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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2008

JUNE 15 THROUGH OCTOBER 2, 2009

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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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.[1]
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.
SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE.
SONIA SOTOMAYOR, ASSOCIATE JUSTICE.[2]

RETIRED

SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

ERIC H. HOLDER, JR., ATTORNEY GENERAL.
ELENA KAGAN, SOLICITOR GENERAL.
WILLIAM K. SUTER, CLERK.
FRANK D. WAGNER, REPORTER OF DECISIONS.
PAMELA TALKIN, MARSHAL.
JUDITH A. GASKELL, LIBRARIAN.

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*For notes, see p. IV.

NOTES

[1] JUSTICE SOUTER retired effective June 29, 2009. See *post*, p. IX.

[2] The Honorable Sonia Sotomayor, of New York, formerly a judge of the United States Court of Appeals for the Second Circuit, was nominated by President Obama on May 26, 2009, to be an Associate Justice of this Court; the nomination was confirmed by the Senate on August 6, 2009; she was commissioned on the same date; and she took the oaths and her seat on August 8, 2009. She was presented to the Court on September 8, 2009. See *post*, p. XIII.

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.)

(For next subsequent allotment, see *post*, p. VI.)

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 June 30, 2009, viz.:

For the District of Columbia Circuit, John G. Roberts, Jr., Chief Justice.

For the First Circuit, Stephen Breyer, Associate Justice.

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

For the Third Circuit, Samuel A. Alito, Jr., 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.

June 29, 2009.

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

(For next subsequent allotment, see *post*, p. vii.)

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 August 17, 2009, viz.:

For the District of Columbia Circuit, JOHN G. ROBERTS, JR., Chief Justice.

For the First Circuit, STEPHEN BREYER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, SAMUEL A. ALITO, JR., 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, SONIA SOTOMAYOR, Associate Justice.

For the Eleventh Circuit, CLARENCE THOMAS, Associate Justice.

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

August 17, 2009.

(For next previous allotment, see *ante*, p. VI.)

RETIREMENT OF JUSTICE SOUTER

Supreme Court of the United States

MONDAY, JUNE 29, 2009

Present: Chief Justice Roberts, Justice Stevens, Justice Scalia, Justice Kennedy, Justice Souter, Justice Thomas, Justice Ginsburg, Justice Breyer, and Justice Alito.

The Chief Justice said:

And now we note with sadness that this is the last session in which our friend and colleague, Justice David Souter, will be on the Bench with us. He has served on this Court faithfully and with great distinction since October 1990. We wish him the best in his well-deserved retirement. On this occasion, we have sent Justice Souter a letter that I will now read. It's dated today.

Supreme Court of the United States,
Chambers of The Chief Justice,
Washington, D. C., June 29, 2009.

Dear David:

We have all felt a profound sense of loss since the announcement of your decision to retire. For nearly twenty years, the Court has had the benefit of your wisdom, civility, and dedication to the cause of justice. Your keen intellect and broad knowledge have enlarged our deliberations and enriched the Court's jurisprudence.

We deeply value the times we have shared in judicial service. We understand your desire to trade white marble for

White Mountains, and return to your land "of easy wind and downy flake." Though you will not be among us in our daily labors, we are grateful that the privilege of your sturdy friendship will endure long beyond your departure from the bench and tables we have shared.

Affectionately,
JOHN G. ROBERTS, JR.
JOHN PAUL STEVENS
ANTONIN SCALIA
ANTHONY M. KENNEDY
CLARENCE THOMAS
RUTH BADER GINSBURG
STEPHEN BREYER
SAMUEL A. ALITO, JR.
SANDRA DAY O'CONNOR

JUSTICE SOUTER said: I've written the following reply.

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF DAVID H. SOUTER,
Washington, D. C., June 29, 2009.

Dear Colleagues,

Your generous letter has touched me more than I can say, and I will only try to leave you with some sense of what our common service has meant to me. You quoted the Poet, and I will, too, in words that set out the ideal of the life engaged, " . . . where love and need are one. . . . "

That phrase accounts for the finest moments of my life on this Court, as we have agreed or contended with each other over those things that matter to decent people in a civil society. For nineteen Terms, I have lived that life with you, all of us sharing our own best years with one another, working side by side as fellow servants and as friends.

I will not sit with you at our bench again after the Court rises for the Summer this time, but neither will I retire from our friendship, which has held us together despite the pull of

the most passionate dissent. It has made the work lighter through all my tenure here, and for as long as I live, I will be thankful for it, and be under a very grateful obligation to each one of you.

Yours affectionately,

David

APPOINTMENT OF JUSTICE SOTOMAYOR

Supreme Court of the United States

TUESDAY, SEPTEMBER 8, 2009

Present: Chief Justice Roberts, Justice Scalia, Justice Kennedy, Justice Thomas, Justice Ginsburg, Justice Breyer, Justice Alito, and Justice Sotomayor.

The Chief Justice said:

This special sitting of the Court is held today to receive the Commission of the newly appointed Associate Justice of the Supreme Court of the United States, Sonia Sotomayor.

We are pleased to have with us today the President of the United States. On behalf of the Court, I extend to you a warm welcome. We are also pleased to have present Vice President Biden and our retired colleague, Justice Souter. Welcome Mr. Vice President and welcome back, Justice Souter. The Court now recognizes the Attorney General of the United States, Eric Holder.

Attorney General Holder said:

Mr. Chief Justice, and may it please the Court. I have the Commission which has been issued to the Honorable Sonia Sotomayor, as an Associate Justice of the Supreme Court of the United States. The Commission has been duly signed by the President of the United States and attested by me as the Attorney General of the United States. I move that the Clerk read the Commission and that it be made part of the permanent records of this Court.

THE CHIEF JUSTICE said:

Thank you, Attorney General Holder, your motion is granted. Mr. Clerk, will you please read the Commission.

The Clerk read the Commission:

BARACK OBAMA,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Sonia Sotomayor, of New York, I have nominated, and, by and with the advice and consent of the Senate, do appoint her an Associate Justice of the Supreme Court of the United States, and do authorize and empower her to execute and fulfill the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto her, the said Sonia Sotomayor, during her good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington, this sixth day of August, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-fourth.

[SEAL] BARACK OBAMA

By the President:

ERIC H. HOLDER,
Attorney General

THE CHIEF JUSTICE said:

I now ask the Deputy Clerk of the Court to escort Justice Sotomayor to the bench.

THE CHIEF JUSTICE said:

Are you ready to take the oath?

Justice Sotomayor said:

I am.

THE CHIEF JUSTICE said:

Please repeat after me.

Justice Sotomayor said:

I, Sonia Sotomayor, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as an Associate Justice of the Supreme Court of the United States under the Constitution and laws of the United States. So help me God.

SONIA SOTOMAYOR

Subscribed and sworn to before me this eighth day of September, 2009.

JOHN G. ROBERTS, JR.
Chief Justice

THE CHIEF JUSTICE said:

JUSTICE SOTOMAYOR, on behalf of all the members of the Court, it is my pleasure to extend to you a very warm welcome as the 111th Justice of the Supreme Court of the United States, and to wish you a long and happy career in our common calling.

JUSTICE SOTOMAYOR said:

Thank you.

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 2006 edition.

Cases reported before page 901 are those decided with opinions of the Court. Cases reported on page 901 *et seq.* are those in which orders were entered. The opinion reported on page 1301 *et seq.* is that written in chambers by an individual Justice.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2008

POLAR TANKERS, INC. *v.* CITY OF VALDEZ, ALASKA

CERTIORARI TO THE SUPREME COURT OF ALASKA

No. 08–310. Argued April 1, 2009—Decided June 15, 2009

A Valdez, Alaska, ordinance that imposes a personal property tax on certain boats and vessels contains exceptions which, in effect, largely limit its applicability to large oil tankers. Petitioner Polar Tankers, Inc., whose vessels transport crude oil from the Port of Valdez to refineries in other States, challenged the ordinance in state court, claiming (1) that the tax was unconstitutional under Art. I, § 10, cl. 3, which forbids a "State . . . without the Consent of Congress, [to] lay any Duty of Tonnage," and (2) that the tax's value-allocation method violated the Commerce and Due Process Clauses. The court rejected the Tonnage Clause claim, but accepted the Commerce Clause and Due Process Clause claim. On appeal, the State Supreme Court upheld the tax, finding that because it was a value-based property tax, the tax was not a duty of tonnage. The State Supreme Court also held the allocation method was fair and thus valid under the Commerce and Due Process Clauses.

Held: The judgment is reversed, and the case is remanded.

182 P. 3d 614, reversed and remanded.

JUSTICE BREYER delivered the opinion of the Court with respect to Parts I, II–A, and II–B–1, concluding that Valdez's tax violates the Tonnage Clause. Consequently, Polar Tankers' alternative Commerce Clause and Due Process Clause arguments need not be considered. Pp. 6–11.

Syllabus

(a) This Court has consistently interpreted the language of the Tonnage Clause in light of its purpose, which mirrors the intent of other constitutional provisions that seek to restrain the States from exercising the taxing power in a way that is injurious to the interests of other States. The Clause seeks to prevent States from nullifying Art. I, § 10, cl. 2's prohibition against import and export duties by taxing "the vessels transporting the merchandise." *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U. S. 261, 265. It also reflects an effort to diminish a State's ability to obtain tax advantages based on its favorable geographic position. Because the Clause forbids a State to "do that indirectly which she is forbidden . . . to do directly," *Passenger Cases*, 7 How. 283, 458, the "prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port," *Clyde Mallory Lines*, *supra*, at 265–266. Pp. 6–9.

(b) This case lies at the heart of what the Tonnage Clause forbids. The ordinance seems designed to impose "a charge for the privilege of entering, trading in, or lying in a port." The tax applies almost exclusively to oil tankers, but to no other form of personal property. An oil tanker can be subject to the tax based on a single entry into the port. Moreover, the tax is closely correlated with cargo capacity. Contrary to Valdez's argument, the fact that the tax is designed to raise revenue for general municipal services argues for, not against, application of the Clause. Pp. 9–11.

JUSTICE BREYER, joined by JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE GINSBURG, rejected, in Part II–B–2, Valdez's claim that, under *State Tonnage Tax Cases*, 12 Wall. 204, its tax is "not within the prohibition of the Constitution," because it is "levied . . . upon ships . . . as property, based on a valuation of the same as property," *id.*, at 213 (emphasis deleted). This Court later made clear that the "prohibition" against tonnage duties "comes into play" where vessels "are not taxed in the *same manner* as the other property of the citizens," *Transportation Co.* v. *Wheeling*, 99 U. S. 273, 284. This qualification, important in light of the Clause's purpose, means that, in order to fund services by taxing ships, a State must also impose similar taxes upon other businesses. Valdez fails to satisfy this requirement. The Court can find little, if any, other personal property that Valdez taxes. Because its value-related property tax on mobile homes, trailers, and recreational vehicles applies only if they are "affixed" to a particular site, it taxes those vehicles as a form of real, not personal, property. Valdez also claims that its ship tax is simply another form of a value-based tax on

Syllabus

oil-related property provided by state law. But Valdez's tax, a purely municipal tax, differs from the tax on other oil-related property, which is primarily a state-level tax, in several ways. As a result of these differences, an ordinary oil-related business finding the tax on its movable property too burdensome must complain to the State, which is in charge of setting the manner of assessment and valuation. At the same time, an oil tanker finding its vessel tax too burdensome must complain to Valdez, for the State has nothing to do with that tax's rate, valuation, or assessment. There is also no effective electorate-related check on Valdez's vessel-taxing power comparable to the check available when a property tax is more broadly imposed. Valdez's property tax hits only ships; it is not constrained by any need to treat ships and other business property alike. Thus, Valdez's tax lacks the safeguards implied by this Court's statements that a property tax on ships escapes the Tonnage Clause's scope only when that tax is imposed upon ships "in the same manner" as it is imposed on other forms of property. Pp. 11–16.

THE CHIEF JUSTICE, joined by JUSTICE THOMAS, agreed that Valdez's tax is unconstitutional, but concluded that the city's argument that its tax may be sustained as a property tax similar to ones the city imposes on other property should be rejected because an unconstitutional tax on maritime commerce does not become permissible when bundled with taxes on other activities or property. Pp. 17–19.

JUSTICE ALITO agreed that Valdez's tax is unconstitutional, but concluded that the tax is an unconstitutional duty of tonnage even if the Tonnage Clause permits a true, evenhanded property tax to be applied to vessels. Pp. 19–20.

BREYER, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, and II–B–1, in which SCALIA, KENNEDY, GINSBURG, and ALITO, JJ., joined, and an opinion with respect to Part II–B–2, in which SCALIA, KENNEDY, and GINSBURG, JJ., joined. ROBERTS, C. J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined, *post*, p. 17. ALITO, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 19. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, p. 20.

Charles A. Rothfeld argued the cause for petitioner. With him on the briefs were *Andrew L. Frey* and *Richard A. Leavy.*

Theodore B. Olson argued the cause for respondent. With him on the brief were *Matthew D. McGill*, *Amir C. Tayrani*, *William M. Walker*, and *Debra J. Fitzgerald.**

JUSTICE BREYER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, and II–B–1, and an opinion with respect to Part II–B–2, in which JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE GINSBURG join.

The Constitution forbids a "State . . . without the Consent of Congress, [to] lay any Duty of Tonnage." Art. I, § 10, cl. 3. The city of Valdez, Alaska, has enacted an ordinance that imposes a personal property tax upon the value of large ships that travel to and from that city. We hold that the ordinance violates the Clause.

---

*Briefs of *amici curiae* urging reversal were filed for the Council on State Taxation by *Todd A. Lard*, *Douglas L. Lindholm*, and *Frederick J. Nicely;* for the National Federation of Independent Business Small Business Legal Center by *Karen R. Harned* and *Elizabeth Milito;* and for the Tropical Shipping and Construction Co., Ltd., by *Jonathan F. Mitchell* and *Paul C. Gracey, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the State of Alaska et al. by *Richard Svobodny,* Acting Attorney General of Alaska, *Craig J. Tillery,* Deputy Attorney General, *Joanne M. Grace*, Assistant Attorney General, *David C. Frederick*, and *Scott H. Angstreich*, by *Richard S. Gebelein*, Chief Deputy Attorney General of Delaware, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Bill McCollum* of Florida, *Lawrence G. Wasden* of Idaho, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Steve Bullock* of Montana, *Anne Milgram* of New Jersey, *Roy Cooper* of North Carolina, *Richard Cordray* of Ohio, *Mark L. Shurtleff* of Utah, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Bruce A. Salzburg* of Wyoming; and for the Multistate Tax Commission by *Joe B. Huddleston* and *Shirley K. Sicilian.*

Briefs of *amici curiae* were filed for the Broadband Tax Institute by *Jerome B. Libin*, *Jeffrey A. Friedman*, and *Marc A. Simonetti;* and for the World Shipping Council et al. by *Marc J. Fink*, *John W. Butler*, *Lawrence W. Kaye*, and *André M. Picciurro.*

I

In 1999, the city of Valdez, Alaska (City or Valdez), adopted an ordinance imposing a personal property tax upon "[b]oats and vessels of at least 95 feet in length" that regularly travel to the City, are kept or used within the City, or which annually take on at least $1 million worth of cargo or engage in other business transactions of comparable value in the City. Valdez Ordinance No. 99–17 (1999) (codified as Valdez Municipal Code § 3.12.020 (2008)). The ordinance contains exceptions that, in effect, limit the tax's applicability primarily to large oil tankers. *Ibid.* And the City applies the tax in accordance with a value-allocation system that adjusts the amount owed downwards insofar as the tankers spend time in other ports. Valdez, Alaska, Resolution No. 00–15, App. to Pet. for Cert. 53a–56a.

Polar Tankers, Inc., a subsidiary of ConocoPhillips, owns vessels that transport crude oil from a terminal in the Port of Valdez (located at the southern end of the Trans Alaska Pipeline System) to refineries in California, Hawaii, and Washington. In August 2000, Polar Tankers filed a lawsuit in Alaska Superior Court challenging the tax as unconstitutional. Polar Tankers argued that the tax effectively imposed a fee on certain vessels for the privilege of entering the port; hence it amounted to a constitutionally forbidden "Duty of Tonnage." It also argued that the tax calculation method (as applied to vessels with a tax situs elsewhere) violated the Commerce and Due Process Clauses by failing to take account of the time a ship spent at sea or being serviced or repaired. Polar Tankers said that the method thereby overstated the percentage of the ship's total earning capacity reasonably allocated to time spent in the Port of Valdez.

The Alaska Superior Court rejected the Tonnage Clause claim, but it accepted the Commerce Clause and Due Process Clause claim. And, for that reason, it held the tax unconstitutional. On appeal, the Alaska Supreme Court, rejecting

both claims, upheld the tax. In respect to the Tonnage Clause claim, the Supreme Court noted that Valdez's tax was a value-based property tax designed to pay for "services available to all taxpayers in the city," including Polar Tankers; and it concluded that "a charge based on the value of property is not a duty of tonnage." 182 P. 3d 614, 623 (2008) (citing *Transportation Co.* v. *Wheeling*, 99 U. S. 273 (1879)). In respect to the Commerce Clause and Due Process Clause claim, the Supreme Court held that Valdez's allocation method was fair, hence constitutional. 182 P. 3d, at 617–622.

Polar Tankers asked us to review the Alaska Supreme Court's determination. And we granted its petition in order to do so.

II

A

We begin, and end, with Polar Tankers' Tonnage Clause claim. We hold that Valdez's tax is unconstitutional because it violates that Clause. And we consequently need not consider Polar Tankers' alternative Commerce Clause and Due Process Clause argument.

When the Framers originally wrote the Tonnage Clause, the words it uses, "Duty of Tonnage," referred in commercial parlance to "a duty" imposed upon a ship, which duty varies according to "the internal cubic capacity of a vessel," *i. e.*, its tons of carrying capacity. *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U. S. 261, 265 (1935) (citing *Inman S. S. Co.* v. *Tinker*, 94 U. S. 238, 243 (1877)); see also T. Cooley, Constitutional Limitations 596 (6th ed. 1890). Over a century ago, however, this Court found that the Framers intended those words to refer to more than "a duty" that sets a "certain rate on each ton" of capacity. *Steamship Co.* v. *Portwardens*, 6 Wall. 31, 34 (1867).

