it suffices to set out in the brief the interest of the *amicus curiae*, the summary of the argument, the argument, and the conclusion). A motion for leave to file may not exceed 1,500 words. A party served with the motion may file an objection thereto, stating concisely the reasons for withholding consent; the objection shall be prepared as required by Rule 33.2.

6. Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

Rule 38. Fees

Under 28 U. S. C. § 1911, the fees charged by the Clerk are:

(a) for docketing a case on a petition for a writ of certiorari or on appeal or for docketing any other proceeding, except a certified question or a motion to docket and dismiss an appeal under Rule 18.5, $300;

(b) for filing a petition for rehearing or a motion for leave to file a petition for rehearing, $200;

(c) for reproducing and certifying any record or paper, $1 per page; and for comparing with the original thereof any photographic reproduction of any record or paper, when furnished by the person requesting its certification, $.50 per page;

(d) for a certificate bearing the seal of the Court, $10; and

(e) for a check paid to the Court, Clerk, or Marshal that is returned for lack of funds, $35.

Rule 39. Proceedings *In Forma Pauperis*

1. A party seeking to proceed *in forma pauperis* shall file a motion for leave to do so, together with the party's notarized affidavit or declaration (in compliance with 28 U. S. C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. The motion shall state whether leave to proceed *in forma pauperis* was sought in any other court and, if so, whether leave was granted. If the United States district court or the United States court of appeals has appointed counsel under the Criminal Justice Act of 1964, 18 U. S. C. § 3006A, or under any other applicable federal statute, no affidavit or declaration is required, but the motion shall cite the statute under which counsel was appointed.

2. If leave to proceed *in forma pauperis* is sought for the purpose of filing a document, the motion, and an affidavit or declaration if required, shall be filed together with that document and shall comply in every respect with Rule 21. As provided in that Rule, it suffices to file an original and 10 copies, unless the party is an inmate confined in an institution and is not represented by counsel, in which case the original, alone, suffices. A copy of the motion, and affidavit or declaration if required, shall precede and be attached to each copy of the accompanying document.

3. Except when these Rules expressly provide that a document shall be prepared as required by Rule 33.1, every document presented by a party proceeding under this Rule shall be prepared as required by Rule 33.2 (unless such preparation is impossible). Every document shall be legible. While making due allowance for any case presented under this Rule by a person appearing *pro se*, the Clerk will not file any document if it does not comply with the substance of these Rules or is jurisdictionally out of time.

4. When the documents required by paragraphs 1 and 2 of this Rule are presented to the Clerk, accompanied by proof of service as required by Rule 29, they will be placed on the docket without the payment of a docket fee or any other fee.

5. The respondent or appellee in a case filed *in forma pauperis* shall respond in the same manner and within the same

time as in any other case of the same nature, except that the filing of an original and 10 copies of a response prepared as required by Rule 33.2, with proof of service as required by Rule 29, suffices. The respondent or appellee may challenge the grounds for the motion for leave to proceed *in forma pauperis* in a separate document or in the response itself.

6. Whenever the Court appoints counsel for an indigent party in a case set for oral argument, the briefs on the merits submitted by that counsel, unless otherwise requested, shall be prepared under the Clerk's supervision. The Clerk also will reimburse appointed counsel for any necessary travel expenses to Washington, D. C., and return in connection with the argument.

7. In a case in which certiorari has been granted, probable jurisdiction noted, or consideration of jurisdiction postponed, this Court may appoint counsel to represent a party financially unable to afford an attorney to the extent authorized by the Criminal Justice Act of 1964, 18 U. S. C. § 3006A, or by any other applicable federal statute.

8. If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ is frivolous or malicious, the Court may deny leave to proceed *in forma pauperis.*

Rule 40. Veterans, Seamen, and Military Cases

1. A veteran suing under any provision of law exempting veterans from the payment of fees or court costs, may proceed without prepayment of fees or costs or furnishing security therefor and may file a motion for leave to proceed on papers prepared as required by Rule 33.2. The motion shall ask leave to proceed as a veteran and be accompanied by an affidavit or declaration setting out the moving party's veteran status. A copy of the motion shall precede and be attached to each copy of the petition for a writ of certiorari or other substantive document filed by the veteran.