The Court over the course of many years has consistently interpreted the language of the Clause in light of its purpose, a purpose that mirrors the intent of other constitutional pro-

visions which, like the Tonnage Clause itself, seek to "restrai[n] the states themselves from the exercise" of the taxing power "injuriously to the interests of each other." J. Story, Commentaries on the Constitution of the United States § 497, p. 354 (1833) (abridged version). Article I, § 10, cl. 2, for example, forbids States to "lay any Imposts or Duties on Imports or Exports." It thereby seeks to prevent States with "convenient ports" from placing other States at an economic disadvantage by laying levies that would "ta[x] the consumption of their neighbours." 3 Records of the Federal Convention of 1787, pp. 542, 519 (M. Farrand ed. 1966) (reprinting James Madison, Preface to Debates in the Convention of 1787 and letter from James Madison to Professor Davis, 1832). The coastal States were not to "take advantage of their favorable geographical position in order to exact a price for the use of their ports from the consumers dwelling in less advantageously situated parts of the country." *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U. S. 534, 556–557 (1959) (Frankfurter, J., dissenting in part).

In writing the Tonnage Clause, the Framers recognized that, if "the states had been left free to tax the privilege of access by vessels to their harbors the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise." *Clyde Mallory Lines*, *supra*, at 265. And the Court has understood the Tonnage Clause as seeking to prevent that nullification. See *Steamship Co.*, *supra*, at 34–35; see also *Packet Co.* v. *Keokuk*, 95 U. S. 80, 87 (1877); *Gibbons* v. *Ogden*, 9 Wheat. 1, 202 (1824). It has also understood the Clause as reflecting an effort to diminish a State's ability to obtain certain geographical vessel-related tax advantages whether the vessel in question transports goods between States and foreign nations or, as here, only between the States. Compare *Inman*, *supra* (invalidating a fee applied to ships engaged in foreign commerce), with *Steamship Co.*, *supra* (invalidating a tax applied to ships engaged in interstate commerce).

Interpreting the Clause in light of its "intent," *id.*, at 34, we have read its language as forbidding a State to "do that indirectly which she is forbidden . . . to do directly," *Passenger Cases*, 7 How. 283, 458 (1849) (opinion of Grier, J.). Thus, we have said that the Clause, which literally forbids a State to "levy a duty or tax . . . graduated on the tonnage," must also forbid a State to "effect the same purpose by merely changing the ratio, and graduating it on the number of masts, or of mariners, the size and power of the steam-engine, or the number of passengers which she carries." *Id.*, at 458–459. A State cannot take what would otherwise amount to a tax on the ship's capacity and evade the Clause by calling that tax "a charge on the owner or supercargo," thereby "justify[ing] this evasion of a great principle by producing a dictionary or a dictum to prove that a ship-captain is not a vessel, nor a supercargo an import." *Id.*, at 459.

The Court has consequently stated that the Tonnage Clause prohibits, "not only a *pro rata* tax . . . , but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty." *Steamship Co.*, *supra*, at 35. And, summarizing earlier cases while speaking for a unanimous Court, Justice Stone concluded that the "prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines*, *supra*, at 265–266. Cf. *Cannon* v. *New Orleans*, 20 Wall. 577 (1874) (invalidating a tax imposed on ships entering a port, which tax was graduated based on the ships' capacity and length of stay); *Inman*, *supra* (invalidating a fee imposed on ships of a certain capacity that entered a port); *Steamship Co.*, *supra* (invalidating a flat tax imposed on every ship that entered a port, regardless of the ship's capacity).

Although the Clause forbids all charges, whatever their form, that impose "a charge for the privilege of entering, trading in, or lying in a port," nothing in the history of the adoption of the Clause, the purpose of the Clause, or this Court's interpretation of the Clause suggests that it operates as a ban on *any and all* taxes which fall on vessels that use a State's port, harbor, or other waterways. See *post*, at 17 (ROBERTS, C. J., concurring in part and concurring in judgment). Such a radical proposition would transform the Tonnage Clause from one that protects vessels, and their owners, from discrimination by seaboard States, to one that gives vessels preferential treatment vis-à-vis all other property, and its owners, in a seaboard State. The Tonnage Clause cannot be read to give vessels such "preferential treatment." Cf. *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, 287 (1976) (noting, in a related context, that the Import-Export Clause "cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies"). See also *infra* this page and 10–16.

B

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Does the tax before us impose "a charge for the privilege of entering, trading in, or lying in a port"? Certainly, the ordinance that imposes the tax would seem designed to do so. It says that the tax applies to ships that travel to (and leave) the City's port regularly for business purposes, that are kept in the City's port, that take on more than $1 million in cargo in that port, or that are involved in business transactions in that amount there. In practice, the tax applied in its first year to 28 vessels, of which 24 were oil tankers, 3 were tugboats, and 1 was a passenger cruise ship. App. 53. The ordinance applies the tax to no other form of personal property. See Valdez Municipal Code §3.12.030(A)(2) (2008).

Moreover, the tax's application and its amount depend upon the ship's capacity. That is to say, the tax applies only to large ships (those at least 95 feet in length), while exempting small ones. See § 3.12.020(A)(1).

Nor can Valdez escape application of the Clause by claiming that the ordinance imposes, not a duty or a tax, but a fee or a charge for "services rendered" to a "vessel," such as "pilotage," "wharfage," "medical inspection," the "use of locks," or the like. *Clyde Mallory Lines*, 296 U. S., at 266; see also *Inman*, 94 U. S., at 243. To the contrary, the ordinance creates a tax designed to raise revenue used for general municipal services. See 182 P. 3d, at 623; Valdez, Alaska, Resolution No. 00–15, App. to Pet. for Cert. 53a–56a. Tonnage Clause precedent makes clear that, where a tax otherwise qualifies as a duty of tonnage, a general, revenue-raising purpose argues in favor of, not against, application of the Clause. See *Steamship Co.*, 6 Wall., at 34.

This case lies at the heart of what the Tonnage Clause forbids. The ordinance applies almost exclusively to oil tankers. And a tax on the value of such vessels is closely correlated with cargo capacity. Because the imposition of the tax depends on a factor related to tonnage and that tonnage-based tax is not for services provided to the vessel, it is unconstitutional.

The dissent contends that the tax does not operate as "a charge for the privilege of entering, trading in, or lying in a port," *Clyde Mallory Lines*, *supra*, at 265–266—that is, as an impermissible tonnage duty—because Valdez levies its tax only upon vessels that meet a "tax situs" requirement. See *post*, at 24–25 (opinion of STEVENS, J.). But in this case, the distinction the dissent draws between tonnage duties and property taxes is a distinction without a difference. That is because to establish a tax situs under the tax challenged here, an oil tanker needs only to enter the port and load oil worth more than $1 million. And, as Polar Tankers notes, oil tankers routinely carry millions of barrels of oil at a time

worth well in excess of $1 million. Reply Brief for Petitioner 6. Thus, by virtue of a single entry into the port, "trading" once in that port, or "lying" once in that port, a tanker automatically establishes a tax situs in Valdez. No one claims that this basis for establishing a tax situs is insufficient under the Constitution. After all, a nondomiciliary jurisdiction may constitutionally tax property when that property has a "substantial nexus" with that jurisdiction, and such a nexus is established when the taxpayer "avails itself of the substantial privilege of carrying on business" in that jurisdiction. *Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.*, 445 U. S. 425, 443, 437 (1980) (internal quotation marks omitted). See also *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 441–445 (1979); *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 312 (1992). Here, the City identified the 28 vessels that were subject to the tax in the year 2000. But the City fails to point to a single oil tanker, or any vessel greater than 95 feet in length, that both entered the port and failed to establish a tax situs. See App. 53. What else is needed to show that a tax characterized as one on property may nevertheless function as a "charge for the privilege of entering . . . a port"?

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Valdez does not deny that its tax operates much like a duty applied exclusively to ships. But, like the Alaska Supreme Court, it points to language in an earlier Court opinion explicitly stating that "[t]axes levied . . . upon ships . . . as property, based on a valuation of the same as property, are not within the prohibition of the Constitution." *State Tonnage Tax Cases*, 12 Wall. 204, 213 (1871) (emphasis deleted); cf. 182 P. 3d, at 622, and n. 43. Valdez says that its tax is just such a value-related tax on personal property and consequently falls outside the scope of the Clause. Brief for Respondent 16–23.

Our problem with this argument, however, is that the Court later made clear that the Clause does not apply to

"taxation" of vessels "as property *in the same manner* as other personal property owned by citizens of the State." "[W]here" vessels "are not taxed *in the same manner* as the other property of the citizens," however, the "prohibition . . . comes into play." *Wheeling*, 99 U. S., at 284 (emphasis added).

Viewed in terms of the purpose of the Clause, this qualification is important. It means that, in order to fund services by taxing ships, a State must also impose similar taxes upon other businesses. And that fact may well operate as a check upon a State's ability to impose a tax on ships at rates that reflect an effort to take economic advantage of the port's geographically based position. After all, the presence of other businesses subject to the tax, particularly businesses owned and operated by state residents, threatens political concern and a potential ballot-box issue, were rates, say, to get out of hand. See *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299, 315 (1852); cf. *South Carolina Highway Dept.* v. *Barnwell Brothers, Inc.*, 303 U. S. 177, 185, n. 2 (1938) (when state action affecting interstate commerce "is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state").

Moreover, and at the very least, a "same manner" requirement helps to ensure that a value-related property tax differs significantly from a graduated tax on a ship's capacity and that the former is not simply a redesignation of the latter. See *Packet Co.*, 95 U. S., at 88 ("'It is the thing and not the name that is to be considered'" (quoting *Cooley, supra*, at 314)).

In our view, Valdez fails to satisfy this requirement. It does not tax vessels "in the same manner as other personal property" of those who do business in Valdez. *Wheeling*,

supra, at 284. We can find little, if any, other personal property that it taxes. According to the State of Alaska, Valdez specifically exempts from property taxation motor vehicles, aircraft, and other vehicles, as well as business machinery. See Dept. of Community and Economic Development, Division of Community and Business Development, Office of the State Assessor, Alaska Taxable 2001, p. 20 (Jan. 2002) (Table 4), online at http://www.commerce.state.ak.us/dca/Taxable/AKTaxable2001.pdf (as visited June 10, 2009, and available in Clerk of Court's case file).

We concede, as Valdez points out, that a different Valdez ordinance imposes what it characterizes as a value-based property tax on mobile homes, trailers, and recreational vehicles. Valdez Municipal Code § 3.12.022 (2008); Brief for Respondent 24–25. But that same ordinance exempts those vehicles from its property tax unless they are "affixed" to a particular site. Hence, whatever words the City uses to describe the tax imposed on mobile homes, trailers, and recreational vehicles, Valdez in fact taxes those vehicles only when they constitute a form, not of personal property, but of real property (like a home). See § 3.12.022 (providing that "trailers and mobile homes" are "subject to taxation" when they are classified as "real property").

Valdez also points to a separate city ordinance that imposes a tax "on all taxable property taxable under Alaska Statutes Chapter 43.56." § 3.28.010 (2008). The Alaska Statutes Chapter identifies as taxable "aircraft and motor vehicles" the operation of which "relates to" the "exploration for, production of, or pipeline transportation of gas or unrefined oil." Alaska Stat. § 43.56.210 (2008). Valdez claims that its tax on ships is simply another form of this value-related tax on oil-related property.

Valdez did not make this claim in the lower courts, however. Nor does the State of Alaska (which has filed a brief in support of Valdez) support this particular claim. Brief

for State of Alaska et al. as *Amici Curiae* 32–33. Thus, we lack the State's explanation of just how the tax on oil-related vehicles works. And, lacking precise information, we might ordinarily decline to consider this claim. See, *e. g.*, *Clingman* v. *Beaver*, 544 U. S. 581, 597–598 (2005).

Nonetheless, the parties have argued the matter in their briefs here; and our deciding the matter now will reduce the likelihood of further litigation. We may make exceptions to our general approach to claims not raised below; and for these reasons we shall do so. See *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 39 (1989).

Addressing the claim on the basis of the briefs and what we have gleaned from publicly available sources, we note that Valdez's ship tax differs from the tax on other oil-related property in several ways. The former is a purely municipal tax. The City imposes it; the City alone determines what property is subject to the tax; the City establishes the rate of taxation; the City values the property; the City resolves evaluation disputes; the City issues assessment notices; the City collects the tax; and the City (as far as we can tell) keeps the revenue without any restrictions. See Valdez Municipal Code § 3.12.020(A)(1) (2008); § 3.12.060; § 3.12.020(B); §§ 3.12.090–3.12.100; § 3.12.210(A) (2001); Valdez, Alaska, Resolution No. 00–15, App. to Pet. for Cert. 53a–56a.

The latter is primarily a state-level tax. The State imposes it. In fact, Valdez's city manager characterized the oil-property tax as involving "property taxed by the State . . . and [raising revenue] subsequently shared with the City." App. 46 (affidavit of Dave Dengel). In addition, the State determines the type of property subject to the tax; the State forbids the municipality to exempt any property it designates as taxable; the State regulates the rate of taxation that may be applied to property it designates as taxable; the State issues assessment notices; the State resolves evaluation disputes; and the State, while permitting the municipality to set the precise tax rate and to collect the tax, im-

poses certain kinds of limits upon the amount of the resulting revenue that the municipality may raise that, in effect, provide a check against excessive rates. See Alaska Stat. § 43.56.010(b) (2008); § 43.56.210(5)(A); 15 Alaska Admin. Code § 56.010 (2009); §§ 56.015–56.040; Alaska Stat. §§ 29.45.080(b), (c) (2008); § 43.56.010(c).

These differences matter. For one thing, they mean that any ordinary oil-related business, other than ships, that finds the tax imposed upon its movable property too burdensome must complain to the State, not to the City, for it is the State that is in charge of setting the manner of assessment and valuation. At the same time, an oil tanker that finds the vessel tax too burdensome must complain to the City, not to the State, for the State has nothing to do with the rate, valuation, or assessment of that particular tax.

For another thing, they mean that there is no effective electorate-related check (comparable to the check available where a property tax is more broadly imposed) upon the City's vessel-taxing power. The City's property tax hits ships and only ships; it is not constrained by any need to treat ships and other business property alike. Taken together, these two considerations mean that Valdez's property tax lacks the safeguards implied by this Court's statements that a property tax on ships escapes the scope of the Tonnage Clause only when that tax is imposed upon ships "in the same manner" as it is imposed on other forms of property.

THE CHIEF JUSTICE contends that a State may never impose a property tax on a vessel belonging to a citizen of another State, even if that vessel is taxed in the "same manner" as other personal property in the taxing State. See *post*, at 17–18 (opinion concurring in part and concurring in judgment). But, as THE CHIEF JUSTICE concedes, this Court held in the *State Tonnage Tax Cases* and *Wheeling* that vessels belonging to a State's own citizens may be subject to a property tax when the vessels are taxed in the same manner as other personal property owned by citizens of that

State. At the time those cases were decided, the home port doctrine was still in effect, which meant that vessels were taxable solely by the owner's domicil State. Since the *State Tonnage Tax Cases* and *Wheeling*, the home port doctrine has been abandoned, and States are now permitted to tax vessels belonging to citizens of other States that develop a tax situs in the nondomiciliary State, provided the tax is fairly apportioned. See, *e. g.*, *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, 172–174 (1949); *Japan Line*, 441 U. S., at 442–443. Given this evolution in the law governing interstate taxation since our decisions in the *State Tonnage Tax Cases* and *Wheeling*, there is little reason to think that the ability of a State to tax vessels in the "same manner" as other personal property applies only to vessels owned by citizens of the taxing State. In any event, we need not decide this issue because it is clear that the vessels subject to the City's ordinance are not taxed in the same manner as other personal property.

As far as we can tell, then, Valdez applies a value-based personal property tax to ships and to no other property at all. It does so in order to obtain revenue for general city purposes. The tax, no less than a similar duty, may (depending upon rates) "ta[x] the consumption" of those in other States. See 3 Records of the Federal Convention of 1787, at 519 (reprinting letter from James Madison to Professor Davis, 1832). It is consequently the kind of tax that the Tonnage Clause forbids Valdez to impose without the consent of Congress, consent that Valdez lacks.

* * *

We conclude that the tax is unconstitutional. We reverse the contrary judgment of the Supreme Court of Alaska. And we remand the case for further proceedings.

It is so ordered.

CHIEF JUSTICE ROBERTS, with whom JUSTICE THOMAS joins, concurring in part and concurring in the judgment.

I agree with the Court's conclusion that the Valdez tax is unconstitutional "[b]ecause the imposition of the tax depends on a factor related to tonnage and that tonnage-based tax is not for services provided to the vessel." *Ante*, at 10. The plurality goes on, however, to reject the city's argument that the tax may be sustained as a property tax similar to ones the city imposes on other property. The plurality rejects that argument on the ground that the city in fact does *not* impose similar taxes on other property. *Ante*, at 11–16. I would instead reject the argument on the ground that it does not matter.

The Tonnage Clause applies to "any Duty of Tonnage," regardless of how that duty compares to other commercial taxes. U. S. Const., Art. I, § 10, cl. 3. The free flow of maritime commerce was so important to the Framers that they grouped the prohibition on tonnage duties with bans on keeping troops or ships of war, entering into compacts with other States or foreign powers, and engaging in war. *Ibid.* In light of the Framers' goal to promote trade, and the language of the Clause, I do not see how an unconstitutional tax on maritime commerce becomes permissible when bundled with taxes on other activities or property. If States wish to use their geographical position to tax national maritime commerce, they must get Congress's consent—just as they must to engage in the other activities prohibited by Clause 3.

The majority responds that nothing in the history of the Clause, its purpose, or this Court's interpretation of it suggests that it bans all taxes on vessels using a port. *Ante*, at 9. The majority's list of interpretive tools tellingly leaves out one—the words the Framers used. The Clause by its terms provides that "No State shall, without the Consent of Congress, lay *any* Duty of Tonnage." U. S. Const., Art. I., § 10, cl. 3 (emphasis added). The majority correctly con-

cludes that the Valdez tax is a tonnage duty, *ante*, at 10, and that should be the end of the matter.

The majority also objects that this approach would give vessels "preferential treatment," when the Clause only protects vessels from discrimination. *Ante*, at 9. But the Clause says nothing about discrimination, and it should hardly come as a surprise that a constitutional ban on tonnage duties would give preferential treatment to vessels. Such protection reflects the high value the Framers placed on the free flow of maritime commerce. See *State Tonnage Tax Cases*, 12 Wall. 204, 214 (1871) ("Prior to the adoption of the Constitution the States . . . levied duties on imports and exports and duties of tonnage, and it was the embarrassments growing out of such regulations and conflicting obligations which mainly led to the abandonment of the Confederation and to the more perfect union under the present Constitution").

The plurality appears to be driven to its tax-comparison analysis only in responding to the city's contention that the tax is exempt from the Tonnage Clause under the *State Tonnage Tax Cases*, *supra*, and *Transportation Co.* v. *Wheeling*, 99 U. S. 273 (1879). Neither of those cases has any bearing here. Both cases make clear that they apply only to taxation of property owned by citizens of the State. See *State Tonnage Tax Cases*, *supra*, at 213 (referring to "[t]axes levied by a State upon ships and vessels *owned by the citizens of the State*" (emphasis added)); *Wheeling*, *supra*, at 284 ("Property . . . *when belonging to a citizen of the State* living within her territory . . . is the subject of State taxation" (emphasis added)). We have never held that the Tonnage Clause allows such property taxes to be imposed on visiting ships. Doing so would allow easy evasion of the important principles of the Clause.

Both the plurality and JUSTICE STEVENS suggest that the evolution of the "home port doctrine" sheds light on how to

read the Tonnage Clause. See *ante*, at 15–16; *post*, at 22, n. 1 (dissenting opinion). I disagree. Under the home port doctrine, Polar Tankers "could not be taxed in [Valdez] at all," even if the tax were not a tonnage duty. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 442 (1979); *Hays* v. *Pacific Mail S. S. Co.*, 17 How. 596, 599 (1855). In contrast, the Tonnage Clause forbids only tonnage duties, and would permit Valdez to impose other taxes on visiting ships—for example, "a reasonable charge for" the service of "policing of a harbor." *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U. S. 261, 267, 266 (1935). The demise of the home port doctrine is in no way inconsistent with reading the Tonnage Clause, as written, to ban all tonnage duties. See *Japan Line*, *supra*, at 439, n. 3 (rejecting home port doctrine while expressly not reaching Tonnage Clause argument).

In any case, because the Court has determined that Valdez's tax is unlike other municipal taxes, it does not decide whether a tonnage duty would be unconstitutional when other similar property is taxed. See *ante*, at 16; *post* this page and 20 (ALITO, J., concurring in part and concurring in judgment). Whatever other taxes the city might impose, this tax "operate[s] to impose a charge for the privilege of entering . . . or lying in" the port of Valdez, and is a duty of tonnage for that reason. *Clyde Mallory*, *supra*, at 265–266. I therefore concur in the judgment.

JUSTICE ALITO, concurring in part and concurring in the judgment.

I join the opinion of the Court, except for Part II–B–2, which might be read to suggest that the tax at issue here would be permitted under the Tonnage Clause if the tax were a property tax levied in the same manner on other personal property within the jurisdiction. It is sufficient for present purposes that the Valdez tax is not such a personal

property tax and therefore, even if the Tonnage Clause permits a true, evenhanded property tax to be applied to vessels, the Valdez tax is an unconstitutional duty of tonnage.

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

The Tonnage Clause prohibits the States and their political subdivisions from charging ships for the privilege of using their ports. Because this case does not involve such a charge, I respectfully dissent.

I

The Tonnage Clause commands that "No State shall, without the Consent of Congress, lay any Duty of Tonnage." U. S. Const., Art. I, § 10, cl. 3. As the Court asserts, the purpose of the Clause is to prevent States with convenient ports from abusing the privileges their natural position affords. See *ante*, at 7. Thus, the pertinent inquiry in determining whether an exaction violates the Clause's prohibitions is whether the charge is " 'in its essence a contribution claimed for the privilege of arriving and departing from a port.' " *Transportation Co.* v. *Wheeling*, 99 U. S. 273, 283–284 (1879) (quoting *Cannon* v. *New Orleans*, 20 Wall. 577, 581 (1874)); see *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U. S. 261, 265–266 (1935). In applying that principle, we have been cognizant of its limits.

By its terms, the Tonnage Clause prohibits States from imposing a duty on ships based on their internal cubic capacity, see *id.*, at 265, and it similarly prohibits charges that "effect the same purpose" as a duty of tonnage—for instance, by imposing a duty based "on the number of masts, or of mariners, the size and power of the steam-engine, or the number of passengers which she carries," *Passenger Cases*, 7 How. 283, 458–459 (1849) (opinion of Grier, J.). By contrast, charges levied for other purposes are outside the Clause's

reach. This Court has often approved charges for services rendered to ships to ensure their safe and convenient use of a port. See *Clyde Mallory*, 296 U. S., at 266–267. And the federal interest in protecting access to the ports generally does not prevent States from charging shipowners those taxes and fees that the States are also authorized to levy on other property. See *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, 375, 376 (1883) (upholding a "license tax" "laid upon the business of keeping a ferry"); *Wheeling*, 99 U. S., at 279 (upholding a property tax on ships).

More than a century ago, we noted that it was "too well settled to admit of question that taxes levied by a State, upon ships or vessels owned by the citizens of the State, as property, based on a valuation of the same as property, to the extent of such ownership, are not within the prohibition of the Constitution." *Ibid.* Just as "[d]raymen may be compelled to pay a license tax on every dray owned by them, hackmen on every hack, [and] tavernkeepers on their taverns in proportion to the number of the rooms which they keep for the accommodation of guests," so too can a State charge the operator of a ferry a "tax upon the boats which he employs." *Wiggins Ferry*, 107 U. S., at 375. "[V]essels of all kinds are liable to taxation as property in the same manner as other personal property owned by citizens of the State." *Wheeling*, 99 U. S., at 284; *State Tonnage Tax Cases*, 12 Wall. 204, 212–213 (1871).

From *Wheeling* and the *State Tonnage Tax Cases*, two principles emerge regarding the circumstances under which States may levy property taxes on ships. First, the State seeking to levy the tax must show that the ship has sufficient contacts with the jurisdiction to establish a tax situs there. In our earlier cases, the existence of the situs was determined by the citizenship of the ship's owner, see *Wheeling*, 99 U. S., at 279; *State Tonnage Tax Cases*, 12 Wall., at 213, but a tax situs can also be created by a property's substantial

contacts with a jurisdiction.[1] The requirement of a tax situs serves to distinguish property taxes from fees charged for the privilege of entering a port, which the Court has consistently found to violate the prohibition against duties of tonnage. See, *e. g.*, *Cannon*, 20 Wall., at 581 (holding unconstitutional "a tax upon every vessel which stops" in the city's jurisdictional waters); *Steamship Co.* v. *Portwardens*, 6 Wall. 31, 33 (1867) (invalidating a tax imposed "upon every ship entering the port" and "collected upon every entry").

Our cases also require that property taxes on ships, as with other property, be calculated based on the ship's value. When a State levies a property tax on ships, the prohibition of the Tonnage Clause comes into play only if the ships are "not taxed in the same manner as the other property of the citizens, or where the tax is imposed upon the vessel as an instrument of commerce, without reference to the value as property." *Wheeling*, 99 U. S., at 284. Although the meaning of *Wheeling*'s "same manner" language is not immedi-

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[1] Previously, courts followed the common-law "home port" doctrine, pursuant to which a ship could be taxed only by the State in which its owner was domiciled. See *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 23–24 (1891). That doctrine has since "yielded to a rule of fair apportionment among the States," permitting any jurisdiction with which a ship has had sufficient contacts to establish a tax situs to levy a property tax on the ship in proportion to the ship's contacts with the jurisdiction. See *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 442–443 (1979); see also *Standard Oil Co.* v. *Peck*, 342 U. S. 382, 383 (1952). We have roundly rejected the doctrine in cases involving ships moving in interstate operations along the inland waters. See *ibid.* And in the context of ocean-going ships, we have referred to the doctrine as "'anachronistic'" and all but "'abandoned,'" noting that "to rehabilitate the 'home port doctrine' as a tool of Commerce Clause analysis would be somewhat odd." *Japan Line*, 441 U. S., at 443. In light of these developments, it is odd indeed that THE CHIEF JUSTICE endeavors to distinguish *Transportation Co.* v. *Wheeling*, 99 U. S. 273 (1879), and the *State Tonnage Tax Cases*, 12 Wall. 204 (1871), as "apply[ing] only to taxation of property owned by citizens of the State." See *ante*, at 18 (opinion concurring in part and concurring in judgment).

ately apparent, the remainder of the opinion emphasizes the importance of the method by which the tax on the petitioner's ships was calculated—*i. e.*, "based on a valuation of the same as property"—rather than the city's taxation of other property in the jurisdiction. *Id.*, at 279; see *id.*, at 284.

Our decision in the *State Tonnage Tax Cases* is to the same effect, as we held that taxes levied on ships "*as property, based on a valuation of the same* as property, are not within the prohibition of the Constitution," but if States tax ships "by a tonnage duty, or indirectly by imposing the tax upon the master or crew, they assume a jurisdiction which they do not possess." 12 Wall., at 213, 214 (emphasis in original). Indeed, each of the taxes challenged in that case was invalidated because it was "levied on the steamboats wholly irrespective of the value of the vessels as property, and solely and exclusively on the basis of their cubical contents." *Id.*, at 217; see *id.*, at 224 (holding the tax unconstitutional because "the amount of the tax depends upon the carrying capacity of the steamboat and not upon her value as property").[2] Thus, in both *Wheeling* and the *State Tonnage Tax Cases*, the method by which the challenged tax was calculated was essential to the Court's determination of its validity.

The tax in this case has both of the critical characteristics of a legitimate property tax. It is undisputed that petitioner's ships "are taxed based on their value, and only those [ships] that have acquired a taxable situs in Valdez are taxed." 182 P. 3d 614, 622 (Alaska 2008). Accordingly,

[2] The Court seems to conflate these methods of calculating taxes on ships, as it asserts that "a tax on the value of such vessels is closely correlated with cargo capacity" and concludes that the tax in this case "depends on a factor related to tonnage." *Ante*, at 10; see also *ante*, at 17 (opinion of ROBERTS, C. J.). This is contrary to our longstanding recognition that a ship's capacity is not a proxy for its value: "[T]he experience of every one shows that a small steamer, new and well built, may be of much greater value than a large one, badly built or in need of extensive repairs." *State Tonnage Tax Cases*, 12 Wall., at 224.

I would uphold the Alaska Supreme Court's decision sustaining the tax against petitioner's Tonnage Clause challenge.

The plurality reaches the opposite conclusion because it reads *Wheeling*'s "same manner" language to impose a different limitation on the States' power to tax ships. According to the plurality, "in order to fund services by taxing ships, a State must also impose similar taxes upon other businesses." *Ante*, at 12. As discussed above, *Wheeling* and the *State Tonnage Cases* are better read to require that property taxes on ships be assessed based on the value of the ship rather than its tonnage. But even if the "same manner" requirement did not clearly refer to the method of calculating the tax, the phrase could not bear the weight the plurality places on it. And there is no other support in our cases or in the text of the Tonnage Clause for a rule that conditions a State's exercise of its admitted authority to levy property taxes on ships upon its decision also to tax other property within its jurisdiction.

Under the plurality's reading, the same tax could be a "Duty of Tonnage" in one instance and not in another depending on taxing decisions wholly outside the Clause's reach. Far from being compelled by our earlier cases, this rule is in tension with our decisions noting the substantial flexibility States must be afforded in making taxing decisions and cautioning courts not to "subject the essential taxing power of the State to an intolerable supervision." *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 159 (1930). That tension is compounded by the inevitable difficulty States will have in navigating the new rule, as the plurality does not suggest at what point a State can be satisfied that it has taxed enough other property that it may also tax ships without violating the Clause's prohibitions.

In support of its understanding of the "same manner" requirement, the plurality asserts that the rule "helps to ensure that a value-related property tax differs significantly from a graduated tax on a ship's capacity and that the former

is not simply a redesignation of the latter." *Ante,* at 12. But our cases provide such assurance without resort to the plurality's strained reading. Because States and their political subdivisions only have authority to tax property that has established a tax situs in the jurisdiction, they cannot levy such taxes on ships merely for the privilege of entering or leaving the port; much more substantial contact with the jurisdiction is required. See Valdez Municipal Code §3.12.020(C) (2008); *Central R. Co. of Pa.* v. *Pennsylvania*, 370 U. S. 607, 614–615 (1962). And it is that contact, rather than entry into the port, that provides the basis for taxing the ships. The tax situs requirement thus ensures that a State cannot avoid the proscriptions of the Tonnage Clause by redesignating a duty charged for the privilege of entering the port as an ad valorem tax.

The facts of this case illustrate the point. Most of petitioner's ships spend 40 to 50 days per year in the Port of Valdez. See App. 32–45. "[A]s a group the tankers form a continuous presence in the city." 182 P. 3d, at 623. The ships' prolonged physical presence and extensive commercial activities in the city have a substantial impact on the city's resources. On average, the ships' presence adds 550 people to the population of Valdez, increasing the city's total population by 10%. Those people, as well as the ships themselves, require numerous public services, including harbor facilities, roads, bridges, water supply, and fire and police protection. *Ibid.* As the Alaska Supreme Court concluded, the challenged tax is therefore a legitimate property tax levied to support the ships' use of the city's services. See *ibid.*

II

Even if the Tonnage Clause were properly understood to permit a jurisdiction to levy a tax on ships only when other property in the jurisdiction is also taxed, I would uphold the challenged tax. Although the tax applies only to ships, see

Valdez Municipal Code §3.12.020, other property in the city is also subject to taxation.

First, §3.12.022 imposes a value-based property tax on trailers, mobile homes, and recreational vehicles that are affixed to a site and connected to utilities. The plurality makes much of the requirement that the property be "'affixed'" to a particular site, concluding that "Valdez in fact taxes those vehicles only when they constitute a form, not of personal property, but of real property." *Ante*, at 13. But the taxability of property pursuant to §3.12.022 is determined in much the same way as the taxability of ships. "A trailer or mobile home is conclusively presumed to be affixed to the land" and may therefore be taxed if "it has remained at a fixed site for more than ninety days." §3.12.022(C). Similarly, a shipowner can establish a tax situs in Valdez and thus be subject to taxation if its ship is "kept or used within the city for any ninety days or more." §3.12.020(C)(2)(c).[3] In both cases, the provision serves to impose a tax on property that has developed substantial contacts with the city. The plurality is thus wrong to conclude that ships have been singled out for taxation.

Valdez also "levie[s] a tax" on all property taxable under Alaska Statutes Chapter 43.56 at the same rate that applies to other property taxed by the city. Valdez Municipal Code §3.28.010.[4] The tax is imposed on property used "primarily in the exploration for, production of, or pipeline transportation of gas or unrefined oil," including machinery, equipment, pumping stations, powerplants, aircraft and motor vehicles, and docks and other port facilities. See Alaska Stat.

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[3] A ship can also establish a tax situs in Valdez if it is usually kept or used within the city, travels to or within the city along regular routes, or is necessary to the conduct of substantial business in the city. §3.12.020(C)(2).

[4] As the plurality notes, *ante*, at 13–14, Valdez did not raise this issue in state court, and the parties have provided only limited briefing on the issue.

§§ 43.56.010, 43.56.210(5)(A) (2008). For several reasons, this tax is more significant than the plurality acknowledges. First, contrary to the plurality's view, the tax appears to be a municipal tax. Valdez Municipal Code § 3.28.010 states that the tax "is hereby levied" on "property taxable under Alaska Statutes Chapter 43.56," which in turn states that "[a] municipality may levy" such taxes, § 43.56.010(b). The terms of these provisions indicate that the city has exercised its express authority to levy such taxes. Given the myriad types of property taxable under those provisions and the requirement of Valdez Municipal Code § 3.28.010 that the property be taxed "at the rate of taxation that applies to other property taxed by the city," it seems clear that petitioner's ships are taxed in the "same manner" as other property even as the plurality uses that term.

My view of the case would be the same even if the tax on property used in oil production were imposed by the State itself, as the plurality assumes. Whether the oil-production tax and the challenged tax are levied by the same unit of government has no relevance to the question whether the latter violates the Constitution. The restriction imposed by the Tonnage Clause is a command to the States limiting their inherent taxing authority as sovereigns. The States' political subdivisions have no such inherent power and can levy taxes only to the extent authorized by the State. See 16 E. McQuillin, Law of Municipal Corporations § 44.05, pp. 19–24 (rev. 3d ed. 2003); see also *Wiggins Ferry*, 107 U. S., at 375 (noting "[t]he power of [a State] to authorize any city within her limits to impose a license tax" on ferries). Indeed, this aspect of the relationship between States and their political subdivisions is reflected in Alaska Stat. § 43.56.010(b), which authorizes municipalities to levy certain taxes and prevents them from exempting particular property from taxation. Because the city's power to levy taxes derives from the State, whether the city or the State levies the tax on oil-production property is constitutionally irrelevant.

Finally, it bears mention that the result in this particular case does nothing to further the interests the Tonnage Clause was intended to protect. As the Court acknowledges, *ante*, at 7, the central purpose of the Clause is "to prevent the seaboard States, possessed of important ports of entry, from levying taxes on goods flowing through their ports to inland States," *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U. S. 534, 556 (1959) (Frankfurter, J., dissenting in part). Port Valdez is at the southern terminus of the Trans Alaska Pipeline System, which carries oil extracted from Alaska's North Slope to Port Valdez where it is loaded onto oil tankers belonging to petitioner and others for transport to refineries in other States. Taxes imposed on ships exporting that oil have the same effect on commerce in oil as do taxes on oil-production property or the oil itself, and Alaska's authority to impose taxes on oil and oil-production property is undisputed. From an economic or political point of view, there is no difference between Alaska's geographical control over the area in which the oil is produced and the port from which it is exported. Accordingly, no federal interest is served by prohibiting Alaska or its political subdivisions from taxing the oil-bearing ships that are continually present in the State's ports.

III

The Tonnage Clause permits a State to levy a property tax on ships whether or not it taxes other property. Were that not the case, the challenged tax would still be permissible because Valdez also taxes mobile homes, trailers, and a wide variety of property used in producing oil. Because the tax in my view does not run afoul of the prohibitions of the Tonnage Clause, I respectfully dissent.