2. A seaman suing under 28 U. S. C. § 1916 may proceed without prepayment of fees or costs or furnishing security

therefor and may file a motion for leave to proceed on papers prepared as required by Rule 33.2. The motion shall ask leave to proceed as a seaman and be accompanied by an affidavit or declaration setting out the moving party's seaman status. A copy of the motion shall precede and be attached to each copy of the petition for a writ of certiorari or other substantive document filed by the seaman.

3. An accused person petitioning for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces under 28 U. S. C. § 1259 may proceed without prepayment of fees or costs or furnishing security therefor and without filing an affidavit of indigency, but is not entitled to proceed on papers prepared as required by Rule 33.2, except as authorized by the Court on separate motion under Rule 39.

Part VIII. Disposition of Cases

Rule 41. Opinions of the Court

Opinions of the Court will be released by the Clerk immediately upon their announcement from the bench, or as the Court otherwise directs. Thereafter, the Clerk will cause the opinions to be issued in slip form, and the Reporter of Decisions will prepare them for publication in the preliminary prints and bound volumes of the United States Reports.

Rule 42. Interest and Damages

1. If a judgment for money in a civil case is affirmed, any interest allowed by law is payable from the date the judgment under review was entered. If a judgment is modified or reversed with a direction that a judgment for money be entered below, the mandate will contain instructions with respect to the allowance of interest. Interest in cases arising in a state court is allowed at the same rate that similar judgments bear interest in the courts of the State in which judgment is directed to be entered. Interest in cases arising in a court of the United States is allowed at the interest rate authorized by law.

2. When a petition for a writ of certiorari, an appeal, or an application for other relief is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel.

Rule 43. Costs

1. If the Court affirms a judgment, the petitioner or appellant shall pay costs unless the Court otherwise orders.

2. If the Court reverses or vacates a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders.

3. The Clerk's fees and the cost of printing the joint appendix are the only taxable items in this Court. The cost of the transcript of the record from the court below is also a taxable item, but shall be taxable in that court as costs in the case. The expenses of printing briefs, motions, petitions, or jurisdictional statements are not taxable.

4. In a case involving a certified question, costs are equally divided unless the Court otherwise orders, except that if the Court decides the whole matter in controversy, as permitted by Rule 19.2, costs are allowed as provided in paragraphs 1 and 2 of this Rule.

5. To the extent permitted by 28 U. S. C. § 2412, costs under this Rule are allowed for or against the United States or an officer or agent thereof, unless expressly waived or unless the Court otherwise orders.

6. When costs are allowed in this Court, the Clerk will insert an itemization of the costs in the body of the mandate or judgment sent to the court below. The prevailing side may not submit a bill of costs.

7. In extraordinary circumstances the Court may adjudge double costs.

Rule 44. Rehearing

1. Any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days

after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time. The petitioner shall file 40 copies of the rehearing petition and shall pay the filing fee prescribed by Rule 38(b), except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The petition shall state its grounds briefly and distinctly and shall be served as required by Rule 29. The petition shall be presented together with certification of counsel (or of a party unrepresented by counsel) that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of counsel (or of a party unrepresented by counsel). A copy of the certificate shall follow and be attached to each copy of the petition. A petition for rehearing is not subject to oral argument and will not be granted except by a majority of the Court, at the instance of a Justice who concurred in the judgment or decision.

2. Any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial and shall comply with all the form and filing requirements of paragraph 1 of this Rule, including the payment of the filing fee if required, but its grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. The petition shall be presented together with certification of counsel (or of a party unrepresented by counsel) that it is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of counsel (or of a party unrepresented by counsel). The certificate shall be bound with each copy of the petition. The Clerk will not file a petition without a certificate. The petition is not subject to oral argument.

3. The Clerk will not file any response to a petition for rehearing unless the Court requests a response. In the absence of extraordinary circumstances, the Court will not

grant a petition for rehearing without first requesting a response.

4. The Clerk will not file consecutive petitions and petitions that are out of time under this Rule.

5. The Clerk will not file any brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing.

6. If the Clerk determines that a petition for rehearing submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition for rehearing submitted in accordance with Rule 29.2 no more than 15 days after the date of the Clerk's letter will be deemed timely.