Syllabus

NIJHAWAN *v.* HOLDER, ATTORNEY GENERAL

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

No. 08–495. Argued April 27, 2009—Decided June 15, 2009

An alien "convicted of an aggravated felony any time after admission is deportable." 8 U. S. C. § 1227(a)(2)(A)(iii). An "aggravated felony" includes "an offense that . . . involves fraud or deceit in which the loss to the . . . victims exceeds $10,000." § 1101(a)(43)(M)(i). Petitioner, an alien, was convicted of conspiring to commit mail fraud and related crimes. Because the relevant statutes did not require a finding of loss, the jury made no such finding. However, at sentencing, petitioner stipulated that the loss exceeded $100 million. He was sentenced to prison and required to make $683 million in restitution. The Government subsequently sought to remove him from the United States, claiming that he had been convicted of an "aggravated felony." The Immigration Judge found that petitioner's conviction fell within the "aggravated felony" definition. The Board of Immigration Appeals agreed, as did the Third Circuit, which held that the Immigration Judge could inquire into the underlying facts of a prior fraud conviction for purposes of determining whether the loss to the victims exceeded $10,000.

Held: Subparagraph (M)(i)'s $10,000 threshold refers to the particular circumstances in which an offender committed a fraud or deceit crime on a particular occasion rather than to an element of the fraud or deceit crime. Pp. 33–43.

(a) Words such as "crime," "felony," and "offense" sometimes refer to a generic crime (a "categorical" interpretation), and sometimes refer to the specific acts in which an offender engaged ("circumstance-specific" interpretation). The basic argument favoring the "categorical" interpretation rests upon *Taylor* v. *United States*, 495 U. S. 575, *Chambers* v. *United States*, 555 U. S. 122, and *James* v. *United States*, 550 U. S. 192. These cases concerned the Armed Career Criminal Act (ACCA), which enhances the sentence for firearm-law offenders who have prior "violent felony" convictions, 18 U. S. C. § 924(e). The Court held that the word "felony" refers to a generic crime as generally committed. Thus, for example, in *James*, the Court applied the "categorical method" to determine whether an "attempted burglary" was a "violent felony." 550 U. S., at 204–206. That method required the Court to examine "not the unsuccessful burglary . . . attempted on a particular occasion, but the generic crime of attempted burglary." *Chambers*, *supra*, at 125. Pp. 33–36.

(b) Contrary to petitioner's arguments, the "$10,000 loss" provision at issue calls for a "circumstance-specific" interpretation, not a "categorical" one. The "aggravated felony" statute of which it is a part differs from ACCA in general, and the "$10,000 loss" provision differs specifically from ACCA's provisions. Pp. 36–40.

(1) The "aggravated felony" statute at issue resembles ACCA when it lists several "offenses" in language that must refer to generic crimes. But other "offenses" are listed using language that almost certainly refers to specific circumstances. Title 8 U. S. C. § 1101(a)(43)(P), for example, after referring to "an offense" that amounts to "falsely making, forging, counterfeiting, mutilating, or altering a passport," adds, "except in the case of a first offense for which . . . the alien committed the offense for the purpose of assisting . . . the alien's spouse, child, or parent . . . to violate a provision of this chapter." The language about "forging . . . passport[s]" may well refer to a generic crime, but the exception cannot possibly refer to a generic crime, because there is no criminal statute that contains any such exception. Subparagraph (M)(ii), which refers to an offense "described in [26 U. S. C. § 7201] (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000," provides another example. Because no § 7201 offense has a specific loss amount as an element, the tax-evasion provision would be pointless, unless the "revenue loss" language calls for circumstance-specific application. Here, the question is to which category subparagraph (M)(i) belongs. Pp. 36–38.

(2) Subparagraph (M)(i)'s language is consistent with a circumstance-specific approach. The words "in which" (modifying "offense") can refer to the conduct involved "*in*" the commission of the offense of conviction, rather than to the elements *of* the offense. Moreover, subparagraph (M)(i) appears just prior to subparagraph (M)(ii), the tax-evasion provision, and their structures are identical. Where, as here, Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations. *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 34. Additionally, applying a categorical approach would leave subparagraph (M)(i) with little, if any, meaningful application. Only three federal fraud statutes appear to contain a relevant monetary loss threshold. And at the time the $10,000 threshold was added, only eight States had fraud and deceit statutes in respect to which that threshold, as categorically interpreted, would have full effect. Congress is unlikely to have intended subparagraph (M)(i) to apply in such a limited and haphazard manner. Pp. 38–40.

(c) This Court rejects petitioner's alternative position that fairness calls for a "modified categorical approach" requiring a jury verdict or a

judge-approved equivalent to embody a loss-amount determination, and permitting the subsequent immigration court applying subparagraph (M)(i) to examine only charging documents, jury instructions, and any special jury finding, or their equivalents. The Court's cases developed the evidentiary list to which petitioner points for a very different purpose, namely, to determine which statutory phrase (contained within a statutory provision covering several different generic crimes) covered a prior conviction. Additionally, petitioner's proposal can prove impractical insofar as it requires obtaining from a jury a special verdict on a fact that is not an element of the offense. Further, evidence of loss offered by the Government must meet a "clear and convincing" standard and the loss must be tied to the specific counts covered by the conviction. These considerations mean that petitioner and others in similar circumstances have at least one and possibly two opportunities to contest the loss amount, the first at the earlier sentencing and the second at the deportation hearing. There was nothing unfair about the Immigration Judge's reliance on earlier sentencing-related material here. The defendant's sentencing stipulation and the court's restitution order show that the conviction involved losses considerably greater than $10,000. Absent any conflicting evidence, this evidence is clear and convincing. Pp. 41–43.

523 F. 3d 387, affirmed.

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

Thomas E. Moseley argued the cause for petitioner. With him on the briefs was *Peter C. Salerno*.

Curtis E. Gannon argued the cause for respondent. With him on the brief were *Solicitor General Kagan*, *Acting Assistant Attorney General Hertz*, *Deputy Solicitor General Kneedler*, *Donald E. Keener*, *Jennifer J. Keeney*, *W. Manning Evans*, *Holly M. Smith*, *Andrew C. MacLachlan*, *Saul Greenstein*, and *Erica B. Miles*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Jayashri Srikantiah*, *Cecillia D. Wang*, *Lucas Guttentag*, and *Steven R. Shapiro;* for the Asian American Justice Center et al. by *Vincent A. Eng*, *Karen K. Narasaki*, *David A. Kettel*, and *Donald W. Yoo;* for the National Association of Criminal Defense Lawyers by *Iris E. Bennett*, *Michael A. Hoffman*, and *Joshua L. Dratel;* and for Akio Kawashima et al. by *Jenny Lin-Alva*, *Edward O. C. Ord*, and *Thomas J. Whalen*.

JUSTICE BREYER delivered the opinion of the Court.

Federal immigration law provides that any "alien who is convicted of an *aggravated felony* at any time after admission is deportable." 8 U. S. C. § 1227(a)(2)(A)(iii) (emphasis added). A related statute defines "aggravated felony" in terms of a set of listed offenses that includes "an offense that . . . involves fraud or deceit *in which the loss to the victim or victims exceeds $10,000.*" § 1101(a)(43)(M)(i) (emphasis added). See Appendix A, *infra.* The question before us is whether the italicized language refers to an element of the fraud or deceit "offense" as set forth in the particular fraud or deceit statute defining the offense of which the alien was previously convicted. If so, then in order to determine whether a prior conviction is for the kind of offense described, the immigration judge must look to the criminal fraud or deceit statute to see whether it contains a monetary threshold of $10,000 or more. See *Taylor* v. *United States*, 495 U. S. 575 (1990) (so interpreting the Armed Career Criminal Act). We conclude, however, that the italicized language does not refer to an element of the fraud or deceit crime. Rather it refers to the particular circumstances in which an offender committed a (more broadly defined) fraud or deceit crime on a particular occasion.

I

Petitioner, an alien, immigrated to the United States in 1985. In 2002 he was indicted for conspiring to commit mail fraud, wire fraud, bank fraud, and money laundering. 18 U. S. C. §§ 371, 1341, 1343, 1344, 1956(h). A jury found him guilty. But because none of these statutes requires a finding of any particular amount of victim loss, the jury made no finding about the amount of the loss. At sentencing petitioner stipulated that the loss exceeded $100 million. The court then imposed a sentence of 41 months in prison and required restitution of $683 million.

In 2005 the Government, claiming that petitioner had been convicted of an "aggravated felony," sought to remove him from the United States. The Immigration Judge found that petitioner's conviction was for crimes of fraud and deceit; that the sentencing stipulation and restitution order showed that the victims' loss exceeded $10,000; and that petitioner's conviction consequently fell within the immigration statute's "aggravated felony" definition. See 8 U. S. C. §§ 1101(a)(43)(M)(i), (U) (including within the definition of "aggravated felony" any "attempt or conspiracy to commit" a listed "offense"). The Board of Immigration Appeals agreed. App. to Pet. for Cert. 44a–51a. So did the Third Circuit. 523 F. 3d 387 (2008). The Third Circuit noted that the statutes of conviction were silent as to amounts, but, in its view, the determination of loss amounts for "aggravated felony" purposes "requires an inquiry into the underlying facts of the case." *Id.*, at 396 (internal quotation marks omitted).

The Courts of Appeals have come to different conclusions as to whether the $10,000 threshold in subparagraph (M)(i) refers to an element of a fraud statute or to the factual circumstances surrounding commission of the crime on a specific occasion. Compare *Conteh* v. *Gonzales*, 461 F. 3d 45, 55 (CA1 2006) (fact-based approach); 523 F. 3d 387 (case below) (same); *Arguelles-Olivares* v. *Mukasey*, 526 F. 3d 171, 178 (CA5 2008) (same), with *Dulal-Whiteway* v. *United States Dept. of Homeland Security*, 501 F. 3d 116, 131 (CA2 2007) (definitional approach); *Kawashima* v. *Mukasey*, 530 F. 3d 1111, 1117 (CA9 2008) (same); *Obasohan* v. *United States Atty. Gen.*, 479 F. 3d 785, 791 (CA11 2007) (same). We granted certiorari to decide the question.

II

The interpretive difficulty before us reflects the linguistic fact that in ordinary speech words such as "crime," "felony," "offense," and the like sometimes refer to a generic crime,

say, the crime of fraud or theft in general, and sometimes refer to the specific acts in which an offender engaged on a specific occasion, say, *the* fraud that the defendant planned and executed last month. See *Chambers* v. *United States*, 555 U. S. 122, 125 (2009). The question here, as we have said, is whether the italicized statutory words "offense that involves fraud or deceit *in which the loss to the . . . victims exceeds $10,000*" should be interpreted in the first sense (which we shall call "categorical"), *i. e.*, as referring to a generic crime, or in the second sense (which we shall call "circumstance-specific"), as referring to the specific way in which an offender committed the crime on a specific occasion. If the first, we must look to the statute defining the offense to determine whether it has an appropriate monetary threshold; if the second, we must look to the facts and circumstances underlying an offender's conviction.

A

The basic argument favoring the first—*i. e.*, the "generic" or "categorical"—interpretation rests upon *Taylor*, *Chambers*, and *James* v. *United States*, 550 U. S. 192 (2007). Those cases concerned the Armed Career Criminal Act (ACCA), a statute that enhances the sentence imposed upon certain firearm-law offenders who also have three prior convictions for "a violent felony." 18 U. S. C. § 924(e). See Appendix B, *infra.* ACCA defines "violent felony" to include, first, felonies with elements that involve the use of physical force against another; second, felonies that amount to "burglary, arson, or extortion" or that involve the use of explosives; and third, felonies that "otherwise involv[e] conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B).

In *Taylor* and *James* we held that ACCA's language read naturally uses the word "felony" to refer to a generic crime as *generally* committed. *Chambers*, *supra*, at 125 (discussing *Taylor*, *supra*, at 602); *James*, *supra*, at 201–202. The

Court noted that such an interpretation of the statute avoids "the practical difficulty of trying to ascertain" in a later proceeding, "perhaps from a paper record" containing only a citation (say, by number) to a statute and a guilty plea, "whether the [offender's] prior crime . . . did or did not involve," say, violence. *Chambers*, *supra*, at 125.

Thus in *James*, referring to *Taylor*, we made clear that courts must use the "categorical method" to determine whether a conviction for "attempted burglary" was a conviction for a crime that, in ACCA's language, "involve[d] conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). That method required the court to "examine, not the unsuccessful burglary the defendant attempted on a particular occasion, but the generic crime of attempted burglary." *Chambers*, *supra*, at 125 (discussing *James*, *supra*, at 204–206).

We also noted that the categorical method is not always easy to apply. That is because sometimes a separately numbered subsection of a criminal statute will refer to several different crimes, each described separately. And it can happen that some of these crimes involve violence while others do not. A single Massachusetts statute section entitled "Breaking and Entering at Night," for example, criminalizes breaking into a "building, ship, vessel or vehicle." Mass. Gen. Laws, ch. 266, § 16 (West 2006). In such an instance, we have said, a court must determine whether an offender's prior conviction was for the violent, rather than the nonviolent, break-ins that this single five-word phrase describes (*e. g.*, breaking into a building rather than into a vessel), by examining "the indictment or information and jury instructions," *Taylor*, 495 U. S., at 602, or, if a guilty plea is at issue, by examining the plea agreement, plea colloquy, or "some comparable judicial record" of the factual basis for the plea, *Shepard* v. *United States*, 544 U. S. 13, 26 (2005).

Petitioner argues that we should interpret the subsection of the "aggravated felony" statute before us as requiring use

of this same "categorical" approach. He says that the statute's language, read naturally as in *Taylor*, refers to a generic kind of crime, not a crime as committed on a particular occasion. He adds that here, as in *Taylor*, such a reading avoids the practical difficulty of determining the nature of prior conduct from what may be a brief paper record, perhaps noting only a statutory section number and a guilty plea; or, if there is a more extensive record, combing through that record for evidence of underlying conduct. Also, the categorical approach, since it covers only criminal statutes with a relevant monetary threshold, not only provides assurance of a finding on the point, but also assures that the defendant had an opportunity to present evidence about the amount of loss.

B

Despite petitioner's arguments, we conclude that the "fraud and deceit" provision before us calls for a "circumstance-specific," not a "categorical," interpretation. The "aggravated felony" statute of which it is a part differs in general from ACCA, the statute at issue in *Taylor*. And the "fraud and deceit" provision differs specifically from ACCA's provisions.

1

Consider, first, ACCA in general. That statute defines the "violent" felonies it covers to include "burglary, arson, or extortion" and "crime[s]" that have "as an element" the use or threatened use of force. 18 U. S. C. §§ 924(e)(2)(B)(i)–(ii). This language refers directly to generic crimes. The statute, however, contains other, more ambiguous language, covering "crime[s]" that "*involv[e] conduct* that presents a serious potential risk of physical injury to another." *Ibid.* (emphasis added). While this language poses greater interpretive difficulty, the Court held that it too refers to crimes as generically defined. *James*, *supra*, at 202.

Now compare the "aggravated felony" statute before us. 8 U. S. C. § 1101(a)(43). We concede that it resembles ACCA in certain respects. The "aggravated felony" statute lists several of its "offenses" in language that must refer to generic crimes. Subparagraph (A), for example, lists "murder, rape, or sexual abuse of a minor." See, *e. g.*, *Estrada-Espinoza* v. *Mukasey,* 546 F. 3d 1147, 1152 (CA9 2008) (en banc) (applying the categorical approach to "sexual abuse"); *Singh* v. *Ashcroft,* 383 F. 3d 144, 164 (CA3 2004) (same); *Santos* v. *Gonzales,* 436 F. 3d 323, 324 (CA2 2005) *(per curiam)* (same). Subparagraph (B) lists "illicit trafficking in a controlled substance." See *Gousse* v. *Ashcroft,* 339 F. 3d 91, 95–96 (CA2 2003) (applying categorical approach); *Fernandez* v. *Mukasey,* 544 F. 3d 862, 871–872 (CA7 2008) (same); *Steele* v. *Blackman,* 236 F. 3d 130, 136 (CA3 2001) (same). And subparagraph (C) lists "illicit trafficking in firearms or destructive devices." Other sections refer specifically to an "offense described in" a particular section of the Federal Criminal Code. See, *e. g.*, subparagraphs (E), (H), (I), (J), (L).

More importantly, however, the "aggravated felony" statute differs from ACCA in that it lists certain other "offenses" using language that almost certainly does not refer to generic crimes but refers to specific circumstances. For example, subparagraph (P), after referring to "an offense" that amounts to "falsely making, forging, counterfeiting, mutilating, or altering a passport," adds, "*except in the case of a first offense for which the alien . . . committed the offense for the purpose of assisting . . . the alien's spouse, child, or parent . . . to violate a provision of this chapter.*" (Emphasis added.) The language about (for example) "forging . . . passport[s]" may well refer to a generic crime, but the italicized exception cannot possibly refer to a generic crime. That is because there is no such generic crime; there is no criminal statute that contains any such exception. Thus if

the provision is to have any meaning at all, the exception must refer to the particular circumstances in which an offender committed the crime on a particular occasion. See also subparagraph (N) (similar exception).

The statute has other provisions that contain qualifying language that certainly seems to call for circumstance-specific application. Subparagraph (K)(ii), for example, lists "offense[s] . . . described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) *if committed for commercial advantage.*" (Emphasis added.) Of the three specifically listed criminal statutory sections only one subsection (namely, § 2423(d)) says anything about *commercial advantage.* Thus, unless the "commercial advantage" language calls for circumstance-specific application, the statute's explicit references to §§ 2421 and 2422 would be pointless. But see *Gertsenshteyn* v. *United States Dept. of Justice*, 544 F. 3d 137, 144–145 (CA2 2008).

Subparagraph (M)(ii) provides yet another example. It refers to an offense "described in section 7201 of title 26 (relating to tax evasion) *in which the revenue loss to the Government exceeds $10,000.*" (Emphasis added.) There is no offense "described in section 7201 of title 26" that has a specific loss amount as an element. Again, unless the "revenue loss" language calls for circumstance-specific application, the tax-evasion provision would be pointless.

The upshot is that the "aggravated felony" statute, unlike ACCA, contains some language that refers to generic crimes and some language that almost certainly refers to the specific circumstances in which a crime was committed. The question before us then is to which category subparagraph (M)(i) belongs.

2

Subparagraph (M)(i) refers to "an offense that . . . involves fraud or deceit *in which the loss to the victim or victims exceeds $10,000.*" (Emphasis added.) The language of the provision is consistent with a circumstance-specific approach.

The words "in which" (which modify "offense") can refer to the conduct involved "*in*" the commission of the offense of conviction, rather than to the elements *of* the offense. Moreover, subparagraph (M)(i) appears just prior to subparagraph (M)(ii), the internal revenue provision we have just discussed, and it is identical in structure to that provision. Where, as here, Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations. *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 34 (2005).

Moreover, to apply a categorical approach here would leave subparagraph (M)(i) with little, if any, meaningful application. We have found no widely applicable federal fraud statute that contains a relevant monetary loss threshold. See, *e. g.*, 18 U. S. C. §§ 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), 371 (conspiracy to defraud the United States), 666 (theft in federally funded programs), 1028 (fraud in connection with identification documents), 1029 (fraud in connection with access devices), 1030 (fraud in connection with computers), 1347 (health care fraud), and 1348 (securities fraud). Petitioner has found only three federal fraud statutes that do so, and those three contain thresholds not of $10,000, but of $100,000 or $1 million, §§ 668 (theft by fraud of an artwork worth $100,000 or more), 1031(a) (contract fraud against the United States where the contract is worth at least $1 million), and 1039(d) (providing enhanced penalties for fraud in obtaining telephone records, where the scheme involves more than $100,000). Why would Congress intend subparagraph (M)(i) to apply to only these three federal statutes, and then choose a monetary threshold that, on its face, would apply to other, nonexistent statutes as well?

We recognize, as petitioner argues, that Congress might have intended subparagraph (M)(i) to apply almost exclusively to those who violate certain state fraud and deceit statutes. So we have examined state law. See Appendix

C, *infra*. We have found, however, that in 1996, when Congress added the $10,000 threshold in subparagraph (M)(i), see Illegal Immigration Reform and Immigrant Responsibility Act § 321(a)(7), 110 Stat. 3009–628, 29 States had no major fraud or deceit statute with any relevant monetary threshold. In 13 of the remaining 21 States, fraud and deceit statutes contain relevant monetary thresholds but with amounts significantly higher than $10,000, leaving only 8 States with statutes in respect to which subparagraph (M)(i)'s $10,000 threshold, as categorically interpreted, would have full effect. We do not believe Congress would have intended (M)(i) to apply in so limited and so haphazard a manner. Cf. *United States* v. *Hayes*, 555 U. S. 415, 427 (2009) (reaching similar conclusion for similar reason in respect to a statute referring to crimes involving "domestic violence").

Petitioner next points to 8 U. S. C. § 1326, which criminalizes illegal entry after removal and imposes a higher maximum sentence when an alien's removal was "subsequent to a conviction for commission of an aggravated felony." § 1326(b)(2). Petitioner says that a circumstance-specific approach to subparagraph (M)(i) could create potential constitutional problems in a subsequent criminal prosecution under that statute, because loss amount would not have been found beyond a reasonable doubt in the prior criminal proceeding. The Government, however, stated in its brief and at oral argument that the later jury, during the illegal reentry trial, would have to find loss amount beyond a reasonable doubt, Brief for Respondent 49–50; Tr. of Oral Arg. 39–40, eliminating any constitutional concern. Cf. *Hayes*, *supra*, at 426.

We conclude that Congress did not intend subparagraph (M)(i)'s monetary threshold to be applied categorically, *i. e.*, to only those fraud and deceit crimes generically defined to include that threshold. Rather, the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion.

III

Petitioner, as an alternative argument, says that we should nonetheless borrow from *Taylor* what that case called a "modified categorical approach." He says that, for reasons of fairness, we should insist that a jury verdict, or a judge-approved equivalent, embody a determination that the loss involved in a prior fraud or deceit conviction amounted to at least $10,000. To determine whether that is so, petitioner says, the subsequent immigration court applying subparagraph (M)(i) should examine only charging documents, jury instructions, and any special jury finding (if one has been requested). If there was a trial but no jury, the subsequent court should examine the equivalent judge-made findings. If there was a guilty plea (and no trial), the subsequent court should examine the written plea documents or the plea colloquy. To authorize any broader examination of the prior proceedings, petitioner says, would impose an unreasonable administrative burden on immigration judges and would unfairly permit him to be deported on the basis of circumstances that were not before *judicially determined* to have been present and which he may not have had an opportunity, prior to conviction, to dispute.

We agree with petitioner that the statute foresees the use of fundamentally fair procedures, including procedures that give an alien a fair opportunity to dispute a Government claim that a prior conviction involved a fraud with the relevant loss to victims. But we do not agree that fairness requires the evidentiary limitations he proposes.

For one thing, we have found nothing in prior law that so limits the immigration court. *Taylor*, *James*, and *Shepard*, the cases that developed the evidentiary list to which petitioner points, developed that list for a very different purpose, namely, that of determining which statutory phrase (contained within a statutory provision that covers several different generic crimes) covered a prior conviction. See *supra*, at 34–35; *Taylor*, 495 U. S., at 602; *Shepard*, 544 U. S.,

at 26. For another, petitioner's proposal itself can prove impractical insofar as it requires obtaining from a jury a special verdict on a fact that (given our Part II determination) is not an element of the offense.

Further, a deportation proceeding is a civil proceeding in which the Government does not have to prove its claim "beyond a reasonable doubt." At the same time the evidence that the Government offers must meet a "clear and convincing" standard. 8 U. S. C. § 1229a(c)(3)(A). And, as the Government points out, the "loss" must "be tied to the specific counts covered by the conviction." Brief for Respondent 44; see, *e. g.*, *Alaka* v. *Attorney General of United States*, 456 F. 3d 88, 107 (CA3 2006) (loss amount must be tethered to offense of conviction; amount cannot be based on acquitted or dismissed counts or general conduct); *Knutsen* v. *Gonzales*, 429 F. 3d 733, 739–740 (CA7 2005) (same). And the Government adds that the "sole purpose" of the "aggravated felony" inquiry "is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself." Brief for Respondent 44 (internal quotation marks omitted). Finally, the Board of Immigration Appeals, too, has recognized that immigration judges must assess findings made at sentencing "with an eye to what losses are covered and to the burden of proof employed." *In re Babaisakov*, 24 I. & N. Dec. 306, 319 (2007).

These considerations, taken together, mean that petitioner and those in similar circumstances have at least one and possibly two opportunities to contest the amount of loss, the first at the earlier sentencing and the second at the deportation hearing itself. They also mean that, since the Government must show the amount of loss by clear and convincing evidence, uncertainties caused by the passage of time are likely to count in the alien's favor.

We can find nothing unfair about the Immigration Judge's having here relied upon earlier sentencing-related material. Petitioner's own stipulation, produced for sentencing purposes, shows that the conviction involved losses considerably

greater than $10,000. The court's restitution order shows the same. In the absence of any conflicting evidence (and petitioner mentions none), this evidence is clear and convincing.

The Court of Appeals concluded that petitioner's prior federal conviction consequently falls within the scope of subparagraph (M)(i). And we affirm its judgment.

It is so ordered.

APPENDIXES

A

Section 101(a)(43) of the Immigration and Nationality Act, as set forth in 8 U. S. C. § 1101(a)(43), provides:

"The term 'aggravated felony' means—

"(A) murder, rape, or sexual abuse of a minor;

"(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

"(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

"(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

"(E) an offense described in—

"(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

"(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (*o*), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

"(iii) section 5861 of title 26 (relating to firearms offenses);

"(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year;

"(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year;

"(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

"(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

"(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

"(K) an offense that—

"(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

"(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

"(iii) is described in any of sections 1581–1585 or 1588–1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

"(L) an offense described in—

"(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

"(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

"(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

"(M) an offense that—

"(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

"(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

"(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter

"(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

"(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

"(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

"(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

"(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

"(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

"(U) an attempt or conspiracy to commit an offense described in this paragraph.

"The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996." (Footnotes omitted.)

B

Armed Career Criminal Act, 18 U. S. C. § 924(e), provides:

"(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

"(2) As used in this subsection—

"(A) the term 'serious drug offense' means—

"(i) an offense under the Controlled Substances Act (21 U. S. C. 801 et seq.), the Controlled Substances Import and Export Act (21 U. S. C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

"(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manu-

facture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U. S. C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

"(B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

"(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

"(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

"(C) the term 'conviction' includes a finding that a person has committed an act of juvenile delinquency involving a violent felony."

C

We examined state statutes involving fraud or deceit in effect in 1996, when Congress added the $10,000 threshold in subparagraph (M)(i). See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 321(a)(7), 110 Stat. 3009–628. While perhaps questions could be raised about whether certain of the statutes listed below involve "fraud or deceit" as required by subparagraph (M)(i), we give petitioner the benefit of any doubt and treat the statute as relevant.

1

In 29 States plus the District of Columbia, the main statutes in effect in 1996 involving fraud and deceit either did not have any monetary threshold or set a threshold lower than $10,000 even for the most serious grade of the offense.

Alabama: see, *e. g.*, Ala. Code §§ 13A–8–2, 13A–8–3, 13A–9–14, 13A–9–14.1, 13A–9–46, 13A–9–47, 13A–9–73 (1994). *Arkansas:* see, *e. g.*, Ark. Code Ann. §§ 5–36–103 (Supp. 1995), 5–37–203 (1993), 5–37–204, 5–37–207, 5–37–211. *California:* see, *e. g.*, Cal. Penal Code Ann. §§ 484, 487 (West 1985), 502.7 (West Supp. 1998). *District of Columbia:* see, *e. g.*, D. C. Code §§ 22–3821, 22–3823 (1996). *Georgia:* see, *e. g.*, Ga. Code Ann. §§ 16–8–3, 16–8–12, 16–9–33 (1996). *Idaho:* see, *e. g.*, Idaho Code §§ 18–2403 (Lexis 1987), 18–2407 (Lexis Supp. 1996). *Kentucky:* see, *e. g.*, Ky. Rev. Stat. Ann. § 514.040 (Lexis Supp. 1996). *Louisiana:* see, *e. g.*, La. Stat. Ann. §§ 14:67, 14:67.11, 14:70.1, 14:70.4, 14:71, 14:71.1 (West 1997). *Maryland:* see, *e. g.*, Md. Ann. Code, Art. 27, §§ 340, 342, 145, 230A, 230C, 230D (Lexis 1996). *Massachusetts:* see, *e. g.*, Mass. Gen. Laws, ch. 266, §§ 30, 37C (West 1996). *Michigan:* see, *e. g.*, Mich. Comp. Laws Ann. §§ 750.218, 750.271, 750.280, 750.219a, 750.356c (West 1991). *Mississippi:* see, *e. g.*, Miss. Code Ann. §§ 97–19–21, 97–19–35, 97–19–39, 97–19–71, 97–19–83 (1994). *Missouri:* see, *e. g.*, Mo. Rev. Stat. §§ 570.030, 570.120, 570.130, 570.180 (1994). *Montana:* see, *e. g.*, Mont. Code Ann. §§ 45–6–301, 45–6–313, 45–6–315, 45–6–317 (1995). *Nebraska:* see, *e. g.*, Neb. Rev. Stat. Ann. §§ 28–512, 28–518, 28–631 (1995). *Nevada:* see, *e. g.*, Nev. Rev. Stat. §§ 205.0832, 205.0835, 205.370, 205.380 (1995). *New Hampshire:* see, *e. g.*, N. H. Rev. Stat. Ann. §§ 637:4, 637:11, 638:5, 638:20 (West 1996). *North Carolina:* see, *e. g.*, N. C. Gen. Stat. Ann. §§ 14–100, 14–106, 14–113.13 (Lexis 1993). *Oklahoma:* see, *e. g.*, Okla. Stat., Tit. 21, §§ 1451 (West 1991), 1462 (West Supp. 1993), 1541.1, 1541.2, 1541.3 (West 1991), 1541.4, 1550.2, 1662, 1663 (West Supp. 1993). *Pennsylvania:* see, *e. g.*, 18 Pa. Cons. Stat. §§ 3903, 3922, 4110, 4111 (1983), 4117 (Supp. 2009); but see § 4105 (bad check statute amended 1996 to introduce $75,000 threshold). *Rhode Island:* see, *e. g.*, R. I. Gen. Laws §§ 11–18–6, 11–18–7, 11–18–8, 11–18–9, 11–41–4, 11–41–5, 11–41–29 (1994), 11–

41–30 (Supp. 1999). *South Carolina:* see, *e. g.*, S. C. Code Ann. § 16–13–240 (2003). *South Dakota:* see, *e. g.*, S. D. Codified Laws §§ 22–30A–3, 22–30A–10 (1988), 22–30A–17 (Supp. 1997). *Utah:* see, *e. g.*, Utah Code Ann. §§ 76–6–405, 76–6–412, 76–6–521, 76–10–1801 (Lexis 1996). *Vermont:* see, *e. g.*, Vt. Stat. Ann., Tit. 13, §§ 2001, 2002, 2024, 2531, 2582 (1996). *Virginia:* see, *e. g.*, Va. Code Ann. §§ 18.2–178, 18.2–95, 18.2–195 (Lexis 1996). *Washington:* see, *e. g.*, Wash. Rev. Code §§ 9A.56.020 (1994), 9A.56.030 (Supp. 2005). *West Virginia:* see, *e. g.*, W. Va. Code Ann. § 61–3–24 (Lexis Supp. 1997). *Wisconsin:* see, *e. g.*, Wis. Stat. §§ 943.20, 943.395, 943.41 (1993–1994). *Wyoming:* see, *e. g.*, Wyo. Stat. Ann. §§ 6–3–407, 6–3–607, 6–3–802 (1997).

2

In 13 States, conviction under the main fraud and deceit statutes in effect in 1996 could categorically qualify under subparagraph (M)(i). But the relevant monetary thresholds for these offenses—that is, the thresholds such that conviction categorically would satisfy the monetary requirement of subparagraph (M)(i)—were significantly higher than $10,000. Additionally, a number of these States had statutes targeted at particular kinds of fraud without any relevant monetary threshold. *Alaska:* see, *e. g.*, Alaska Stat. §§ 11.46.120, 11.46.180 (1996) ($25,000); but see, *e. g.*, § 11.46.285 (fraudulent use of a credit card, no relevant monetary threshold). *Arizona:* see, *e. g.*, Ariz. Rev. Stat. Ann. §§ 13–1802 (West 1989), 13–2109 (West 2000) ($25,000); but see, *e. g.*, §§ 13–2103 (receipt of anything of value by fraudulent use of a credit card), 13–2204 (defrauding secured creditors), 13–2205 (defrauding judgment creditors), 13–2206 (West 1989) (fraud in insolvency), all with no relevant monetary threshold. *Colorado:* see, *e. g.*, Colo. Rev. Stat. Ann. § 18–4–401 (Supp. 1996) ($15,000), but see, *e. g.*, §§ 18–5–205 (fraud by check), 18–5–207 (1986) (purchase on credit to defraud), both with no relevant monetary threshold. *Delaware:* see, *e. g.*, Del. Code

Ann., Tit. 11, §§ 841, 843 (1995) ($50,000); but see, *e. g.*, §§ 903 (unlawful use of credit card), 913 (insurance fraud), 916 (home improvement fraud), all with no relevant monetary threshold. *Hawaii:* see, *e. g.*, Haw. Rev. Stat. §§ 708–830, 708–830.5 (Lexis 1994) ($20,000); but see, *e. g.*, §§ 708–873 (defrauding secured creditors), 708–8100 (fraudulent use of a credit card), 708–8100.5 (fraudulent encoding of a credit card), 708–8103 (credit card fraud by a provider of goods or services), all with no relevant monetary threshold. *Indiana:* see, *e. g.*, Ind. Code §§ 35–43–4–1, 35–43–4–2 (West 1993) ($100,000), 35–43–5–7.1 (West Supp. 1996) ($50,000); but see, *e. g.*, §§ 35–43–5–3 (deception), 35–43–5–4 (West 1993) (insurance and credit card fraud), 35–43–5–7 (welfare fraud), 35–43–5–8 (fraud on financial institutions), all with no relevant monetary threshold. *Kansas:* see, *e. g.*, Kan. Stat. Ann. §§ 21–3701 (1995), 21–3707 (Supp. 1996), 21–3729 (1995), 21–3846 (Supp. 1996) ($25,000). *Minnesota:* see, *e. g.*, Minn. Stat. § 609.52 (1996) ($35,000). *New Jersey:* see, *e. g.*, N. J. Stat. Ann. §§ 2C:20–2, 2C:20–4, 2C:21–13, 2C:21–17 (West 1995) ($75,000); but see, *e. g.*, §§ 2C:21–6 (credit cards), 2C:21–12 (defrauding secured creditors), both without a relevant monetary threshold. *New Mexico:* see, *e. g.*, N. M. Stat. Ann. §§ 30–16–6 (1994), 30–33–13 (1997), 30–44–7 (1989), 30–50–4 (1997) ($20,000); but see, *e. g.*, § 30–16–33 (1994) (credit card fraud, no relevant monetary threshold). *New York:* see, *e. g.*, N. Y. Penal Law Ann. §§ 155.05 (West 1988), 155.40, 158.20 (West Supp. 1998), 176.25 ($50,000); but see, *e. g.*, §§ 190.65 (scheme to defraud), 185.00 (fraud in insolvency), 185.05 (fraud involving security interest), all with no relevant monetary threshold. *Ohio:* see, *e. g.*, Ohio Rev. Code Ann. §§ 2913.02, 2913.11, 2913.21, 2913.40, 2913.45, 2913.47, 2913.48 (Lexis 1996) ($100,000). *Texas:* see, *e. g.*, Tex. Penal Code Ann. §§ 31.02 (West 1994), 31.03, 35.02 (West Supp. 2003) ($20,000); but see, *e. g.*, § 32.31 (credit card or debit card abuse, no relevant monetary threshold).