Rule 45. Process; Mandates

1. All process of this Court issues in the name of the President of the United States.

2. In a case on review from a state court, the mandate issues 25 days after entry of the judgment, unless the Court or a Justice shortens or extends the time, or unless the parties stipulate that it issue sooner. The filing of a petition for rehearing stays the mandate until disposition of the petition, unless the Court orders otherwise. If the petition is denied, the mandate issues forthwith.

3. In a case on review from any court of the United States, as defined by 28 U. S. C. § 451, a formal mandate does not issue unless specially directed; instead, the Clerk of this Court will send the clerk of the lower court a copy of the opinion or order of this Court and a certified copy of the judgment. The certified copy of the judgment, prepared and signed by this Court's Clerk, will provide for costs if any are awarded. In all other respects, the provisions of paragraph 2 of this Rule apply.

Rule 46. Dismissing Cases

1. At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay

to the Clerk any fees then due, the Clerk, without further reference to the Court, will enter an order of dismissal.

2. (a) A petitioner or appellant may file a motion to dismiss the case, with proof of service as required by Rule 29, tendering to the Clerk any fees due and costs payable. No more than 15 days after service thereof, an adverse party may file an objection, limited to the amount of damages and costs in this Court alleged to be payable or to showing that the moving party does not represent all petitioners or appellants. The Clerk will not file any objection not so limited.

(b) When the objection asserts that the moving party does not represent all the petitioners or appellants, the party moving for dismissal may file a reply within 10 days, after which time the matter will be submitted to the Court for its determination.

(c) If no objection is filed—or if upon objection going only to the amount of damages and costs in this Court, the party moving for dismissal tenders the additional damages and costs in full within 10 days of the demand therefor—the Clerk, without further reference to the Court, will enter an order of dismissal. If, after objection as to the amount of damages and costs in this Court, the moving party does not respond by a tender within 10 days, the Clerk will report the matter to the Court for its determination.

3. No mandate or other process will issue on a dismissal under this Rule without an order of the Court.

Part IX. Definitions and Effective Date

Rule 47. Reference to "State Court" and "State Law"

The term "state court," when used in these Rules, includes the District of Columbia Court of Appeals, the Supreme Court of the Commonwealth of Puerto Rico, the courts of the Northern Mariana Islands, and the local courts of Guam. References in these Rules to the statutes of a State include the statutes of the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the Territory of Guam.

Rule 48. Effective Date of Rules

1. These Rules, adopted July 17, 2007, will be effective October 1, 2007.

2. The Rules govern all proceedings after their effective date except to the extent that, in the opinion of the Court, their application to a pending matter would not be feasible or would work an injustice, in which event the former procedure applies.

3. In any case in which a petition for a writ of certiorari or appeal has been filed before the effective date of these revised Rules, but in which the respondent or appellee has not filed its response prior to that date, all remaining briefs submitted in that case prior to the Court's decision whether to grant review may comply with the May 2, 2005, version of the Rules of the Supreme Court of the United States rather than with these revised Rules. Similarly, in any case in which a petitioner or appellant has filed its brief on the merits prior to the effective date of these revised Rules, all remaining briefs in that case may comply with the May 2, 2005, version of the Rules of the Supreme Court of the United States rather than with these revised Rules.

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	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	2004	**2005**	**2006**	**2004**	**2005**	**2006**	**2004**	**2005**	**2006**	**2004**	**2005**	**2006**
Number of cases on dockets	4	8	6	2,041	2,025	2,069	6,543	7,575	8,181	8,588	9,608	10,256
Number disposed of during term	0	4	1	1,687	1,679	1,714	5,814	6,526	7,180	7,501	8,209	8,895
Number remaining on dockets	4	4	5	354	346	355	729	1,049	995	1,087	1,399	1,361

	TERMS		
	2004	**2005**	**2006**
Cases argued during term	87	* 90	78
Number disposed of by full opinions	85	82	74
Number disposed of by per curiam opinions	2	5	4
Number set for reargument	0	3	0
Cases granted review this term	80	78	77
Cases reviewed and decided without oral argument	826	105	280
Total cases to be available for argument at outset of following term	41	31	28

* Includes three cases reargued 04–473, 04–1170, 04–1360.

JUNE 29, 2007

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