3

In eight States, the main fraud and deceit statutes in effect in 1996 had relevant monetary thresholds of $10,000. However, a number of these States also had statutes targeted at particular kinds of fraud without any relevant monetary threshold. *Connecticut:* see, *e. g.*, Conn. Gen. Stat. Ann. §§ 53a–119 (West Supp. 1996), 53a–122 (West 1994); but see, *e. g.*, §§ 53a–128c, 53a–128i (credit card crimes, no relevant monetary threshold). *Florida:* see, *e. g.*, Fla. Stat. Ann. §§ 812.012 (1994), 812.014 (West Supp. 1996); but see, *e. g.*, §§ 817.234 (insurance fraud), 817.61 (fraudulent use of credit cards), both without a relevant monetary threshold. *Illinois:* see, *e. g.*, Ill. Comp. Stat. Ann., ch. 720, § 5/16–1 (West Supp. 1995 and 1995 Ill. Laws pp. 3925–3926); but see, *e. g.*, §§ 5/17–6 (West 1993) (state benefits fraud), 5/17–9 (public aid wire fraud), 5/17–10 (public aid mail fraud), 5/17–13 (1995 Ill. Laws, at 2888) (fraudulent land sales), all without a relevant monetary threshold. *Iowa:* see, *e. g.*, Iowa Code Ann. §§ 714.1, 714.2 (West 1993), 714.8 (West 1993 and 1994 Iowa Acts p. 46), 714.9 (West 1993). *Maine:* see, *e. g.*, Me. Rev. Stat. Ann., Tit. 17A, §§ 354, 362 (1983); but see, *e. g.*, §§ 902 (defrauding a creditor), 908 (1995 Me. Acts pp. 893–894) (home repair fraud), both without relevant monetary thresholds. *North Dakota:* see, *e. g.*, N. D. Cent. Code Ann. §§ 12.1–23–02, 12.1–23–05 (Lexis 1997). *Oregon:* see, *e. g.*, Ore. Rev. Stat. §§ 164.085, 164.057 (1991); but see, *e. g.*, §§ 165.055 (1993 Ore. Laws p. 1826) (fraudulent use of a credit card), 165.692 (1995 Ore. Laws p. 1285), 165.990 (1991 and 1995 Ore. Laws, at 1285–1286) (false claims for health care payments), both without a relevant monetary threshold. *Tennessee:* see, *e. g.*, Tenn. Code Ann. §§ 39–14–101, 39–14–105, 39–14–118, 39–14–133 (1991).

Syllabus

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT ET AL. *v.* OSBORNE

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

No. 08–6. Argued March 2, 2009—Decided June 18, 2009

Respondent Osborne was convicted of sexual assault and other crimes in state court. Years later, he filed this suit under 42 U. S. C. § 1983, claiming he had a due process right to access the evidence used against him in order to subject it to DNA testing at his own expense. The Federal District Court first dismissed his claim under *Heck* v. *Humphrey*, 512 U. S. 477, holding that Osborne must proceed in habeas because he sought to set the stage for an attack on his conviction. The Ninth Circuit reversed, concluding that § 1983 was the proper vehicle for Osborne's claims. On remand, the District Court granted Osborne summary judgment, concluding that he had a limited constitutional right to the new testing under the unique and specific facts presented, *i. e.*, that such testing had been unavailable at trial, that it could be accomplished at almost no cost to the State, and that the results were likely to be material. The Ninth Circuit affirmed, relying on the prosecutorial duty to disclose exculpatory evidence under, *e. g.*, *Brady* v. *Maryland*, 373 U. S. 83.

Held: Assuming Osborne's claims can be pursued using § 1983, he has no constitutional right to obtain postconviction access to the State's evidence for DNA testing. Pp. 62–75.

(a) DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. The availability of new DNA-testing technologies, however, cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt. The task of establishing rules to harness DNA's power to prove innocence without unnecessarily overthrowing the established criminal justice system belongs primarily to the legislature. See *Washington* v. *Glucksberg*, 521 U. S. 702, 719. Forty-six States and the Federal Government have already enacted statutes dealing specifically with access to evidence for DNA testing. These laws recognize the value of DNA testing but also the need for conditions on accessing the State's evidence. Alaska is one of a handful of States yet to enact specific DNA-testing legislation, but Alaska courts are addressing how to apply existing discovery and postconviction relief laws to this novel technology. Pp. 62–65.

(b) The Court assumes without deciding that the Ninth Circuit was correct that *Heck* does not bar Osborne's § 1983 claim. That claim can be rejected without resolving the proper application of *Heck*. P. 67.

(c) The Ninth Circuit erred in finding a due process violation. Pp. 67–75.

(1) While Osborne does have a liberty interest in pursuing the postconviction relief granted by the State, the Ninth Circuit erred in extending the *Brady* right of pretrial disclosure to the postconviction context. Osborne has already been found guilty and therefore has only a limited liberty interest in postconviction relief. See, *e. g.*, *Herrera* v. *Collins*, 506 U. S. 390, 399. Instead of the *Brady* inquiry, the question is whether consideration of Osborne's claim within the framework of the State's postconviction relief procedures "offends some [fundamental] principle of justice" or "transgresses any recognized principle of fundamental fairness in operation." *Medina* v. *California*, 505 U. S. 437, 446, 448. Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.

There is nothing inadequate about Alaska's postconviction relief procedures in general or its methods for applying those procedures to persons seeking access to evidence for DNA testing. The State provides a substantive right to be released on a sufficiently compelling showing of new evidence that establishes innocence. It also provides for discovery in postconviction proceedings, and has—through judicial decision—specified that such discovery is available to those seeking access to evidence for DNA testing. These procedures are similar to those provided by federal law and the laws of other States, and they satisfy due process. The same is true for Osborne's reliance on a claimed federal right to be released upon proof of "actual innocence." Even assuming such a right exists, which the Court has not decided and does not decide, there is no due process problem, given the procedures available to access evidence for DNA testing. Pp. 67–72.

(2) The Court rejects Osborne's invitation to recognize a freestanding, substantive due process right to DNA evidence untethered from the liberty interests he hopes to vindicate with it. In the circumstances of this case, there is no such right. Generally, the Court is "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins* v. *Harker Heights*, 503 U. S. 115, 125. There is no long history of a right of access to state evidence for DNA testing that might prove innocence. "The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it." *Reno*

v. *Flores*, 507 U. S. 292, 303. Moreover, to suddenly constitutionalize this area would short circuit what has been a prompt and considered legislative response by Congress and the States. It would shift to the Federal Judiciary responsibility for devising rules governing DNA access and creating a new constitutional code of procedures to answer the myriad questions that would arise. There is no reason to suppose that federal courts' answers to those questions will be any better than those of state courts and legislatures, and good reason to suspect the opposite. See, *e. g.*, *Collins*, *supra*, at 125. Pp. 72–75.

521 F. 3d 1118, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. ALITO, J., filed a concurring opinion, in which KENNEDY, J., joined, and in which THOMAS, J., joined as to Part II, *post*, p. 75. STEVENS, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, and in which SOUTER, J., joined as to Part I, *post*, p. 87. SOUTER, J., filed a dissenting opinion, *post*, p. 103.

Kenneth M. Rosenstein, Assistant Attorney General of Alaska, argued the cause for petitioners. With him on the briefs were *Richard A. Svobodny*, Acting Attorney General, *Talis J. Colberg*, former Attorney General, *Diane L. Wendlandt*, Assistant Attorney General, *Roy T. Englert, Jr.*, and *Alan E. Untereiner*.

Deputy Solicitor General Katyal argued the cause for the United States as *amicus curiae* urging reversal. On the brief were former *Solicitor General Garre*, *Acting Assistant Attorney General Friedrich*, former *Deputy Solicitor General Joseffer*, and *Curtis E. Gannon*.

Peter J. Neufeld argued the cause for respondent. With him on the brief were *Barry C. Scheck*, *Nina R. Morrison*, *David T. Goldberg*, *Kannon K. Shanmugam*, *Anna-Rose Mathieson*, *Robert C. Bundy*, and *Randall S. Cavanaugh*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Edmund G. Brown, Jr.*, Attorney General of California, *Dane R. Gillette*, Chief Assistant Attorney General, *Donald E. de Nicola*, Deputy Solicitor General, *Gerald A. Engler*, Senior Assistant Attorney General, and *Enid A. Camps* and *Michael Chamberlain*, Deputy Attorneys General, by *John D. Seidel*, Senior Assistant Attorney General of

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. The Federal Government and the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure—usually but not always through legislation.

Against this prompt and considered response, the respondent, William Osborne, proposes a different approach: the rec-

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Colorado, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Joseph R. "Beau" Biden III* of Delaware, *Bill McCollum* of Florida, *Lawrence G. Wasden* of Idaho, *Thomas J. Miller* of Iowa, *Steve Six* of Kansas, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* 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, *Jon Bruning* of Nebraska, *Kelly A. Ayotte* of New Hampshire, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Patrick C. Lynch* of Rhode Island, *Lawrence E. Long* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *Robert F. McDonnell* of Virginia, *Robert M. McKenna* of Washington, *J. B. Van Hollen* of Wisconsin, and *Bruce A. Salzburg* of Wyoming; for the City of New York by *Michael A. Cardozo*, *Leonard J. Koerner*, *Edward F. X. Hart*, and *Drake A. Colley;* for the Council of State Governments et al. by *Richard Ruda;* and for K. G. et al. by *Paul G. Cassell.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Walter Dellinger*, *Irving L. Gornstein*, *Shannon M. Pazur*, *Steven R. Shapiro*, *John W. Whitehead*, and *Barbara E. Bergman;* for Current and Former Prosecutors by *Donald B. Ayer;* for Eleven Individuals Who Have Received Clemency Through DNA Testing by *Jeffrey L. Fisher*, *Pamela S. Karlan*, *Lawrence C. Marshall*, *Amy Howe*, *Kevin K. Russell*, and *Thomas C. Goldstein;* for Individuals Exonerated by Post-Conviction DNA Testing by *Paul A. Engelmayer;* and for Jeanette Popp et al. by *Kenneth W. Starr* and *Mark T. Cramer.*

ognition of a freestanding and far-reaching constitutional right of access to this new type of evidence. The nature of what he seeks is confirmed by his decision to file this lawsuit in federal court under 42 U. S. C. § 1983, not within the state criminal justice system. This approach would take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause. There is no reason to constitutionalize the issue in this way. Because the decision below would do just that, we reverse.

I

A

This lawsuit arose out of a violent crime committed 16 years ago, which has resulted in a long string of litigation in the state and federal courts. On the evening of March 22, 1993, two men driving through Anchorage, Alaska, solicited sex from a female prostitute, K. G. She agreed to perform fellatio on both men for $100 and got in their car. The three spent some time looking for a place to stop and ended up in a deserted area near Earthquake Park. When K. G. demanded payment in advance, the two men pulled out a gun and forced her to perform fellatio on the driver while the passenger penetrated her vaginally, using a blue condom she had brought. The passenger then ordered K. G. out of the car and told her to lie face-down in the snow. Fearing for her life, she refused, and the two men choked her and beat her with the gun. When K. G. tried to flee, the passenger beat her with a wooden axe handle and shot her in the head while she lay on the ground. They kicked some snow on top of her and left her for dead. 521 F. 3d 1118, 1122 (CA9 2008) (case below); *Osborne* v. *State,* 163 P. 3d 973, 975–976 (Alaska App. 2007) (*Osborne II*); App. 27, 42–44.

K. G. did not die; the bullet had only grazed her head. Once the two men left, she found her way back to the road,

and flagged down a passing car to take her home. Ultimately, she received medical care and spoke to the police. At the scene of the crime, the police recovered a spent shell casing, the axe handle, some of K. G.'s clothing stained with blood, and the blue condom. *Jackson* v. *State*, No. A–5276 etc. (Alaska App., Feb. 7, 1996), App. to Pet. for Cert. 117a.

Six days later, two military police officers at Fort Richardson pulled over Dexter Jackson for flashing his headlights at another vehicle. In his car they discovered a gun (which matched the shell casing), as well as several items K. G. had been carrying the night of the attack. *Id.*, at 116a, 118a–119a. The car also matched the description K. G. had given to the police. Jackson admitted that he had been the driver during the rape and assault, and told the police that William Osborne had been his passenger. 521 F. 3d, at 1122–1123; 423 F. 3d 1050, 1051–1052 (CA9 2005); *Osborne* v. *State*, 110 P. 3d 986, 990 (Alaska App. 2005) (*Osborne I*). Other evidence also implicated Osborne. K. G. picked out his photograph (with some uncertainty) and at trial she identified Osborne as her attacker. Other witnesses testified that shortly before the crime, Osborne had called Jackson from an arcade, and then driven off with him. An axe handle similar to the one at the scene of the crime was found in Osborne's room on the military base where he lived.

The State also performed DQ Alpha testing on sperm found in the blue condom. DQ Alpha testing is a relatively inexact form of DNA testing that can clear some wrongly accused individuals, but generally cannot narrow the perpetrator down to less than 5% of the population. See Dept. of Justice, National Comm'n on the Future of DNA Evidence, The Future of Forensic DNA Testing 17 (NCJ 183697, 2000) (hereinafter Future of Forensic DNA Testing); Dept. of Justice, National Comm'n on the Future of DNA Evidence, Postconviction DNA Testing: Recommendations for Handling Requests 27 (NCJ 177626, 1999) (hereinafter Postconviction DNA Testing). The semen found on the condom had a geno-

type that matched a blood sample taken from Osborne, but not ones from Jackson, K. G., or a third suspect named James Hunter. Osborne is black, and approximately 16% of black individuals have such a genotype. App. 117–119. In other words, the testing ruled out Jackson and Hunter as possible sources of the semen, and also ruled out over 80% of other black individuals. The State also examined some pubic hairs found at the scene of the crime, which were not susceptible to DQ Alpha testing, but which state witnesses attested to be similar to Osborne's. App. to Pet. for Cert. 117a.

B

Osborne and Jackson were convicted by an Alaska jury of kidnaping, assault, and sexual assault. They were acquitted of an additional count of sexual assault and of attempted murder. Finding it "'nearly miraculous'" that K. G. had survived, the trial judge sentenced Osborne to 26 years in prison, with 5 suspended. *Id.*, at 128a. His conviction and sentence were affirmed on appeal. *Id.*, at 113a–130a.

Osborne then sought postconviction relief in Alaska state court. He claimed that he had asked his attorney, Sidney Billingslea, to seek more discriminating restriction-fragment-length-polymorphism (RFLP) DNA testing during trial, and argued that she was constitutionally ineffective for not doing so.[1] Billingslea testified that after investigation, she had concluded that further testing would do more harm than good. She planned to mount a defense of mistaken identity, and thought that the imprecision of the DQ Alpha test gave her "'very good numbers in a mistaken identity, cross-racial identification case, where the victim was in the

[1] RFLP testing, unlike DQ Alpha testing, "has a high degree of discrimination," although it is sometimes ineffective on small samples. Postconviction DNA Testing 26–27; Future of Forensic DNA Testing 14–16. Billingslea testified that she had no memory of Osborne making such a request, but said she was "'willing to accept'" that he had. *Osborne I*, 110 P. 3d 986, 990 (Alaska App. 2005).

dark and had bad eyesight.'" *Osborne I*, 110 P. 3d, at 990. Because she believed Osborne was guilty, "'insisting on a more advanced . . . DNA test would have served to prove that Osborne committed the alleged crimes.'" *Ibid.* The Alaska Court of Appeals concluded that Billingslea's decision had been strategic and rejected Osborne's claim. *Id.*, at 991–992.

In this proceeding, Osborne also sought the DNA testing that Billingslea had failed to perform, relying on an Alaska postconviction statute, Alaska Stat. § 12.72 (2008), and the State and Federal Constitutions. In two decisions, the Alaska Court of Appeals concluded that Osborne had no right to the RFLP test. According to the court, § 12.72 "apparently" did not apply to DNA testing that had been available at trial.[2] *Osborne I*, 110 P. 3d, at 992–993. The court found no basis in our precedents for recognizing a federal constitutional right to DNA evidence. *Id.*, at 993. After a remand for further findings, the Alaska Court of Appeals concluded that Osborne could not claim a state constitutional right either, because the other evidence of his guilt was too strong and RFLP testing was not likely to be conclusive. *Osborne II*, 163 P. 3d, at 979–981. Two of the three judges wrote separately to say that "[i]f Osborne could show that he were in fact innocent, it would be unconscionable to punish him," and that doing so might violate the Alaska Constitution. *Id.*, at 984–985 (Mannheimer, J., concurring).

The court relied heavily on the fact that Osborne had confessed to some of his crimes in a 2004 application for parole—in which it is a crime to lie. *Id.*, at 978–979, 981 (majority opinion) (citing Alaska Stat. § 11.56.210 (2002)). In this statement, Osborne acknowledged forcing K. G. to have sex at gunpoint, as well as beating her and covering her with

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[2] It is not clear whether the Alaska Court of Appeals was correct that Osborne sought *only* forms of DNA testing that had been available at trial, compare *id.*, at 992, 995, with 521 F. 3d 1118, 1123, n. 2 (CA9 2008), but it resolved the case on that basis.

snow. 163 P. 3d, at 977–978, n. 11. He repeated this confession before the parole board. Despite this acceptance of responsibility, the board did not grant him discretionary parole. App. to Pet. for Cert. 8a. In 2007, he was released on mandatory parole, but he has since been rearrested for another offense, and the State has petitioned to revoke this parole. Brief for Petitioners 7, n. 3.

Meanwhile, Osborne had also been active in federal court, suing state officials under 42 U. S. C. § 1983. He claimed that the Due Process Clause and other constitutional provisions gave him a constitutional right to access the DNA evidence for what is known as short-tandem-repeat (STR) testing (at his own expense). App. 24. This form of testing is more discriminating than the DQ Alpha or RFLP methods available at the time of Osborne's trial.[3] The District Court first dismissed the claim under *Heck* v. *Humphrey*, 512 U. S. 477 (1994), holding it "inescapable" that Osborne sought to "set the stage" for an attack on his conviction, and therefore "must proceed through a writ of habeas corpus." App. 207 (internal quotation marks omitted). The United States Court of Appeals for the Ninth Circuit reversed, concluding that § 1983 was the proper vehicle for Osborne's claims, while "express[ing] no opinion as to whether Osborne ha[d] been deprived of a federally protected right." 423 F. 3d, at 1056.

On cross-motions for summary judgment after remand, the District Court concluded that "there *does* exist, under the unique and specific facts presented, a very limited constitutional right to the testing sought." 445 F. Supp. 2d 1079,

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[3] STR testing is extremely discriminating, can be used on small samples, and is "rapidly becoming the standard." Future of Forensic DNA Testing 18, n. 9. Osborne also sought to subject the pubic hairs to mitochondrial DNA testing, a secondary testing method often used when a sample cannot be subjected to other tests. See Postconviction DNA Testing 28. He argues that "[a]ll of the same arguments that support access to the condom for STR testing support access to the hairs for mitochondrial testing as well," Brief for Respondent 11, n. 4, and we treat the claim accordingly.

1081 (2006) (some emphasis deleted). The court relied on several factors: that the testing Osborne sought had been unavailable at trial, that the testing could be accomplished at almost no cost to the State, and that the results were likely to be material. *Id.*, at 1081–1082. It therefore granted summary judgment in favor of Osborne.

The Court of Appeals affirmed, relying on the prosecutorial duty to disclose exculpatory evidence recognized in *Pennsylvania* v. *Ritchie*, 480 U. S. 39 (1987), and *Brady* v. *Maryland*, 373 U. S. 83 (1963). While acknowledging that our precedents "involved only the right to *pre-trial* disclosure," the court concluded that the Due Process Clause also "extends the government's duty to disclose (or the defendant's right of access) to *post-conviction* proceedings." 521 F. 3d, at 1128. Although Osborne's trial and appeals were over, the court noted that he had a "potentially viable" state constitutional claim of "actual innocence," *id.*, at 1130, and relied on the "well-established assumption" that a similar claim arose under the Federal Constitution, *id.*, at 1131; cf. *Herrera* v. *Collins*, 506 U. S. 390 (1993). The court held that these potential claims extended some of the State's *Brady* obligations to the postconviction context.

The court declined to decide the details of what showing must be made to access the evidence because it found "Osborne's case for disclosure . . . so strong on the facts" that "[w]herever the bar is, he crosses it." 521 F. 3d, at 1134. While acknowledging that Osborne's prior confessions were "certainly relevant," the court concluded that they did not "necessarily trum[p] . . . the right to obtain post-conviction access to evidence" in light of the "emerging reality of wrongful convictions based on false confessions." *Id.*, at 1140.

We granted certiorari to decide whether Osborne's claims could be pursued using § 1983, and whether he has a right under the Due Process Clause to obtain postconviction access to the State's evidence for DNA testing. 555 U. S. 992

(2008); Pet. for Cert. i. We now reverse on the latter ground.

II

Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue. Postconviction DNA Testing 1–2; Future of Forensic DNA Testing 13–14. DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others.

At the same time, DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent. See *House* v. *Bell*, 547 U. S. 518, 540–548 (2006). The availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt. The dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice.

That task belongs primarily to the legislature. "[T]he States are currently engaged in serious, thoughtful examinations," *Washington* v. *Glucksberg*, 521 U. S. 702, 719 (1997), of how to ensure the fair and effective use of this testing within the existing criminal justice framework. Forty-six States have already enacted statutes dealing specifically with access to DNA evidence. See generally Brief for State of California et al. as *Amici Curiae* 3–13; Garrett, Claiming Innocence, 92 Minn. L. Rev. 1629, 1719 (2008) (surveying state statutes); see also An Act to Improve the Preservation

and Accessibility of Biological Evidence, Mississippi S. 2709 (enacted March 16, 2009); An Act to Provide for DNA Testing for Certain Inmates for the Purposes of Determining Whether They May Have Been Wrongfully Convicted, South Dakota H. R. 1166 (enacted March 11, 2009). The State of Alaska itself is considering joining them. See An Act Relating to Post-conviction DNA Testing, H. 174, 26th Leg., 1st Sess. (2009) (proposed legislation similar to that enacted by the States). The Federal Government has also passed the Innocence Protection Act of 2004, § 411, 118 Stat. 2278, codified in part at 18 U. S. C. § 3600, which allows federal prisoners to move for court-ordered DNA testing under certain specified conditions. That Act also grants money to States that enact comparable statutes, § 413, 118 Stat. 2285, note following 42 U. S. C. § 14136, and as a consequence has served as a model for some state legislation. At oral argument, Osborne agreed that the federal statute is a model for how States ought to handle the issue. Tr. of Oral Arg. 33, 38–39; see also Brief for United States as *Amicus Curiae* 19–26 (defending constitutionality of Innocence Protection Act).

These laws recognize the value of DNA evidence but also the need for certain conditions on access to the State's evidence. A requirement of demonstrating materiality is common, *e. g.*, 18 U. S. C. § 3600(a)(8), but it is not the only one. The federal statute, for example, requires a sworn statement that the applicant is innocent. § 3600(a)(1). This requirement is replicated in several state statutes. *E. g.*, Cal. Penal Code Ann. §§ 1405(b)(1), (c)(1) (West Supp. 2009); Fla. Stat. § 925.11(2)(a)(3) (2007); N. H. Rev. Stat. Ann. § 651–D:2(I)(b) (West 2007); S. C. Code Ann. § 17–28–40 (Supp. 2008). States also impose a range of diligence requirements. Several require the requested testing to "have been technologically impossible at trial." Garrett, *supra*, at 1681, and n. 242. Others deny testing to those who declined testing at trial for tactical reasons. *E. g.*, Utah Code Ann. § 78B–9–301(4) (Lexis 2008).

Alaska is one of a handful of States yet to enact legislation specifically addressing the issue of evidence requested for DNA testing. But that does not mean that such evidence is unavailable for those seeking to prove their innocence. Instead, Alaska courts are addressing how to apply existing laws for discovery and postconviction relief to this novel technology. See *Osborne I*, 110 P. 3d, at 992–993; *Patterson* v. *State*, No. A–8814, 2006 WL 573797, *4 (Alaska App., Mar. 8, 2006). The same is true with respect to other States that do not have DNA-specific statutes. *E. g.*, *Fagan* v. *State*, 957 So. 2d 1159 (Ala. Crim. App. 2007). Cf. Mass. Rule Crim. Proc. 30(c)(4) (2009).

First, access to evidence is available under Alaska law for those who seek to subject it to newly available DNA testing that will prove them to be actually innocent. Under the State's general postconviction relief statute, a prisoner may challenge his conviction when "there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice." Alaska Stat. § 12.72.010(4) (2008). Such a claim is exempt from otherwise applicable time limits if "newly discovered evidence," pursued with due diligence, "establishes by clear and convincing evidence that the applicant is innocent." § 12.72.020(b)(2).

Both parties agree that under these provisions of § 12.72, "a defendant is entitled to post-conviction relief if the defendant presents newly discovered evidence that establishes by clear and convincing evidence that the defendant is innocent." *Osborne I*, *supra*, at 992 (internal quotation marks omitted). If such a claim is brought, state law permits general discovery. See Alaska Rule Crim. Proc. 35.1(g) (2008–2009). Alaska courts have explained that these procedures are available to request DNA evidence for newly available testing to establish actual innocence. See *Patterson*, *supra*, at *4 ("If Patterson had brought the DNA analysis request as part of his previous application for [postconviction]

relief . . . he would have been able to request production of evidence").

In addition to this statutory procedure, the Alaska Court of Appeals has invoked a widely accepted three-part test to govern additional rights to DNA access under the State Constitution. *Osborne II*, 163 P. 3d, at 974–975. Drawing on the experience with DNA evidence of State Supreme Courts around the country, the Court of Appeals explained that it was "reluctant to hold that Alaska law offers no remedy to defendants who could prove their factual innocence." *Osborne I*, 110 P. 3d, at 995; see *id.*, at 995, n. 27 (citing decisions from other state courts). It was "prepared to hold, however, that a defendant who seeks post-conviction DNA testing . . . must show (1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning the defendant's identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue." *Id.*, at 995. Thus, the Alaska courts have suggested that even those who do not get discovery under the State's criminal rules have available to them a safety valve under the State Constitution.

This is the background against which the Federal Court of Appeals ordered the State to turn over the DNA evidence in its possession, and it is our starting point in analyzing Osborne's constitutional claims.

III

The parties dispute whether Osborne has invoked the proper federal statute in bringing his claim. He sued under the federal civil rights statute, 42 U. S. C. § 1983, which gives a cause of action to those who challenge a State's "deprivation of any rights . . . secured by the Constitution." The State insists that Osborne's claim must be brought under 28 U. S. C. § 2254, which allows a prisoner to seek "a writ of habeas corpus . . . on the ground that he is in custody in violation of the Constitution."

While Osborne's claim falls within the literal terms of § 1983, we have also recognized that § 1983 must be read in harmony with the habeas statute. See *Preiser* v. *Rodriguez*, 411 U. S. 475, 500 (1973); *Heck*, 512 U. S., at 487. "Stripped to its essence," the State says, "Osborne's § 1983 action is nothing more than a request for evidence to support a hypothetical claim that he is actually innocent. . . . [T]his hypothetical claim sounds at the core of habeas corpus." Brief for Petitioners 19.

Osborne responds that his claim does not sound in habeas at all. Although invalidating his conviction is of course his ultimate goal, giving him the evidence he seeks "would not necessarily imply the invalidity of [his] confinement." Brief for Respondent 21. If he prevails, he would receive only *access* to the DNA, and even if DNA testing exonerates him, his conviction is not automatically invalidated. He must bring an entirely separate suit or a petition for clemency to invalidate his conviction. If he were proved innocent, the State might also release him on its own initiative, avoiding any need to pursue habeas at all.

Osborne also invokes our recent decision in *Wilkinson* v. *Dotson*, 544 U. S. 74 (2005). There, we held that prisoners who sought new hearings for parole eligibility and suitability need not proceed in habeas. We acknowledged that the two plaintiffs "hope[d]" their suits would "help bring about earlier release," *id.*, at 78, but concluded that the § 1983 suit would not accomplish that without further proceedings. "Because neither prisoner's claim would necessarily spell speedier release, neither l[ay] at the core of habeas corpus." *Id.*, at 82 (internal quotation marks omitted). Every Court of Appeals to consider the question since *Dotson* has decided that because access to DNA evidence similarly does not "necessarily spell speedier release," *ibid.*, it can be sought under § 1983. See 423 F. 3d, at 1055–1056; *Savory* v. *Lyons*, 469 F. 3d 667, 672 (CA7 2006); *McKithen* v. *Brown*, 481 F. 3d 89, 103, and n. 15 (CA2 2007). On the other hand, the State

argues that *Dotson* is distinguishable because the challenged procedures in that case did not affect the ultimate "exercise of discretion by the parole board." Brief for Petitioners 32. It also maintains that *Dotson* does not set forth "the *exclusive* test for whether a prisoner may proceed under § 1983." Brief for Petitioners 32.

While we granted certiorari on this question, our resolution of Osborne's claims does not require us to resolve this difficult issue. Accordingly, we will assume without deciding that the Court of Appeals was correct that *Heck* does not bar Osborne's § 1983 claim. Even under this assumption, it was wrong to find a due process violation.

IV

A

"No State shall . . . deprive any person of life, liberty, or property, without due process of law." U. S. Const., Amdt. 14, § 1; accord, Amdt. 5. This Clause imposes procedural limitations on a State's power to take away protected entitlements. See, *e. g.*, *Jones* v. *Flowers*, 547 U. S. 220, 226–239 (2006). Osborne argues that access to the State's evidence is a "process" needed to vindicate his right to prove himself innocent and get out of jail. Process is not an end in itself, so a necessary premise of this argument is that he has an entitlement (what our precedents call a "liberty interest") to prove his innocence even after a fair trial has proved otherwise. We must first examine this asserted liberty interest to determine what process (if any) is due. See *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 570–571 (1972); *Olim* v. *Wakinekona*, 461 U. S. 238, 250–251 (1983).

In identifying his potential liberty interest, Osborne first attempts to rely on the Governor's constitutional authority to "grant pardons, commutations, and reprieves." Alaska Const., Art. III, § 21. That claim can be readily disposed of. We have held that noncapital defendants do not have a liberty interest in traditional state executive clemency,

to which no particular claimant is *entitled* as a matter of state law. *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U. S. 458, 464 (1981). Osborne therefore cannot challenge the constitutionality of any procedures available to vindicate an interest in state clemency.

Osborne does, however, have a liberty interest in demonstrating his innocence with new evidence under state law. As explained, Alaska law provides that those who use "newly discovered evidence" to "establis[h] by clear and convincing evidence that [they are] innocent" may obtain "vacation of [their] conviction or sentence in the interest of justice." Alaska Stat. §§ 12.72.020(b)(2), 12.72.010(4). This "state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right." *Dumschat*, *supra*, at 463; see also *Wolff* v. *McDonnell*, 418 U. S. 539, 556–558 (1974).

The Court of Appeals went too far, however, in concluding that the Due Process Clause requires that certain familiar preconviction trial rights be extended to protect Osborne's postconviction liberty interest. After identifying Osborne's possible liberty interests, the court concluded that the State had an obligation to comply with the principles of *Brady* v. *Maryland*, 373 U. S. 83. In that case, we held that due process requires a prosecutor to disclose material exculpatory evidence to the defendant before trial. The Court of Appeals acknowledged that nothing in our precedents suggested that this disclosure obligation continued after the defendant was convicted and the case was closed, 521 F. 3d, at 1128, but it relied on prior Ninth Circuit precedent applying "*Brady* as a post-conviction right," *ibid.* (citing *Thomas* v. *Goldsmith*, 979 F. 2d 746, 749–750 (1992)). Osborne does not claim that *Brady* controls this case, Brief for Respondent 39–40, and with good reason.

A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man. At trial, the defendant is presumed innocent and may demand that

the government prove its case beyond reasonable doubt. But "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrera*, 506 U. S., at 399. "Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." *Dumschat*, *supra*, at 464 (internal quotation marks and alterations omitted).

The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief. "[W]hen a State chooses to offer help to those seeking relief from convictions," due process does not "dictat[e] the exact form such assistance must assume." *Pennsylvania* v. *Finley*, 481 U. S. 551, 559 (1987). Osborne's right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. *Brady* is the wrong framework.

Instead, the question is whether consideration of Osborne's claim within the framework of the State's procedures for postconviction relief "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or "transgresses any recognized principle of fundamental fairness in operation." *Medina* v. *California*, 505 U. S. 437, 446, 448 (1992) (internal quotation marks omitted); see *Herrera*, *supra*, at 407–408 (applying *Medina* to postconviction relief for actual innocence); *Finley*, *supra*, at 556 (postconviction relief procedures are constitutional if they "compor[t] with fundamental fairness"). Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.

We see nothing inadequate about the procedures Alaska has provided to vindicate its state right to postconviction relief in general, and nothing inadequate about how those procedures apply to those who seek access to DNA evidence.

Alaska provides a substantive right to be released on a sufficiently compelling showing of new evidence that establishes innocence. It exempts such claims from otherwise applicable time limits. The State provides for discovery in postconviction proceedings, and has—through judicial decision—specified that this discovery procedure is available to those seeking access to DNA evidence. *Patterson*, 2006 WL 573797, *4. These procedures are not without limits. The evidence must indeed be newly available to qualify under Alaska's statute, must have been diligently pursued, and must also be sufficiently material. These procedures are similar to those provided for DNA evidence by federal law and the law of other States, see, *e. g.*, 18 U. S. C. § 3600(a), and they are not inconsistent with the "traditions and conscience of our people" or with "any recognized principle of fundamental fairness," *Medina*, *supra*, at 446, 448 (internal quotation marks omitted).

And there is more. While the Alaska courts have not had occasion to conclusively decide the question, the Alaska Court of Appeals has suggested that the State Constitution provides an additional right of access to DNA. In expressing its "reluctan[ce] to hold that Alaska law offers no remedy" to those who belatedly seek DNA testing, and in invoking the three-part test used by other state courts, the court indicated that in an appropriate case the State Constitution may provide a failsafe even for those who cannot satisfy the statutory requirements under general postconviction procedures. *Osborne I*, 110 P. 3d, at 995–996.

To the degree there is some uncertainty in the details of Alaska's newly developing procedures for obtaining postconviction access to DNA, we can hardly fault the State for that. Osborne has brought this § 1983 action without ever using these procedures in filing a state or federal habeas claim relying on actual innocence. In other words, he has not tried to use the process provided to him by the State or attempted to vindicate the liberty interest that is now the centerpiece

of his claim. When Osborne *did* request DNA testing in state court, he sought RFLP testing that had been available at trial, not the STR testing he now seeks, and the state court relied on that fact in denying him testing under Alaska law. *Id.*, at 992 ("[T]he DNA testing that Osborne proposes to perform on this evidence existed at the time of Osborne's trial"); *Osborne II*, 163 P. 3d, at 984 (Mannheimer, J., concurring) ("[T]he DNA testing [Osborne] proposes would not yield 'new evidence' for purposes of . . . [Alaska Stat. § 12.72.010]" because it was "available at the time of Osborne's trial").

His attempt to sidestep state process through a new federal lawsuit puts Osborne in a very awkward position. If he simply seeks the DNA through the State's discovery procedures, he might well get it. If he does not, it may be for a perfectly adequate reason, just as the federal statute and all state statutes impose conditions and limits on access to DNA evidence. It is difficult to criticize the State's procedures when Osborne has not invoked them. This is not to say that Osborne must exhaust state-law remedies. See *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 500–501 (1982). But it is Osborne's burden to demonstrate the inadequacy of the state-law procedures available to him in state postconviction relief. Cf. *Medina*, *supra*, at 453. These procedures are adequate on their face, and without trying them, Osborne can hardly complain that they do not work in practice.

As a fallback, Osborne also obliquely relies on an asserted federal constitutional right to be released upon proof of "actual innocence." Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming, *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet. *House*, 547 U. S., at 554–555; *Herrera*, 506 U. S., at 398–417; see also *id.*, at 419–421 (O'Connor, J., concurring); *id.*, at 427–428 (SCALIA,

J., concurring); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 159, n. 87 (1970). In this case too we can assume without deciding that such a claim exists, because even if so there is no due process problem. Osborne does not dispute that a federal actual innocence claim (as opposed to a DNA access claim) would be brought in habeas. Brief for Respondent 22–24. If such a habeas claim is viable, federal procedural rules permit discovery "for good cause." 28 U. S. C. § 2254 Rule 6; *Bracy* v. *Gramley*, 520 U. S. 899, 908–909 (1997). Just as with state law, Osborne cannot show that available discovery is facially inadequate, and cannot show that it would be arbitrarily denied to him.

B

The Court of Appeals below relied only on procedural due process, but Osborne seeks to defend the judgment on the basis of substantive due process as well. He asks that we recognize a freestanding right to DNA evidence untethered from the liberty interests he hopes to vindicate with it. We reject the invitation and conclude, in the circumstances of this case, that there is no such substantive due process right. "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992). Osborne seeks access to state evidence so that he can apply new DNA-testing technology that might prove him innocent. There is no long history of such a right, and "[t]he mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it." *Reno* v. *Flores*, 507 U. S. 292, 303 (1993).

And there are further reasons to doubt. The elected governments of the States are actively confronting the challenges DNA technology poses to our criminal justice systems and our traditional notions of finality, as well as the opportu-

nities it affords. To suddenly constitutionalize this area would short circuit what looks to be a prompt and considered legislative response. The first DNA-testing statutes were passed in 1994 and 1997. Act of Aug. 2, 1994, ch. 737, 1994 N. Y. Laws 3709 (codified at N. Y. Crim. Proc. Law Ann. § 440.30(1–a) (West 2005)); Act of May 9, 1997, Pub. Act No. 90–141, 1997 Ill. Laws 2461 (codified at 725 Ill. Comp. Stat., ch. 725, § 5/116–3(a) (West 2007)). In the past decade, 44 States and the Federal Government have followed suit, reflecting the increased availability of DNA testing. As noted, Alaska itself is considering such legislation. See *supra*, at 64. "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field." *Glucksberg*, 521 U. S., at 720 (internal quotation marks omitted). "[J]udicial imposition of a categorical remedy . . . might pretermit other responsible solutions being considered in Congress and state legislatures." *Murray* v. *Giarratano*, 492 U. S. 1, 14 (1989) (KENNEDY, J., concurring in judgment). If we extended substantive due process to this area, we would cast these statutes into constitutional doubt and be forced to take over the issue of DNA access ourselves. We are reluctant to enlist the Federal Judiciary in creating a new constitutional code of rules for handling DNA.[4]

Establishing a freestanding right to access DNA evidence for testing would force us to act as policymakers, and our

[4] The dissent asserts that our position "resembles" Justice Harlan's dissent in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Post*, at 101, n. 10 (opinion of STEVENS, J.). *Miranda* devised rules to safeguard a constitutional right the Court had already recognized. Indeed, the underlying requirement at issue in that case that confessions be voluntary had "roots" going back centuries. *Dickerson* v. *United States*, 530 U. S. 428, 432–433 (2000). In contrast, the asserted right to access DNA evidence is unrooted in history or tradition, and would thrust the Federal Judiciary into an area previously left to state courts and legislatures.

substantive due process rulemaking authority would not only have to cover the right of access but a myriad of other issues. We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. Cf. *Arizona* v. *Youngblood*, 488 U. S. 51, 56–58 (1988). If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when? No doubt there would be a miscellany of other minor directives. See, *e. g.*, *Harvey* v. *Horan*, 285 F. 3d 298, 300–301 (CA4 2002) (Wilkinson, C. J., concurring in denial of rehearing).

In this case, the evidence has already been gathered and preserved, but if we extend substantive due process to this area, these questions would be before us in short order, and it is hard to imagine what tools federal courts would use to answer them. At the end of the day, there is no reason to suppose that their answers to these questions would be any better than those of state courts and legislatures, and good reason to suspect the opposite. See *Collins*, *supra*, at 125; *Glucksberg*, *supra*, at 720.

* * *

DNA evidence will undoubtedly lead to changes in the criminal justice system. It has done so already. The question is whether further change will primarily be made by legislative revision and judicial interpretation of the existing system, or whether the Federal Judiciary must leap ahead—revising (or even discarding) the system by creating a new constitutional right and taking over responsibility for refining it.

Federal courts should not presume that state criminal procedures will be inadequate to deal with technological change. The criminal justice system has historically accommodated new types of evidence, and is a time-tested means of carrying out society's interest in convicting the guilty while respect-

ing individual rights. That system, like any human endeavor, cannot be perfect. DNA evidence shows that it has not been. But there is no basis for Osborne's approach of assuming that because DNA has shown that these procedures are not flawless, DNA evidence must be treated as categorically outside the process, rather than within it. That is precisely what his § 1983 suit seeks to do, and that is the contention we reject.

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 ALITO, with whom JUSTICE KENNEDY joins, and with whom JUSTICE THOMAS joins as to Part II, concurring.

Respondent was convicted for a brutal sexual assault. At trial, the defense declined to have DNA testing done on a semen sample found at the scene of the crime. Defense counsel explained that this decision was made based on fear that the testing would provide further evidence of respondent's guilt. After conviction, in an unsuccessful attempt to obtain parole, respondent confessed in detail to the crime. Now, respondent claims that he has a federal constitutional right to test the sample and that he can go directly to federal court to obtain this relief without giving the Alaska courts a full opportunity to consider his claim.

I agree with the Court's resolution of respondent's constitutional claim. In my view, that claim also fails for two independent reasons beyond those given by the majority. First, a state prisoner asserting a federal constitutional right to perform such testing must file a petition for a writ of habeas corpus, not an action under Rev. Stat. § 1979, 42 U. S. C. § 1983, as respondent did here, and thus must exhaust state remedies, see 28 U. S. C. § 2254(b)(1)(A). Second, even though respondent did not exhaust his state remedies, his claim may be rejected on the merits, see § 2254(b)(2), because

a defendant who declines the opportunity to perform DNA testing at trial for tactical reasons has no constitutional right to perform such testing after conviction.

I

As our prior opinions illustrate, it is sometimes difficult to draw the line between claims that are properly brought in habeas and those that may be brought under 42 U. S. C. § 1983. See *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973); *Heck* v. *Humphrey*, 512 U. S. 477 (1994); *Wilkinson* v. *Dotson*, 544 U. S. 74 (2005). But I think that this case falls on the habeas side of the line.

We have long recognized the principles of federalism and comity at stake when state prisoners attempt to use the federal courts to attack their final convictions. See, *e. g.*, *Darr* v. *Burford*, 339 U. S. 200, 204 (1950); *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 490–491 (1973); *Preiser*, *supra*, at 491–492; *Rose* v. *Lundy*, 455 U. S. 509, 518–519 (1982); *Rhines* v. *Weber*, 544 U. S. 269, 273–274 (2005). We accordingly held that " 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.' " *Lundy*, *supra*, at 518 (quoting *Darr*, *supra*, at 204). Congress subsequently codified *Lundy*'s exhaustion requirement in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2254(b)(1)(A).

We also have long recognized the need to impose sharp limits on state prisoners' efforts to bypass state courts with their discovery requests. See, *e. g.*, *Wainwright* v. *Sykes*, 433 U. S. 72, 87–90 (1977); *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 8–10 (1992); *Williams* v. *Taylor*, 529 U. S. 420, 436 (2000). For example, we have held that "concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum" require a state prisoner to show "cause-and-prejudice" before asking a federal habeas court

to hold an evidentiary hearing. *Keeney*, *supra*, at 8. That result reduces opportunities for " 'sandbagging' on the part of defense lawyers," *Sykes*, *supra*, at 89, and it "reduces the 'inevitable friction' that results when a federal habeas court 'overturns either the factual or legal conclusions reached by the state-court system,' " *Keeney*, *supra*, at 9 (quoting *Sumner* v. *Mata*, 449 U. S. 539, 550 (1981); brackets omitted). Congress subsequently codified *Keeney*'s cause-and-prejudice rule in AEDPA, 28 U. S. C. § 2254(e)(2).

The rules set forth in our cases and codified in AEDPA would mean very little if state prisoners could simply evade them through artful pleading. For example, I take it as common ground that a state prisoner's claim under *Brady* v. *Maryland*, 373 U. S. 83 (1963), must be brought in habeas because that claim, if proved, would invalidate the judgment of conviction or sentence (and thus the lawfulness of the inmate's confinement). See *Heck*, *supra*, at 481. But under respondent's view, I see no reason why a *Brady* claimant could not bypass the state courts and file a § 1983 claim in federal court, contending that he has a due process right to search the State's files for exculpatory evidence. Allowing such a maneuver would violate the principles embodied in *Lundy*, *Keeney*, and AEDPA.

Although respondent has now recharacterized his claim in an effort to escape the requirement of proceeding in habeas, in his complaint he squarely alleged that the State "deprived [him] of access to exculpatory evidence in violation of *Brady[*, *supra]*, and the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution." App. 37. That allegedly "exculpatory" evidence—which *Brady* defines as "evidence favorable to [the] accused" and "material either to guilt or to punishment," 373 U. S., at 87—would, by definition, undermine respondent's "guilt" or "punishment" if his allegations are true. Such claims should be brought in habeas, see *Heck*, *supra*, at 481, and respondent cannot avoid

that result by attempting to bring his claim under § 1983, see *Dotson*, *supra*, at 92 (KENNEDY, J., dissenting).[1]

It is no answer to say, as respondent does, that he simply wants to use § 1983 as a discovery tool to lay the foundation for a future state postconviction application, a state clemency petition, or a request for relief by means of "prosecutorial consent." See Brief for Respondent 23. Such tactics implicate precisely the same federalism and comity concerns that motivated our decisions (and Congress') to impose exhaustion requirements and discovery limits in federal habeas proceedings. If a petitioner can evade the habeas statute's exhaustion requirements in this way, I see no reason why a state prisoner asserting an ordinary *Brady* claim—*i. e.*, a state prisoner who claims that the prosecution failed to turn over exculpatory evidence prior to trial—could not follow the same course.

What respondent seeks was accurately described in his complaint—the discovery of evidence that has a material bearing on his conviction. Such a claim falls within "the core" of habeas. *Preiser*, *supra*, at 489. Recognition of a constitutional right to postconviction scientific testing of evidence in the possession of the prosecution would represent an expansion of *Brady* and a broadening of the discovery rights now available to habeas petitioners. See 28 U. S. C. § 2254 Rule 6. We have never previously held that a state prisoner may seek discovery by means of a § 1983 action,

[1] This case is quite different from *Dotson*. In that case, two state prisoners filed § 1983 actions challenging the constitutionality of Ohio's parole procedures and seeking "a new parole hearing that may or may not result in release, prescription of the composition of the hearing panel, and specification of the procedures to be followed." 544 U. S., at 86 (SCALIA, J., concurring). Regardless of whether such remedies fall outside the authority of federal habeas judges, compare *id.*, at 86–87, with *id.*, at 88–92 (KENNEDY, J., dissenting), there is no question that the relief respondent seeks in this case—"exculpatory" evidence that tends to prove his innocence—lies "within the core of habeas corpus," *Preiser* v. *Rodriguez*, 411 U. S. 475, 487 (1973).

and we should not take that step here. I would hold that respondent's claim (like all other *Brady* claims) should be brought in habeas.

II

The principles of federalism, comity, and finality are not the only ones at stake for the State in cases like this one. To the contrary, DNA evidence creates special opportunities, risks, and burdens that implicate important state interests. Given those interests—and especially in light of the rapidly evolving nature of DNA testing technology—this is an area that should be (and is being) explored "through the workings of normal democratic processes in the laboratories of the States." *Atkins* v. *Virginia*, 536 U. S. 304, 326 (2002) (Rehnquist, C. J., dissenting).[2]

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[2] Forty-six States, plus the District of Columbia and the Federal Government, have recently enacted DNA testing statutes. See 18 U. S. C. §3600; Ariz. Rev. Stat. Ann. §13–4240 (West 2001); Ark. Code Ann. §16–112–202 (2006); Cal. Penal Code Ann. §1405 (West Supp. 2009); Colo. Rev. Stat. Ann. §18–1–413 (2008); Conn. Gen. Stat. §52–582 (2009); Del. Code Ann., Tit. 11, §4504 (2007); D. C. Code §22–4133 to §22–4135 (2008 Supp.); Fla. Stat. §925.11 (2007); Ga. Code Ann. §5–5–41 (Supp. 2008); Haw. Rev. Stat. §844D–123 (2008 Cum. Supp.); Idaho Code §19–4902 (Lexis 2004); Ill. Comp. Stat., ch. 725, §5/116–3 (West 2006); Ind. Code §35–38–7–5 (West 2004); Iowa Code §81.10 (2009); Kan. Stat. Ann. §21–2512 (2007); Ky. Rev. Stat. Ann. §422.285 (Lexis Supp. 2008); La. Code Crim. Proc. Ann., Art. 926.1 (West Supp. 2009); Me. Rev. Stat. Ann., Tit. 15, §2137 (Supp. 2008); Md. Crim. Proc. Code Ann. §8–201 (Lexis 2008); Mich. Comp. Laws Ann. §770.16 (West Supp. 2009); Minn. Stat. §590.01 (2008); Mo. Rev. Stat. §547.035 (2008 Cum. Supp.); Mont. Code Ann. §46–21–110 (2007); Neb. Rev. Stat. §29–4120 (2008); Nev. Rev. Stat. §176.0918 (2007); N. H. Rev. Stat. Ann. §651–D:2 (2007); N. J. Stat. Ann. §2A:84A–32a (West Supp. 2009); N. M. Stat. Ann. §31–1A–2 (Supp. 2008); N. Y. Crim. Proc. Law Ann. §440.30(1–a) (West 2005); N. C. Gen. Stat. Ann. §15A–269 (Lexis 2007); N. D. Cent. Code Ann. §29–32.1–15 (Lexis 2006); Ohio Rev. Code Ann. §2953.72 (Lexis Supp. 2009); Ore. Rev. Stat. §138.690 (2007); 42 Pa. Cons. Stat. §9543.1 (2006); R. I. Gen. Laws §10–9.1–11 (Lexis Supp. 2008); S. C. Code Ann. §17–28–30 (Supp. 2008); Tenn. Code Ann. §40–30–304 (2006); Tex. Code Crim. Proc. Ann., Arts. 64.01–64.05 (Vernon 2006 and Supp. 2008); Utah Code Ann. §78B–9–300 to §78B–9–304 (2008 Lexis Supp.); Vt.

A

As the Court notes, DNA testing often produces highly reliable results. See *ante*, at 62. Indeed, short tandem repeat (STR) "DNA tests can, in certain circumstances, establish to a virtual certainty whether a given individual did or did not commit a particular crime." *Harvey* v. *Horan*, 285 F. 3d 298, 305 (CA4 2002) (Luttig, J., respecting denial of rehearing en banc). Because of that potential for "virtual certainty," JUSTICE STEVENS argues that the State should welcome respondent's offer to perform modern DNA testing (at his own expense) on the State's DNA evidence; the test will either confirm respondent's guilt (in which case the State has lost nothing) or exonerate him (in which case the State has no valid interest in detaining him). See *post*, at 97–98.

Alas, it is far from that simple. First, DNA testing—even when performed with modern STR technology, and even when performed in perfect accordance with protocols—often

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Stat. Ann., Tit. 13, § 5561 (Supp. 2008); Va. Code Ann. § 19.2–327.1 (Lexis 2008); Wash. Rev. Code § 10.73.170 (2008); W. Va. Code Ann. § 15–2B–14 (Lexis Supp. 2008); Wis. Stat. § 974.07 (2005–2006); Wyo. Stat. Ann. § 7–12–303 (2008 Supp.). The pace of the legislative response has been so fast that two States have enacted statutes while this case was *sub judice:* The Governor of South Dakota signed a DNA access law on March 11, 2009, see H. R. 1166, and the Governor of Mississippi signed a DNA access law on March 16, 2009, see S. 2709. The only States that do not have DNA testing statutes are Alabama, Alaska, Massachusetts, and Oklahoma; and at least three of those States have addressed the issue through judicial decisions. See *Fagan* v. *State*, 957 So. 2d 1159 (Ala. Crim. App. 2007); *Osborne* v. *State*, 110 P. 3d 986, 995 (Alaska App. 2005) *(Osborne I); Commonwealth* v. *Donald*, 66 Mass. App. 1110, 848 N. E. 2d 447 (2006). Because the Court relies on such evidence, JUSTICE STEVENS accuses it of "resembl[ing]" Justice Harlan's position in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). See *post*, at 101, n. 10 (dissenting opinion) (quoting 384 U. S., at 523–524). I can think of worse things than sharing Justice Harlan's judgment that "this Court's too rapid departure from existing constitutional standards" may "frustrat[e]" the States' "long-range and lasting" legislative efforts. *Id.*, at 524.

fails to provide "absolute proof" of anything. *Post*, at 98 (STEVENS, J., dissenting). As one scholar has observed:

> "[F]orensic DNA testing rarely occurs [under] idyllic conditions. Crime scene DNA samples do not come from a single source obtained in immaculate conditions; they are messy assortments of multiple unknown persons, often collected in the most difficult conditions. The samples can be of poor quality due to exposure to heat, light, moisture, or other degrading elements. They can be of minimal or insufficient quantity, especially as investigators push DNA testing to its limits and seek profiles from a few cells retrieved from cigarette butts, envelopes, or soda cans. And most importantly, forensic samples often constitute a mixture of multiple persons, such that it is not clear whose profile is whose, or even how many profiles are in the sample at all. All of these factors make DNA testing in the forensic context far more subjective than simply reporting test results . . . ." Murphy, The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing, 58 Emory L. J. 489, 497 (2008) (footnotes omitted).

See also R. Michaelis, R. Flanders, & P. Wulff, A Litigator's Guide to DNA 341 (2008) (hereinafter Michaelis) (noting that even "STR analyses are plagued by issues of suboptimal samples, equipment malfunctions and human error, just as any other type of forensic DNA test"); *Harvey* v. *Horan*, 278 F. 3d 370, 383, n. 4 (CA4 2002) (King, J., concurring in part and concurring in judgment) (noting that the first STR DNA test performed under Virginia's postconviction DNA access statute was inconclusive). Such concerns apply with particular force where, as here, the sample is minuscule, it may contain three or more persons' DNA, and it may have degraded significantly during the 24 or more hours it took police to recover it.

Second, the State has important interests in maintaining the integrity of its evidence, and the risks associated with evidence contamination increase every time someone attempts to extract new DNA from a sample. According to Professor John Butler—who is said to have written "the canonical text on forensic DNA typing," Murphy, *supra,* at 493, n. 16—"[t]he extraction process is probably where the DNA sample is more susceptible to contamination in the laboratory than at any other time in the forensic DNA analysis process," J. Butler, Forensic DNA Typing 42 (2d ed. 2005).

Indeed, modern DNA testing technology is so powerful that it actually increases the risks associated with mishandling evidence. STR tests, for example, are so sensitive that they can detect DNA transferred from person X to a towel (with which he wipes his face), from the towel to Y (who subsequently wipes his face), and from Y's face to a murder weapon later wielded by Z (who can use STR technology to blame X for the murder). See Michaelis 62–64; Thompson, Ford, Doom, Raymer, & Krane, Evaluating Forensic DNA Evidence: Essential Elements of a Competent Defense Review (Part 2), The Champion, May 2003, pp. 25–26. Any test that is sensitive enough to pick up such trace amounts of DNA will be able to detect even the slightest, unintentional mishandling of evidence. See Michaelis 63 (cautioning against mishandling evidence because "two research groups have already demonstrated the ability to obtain STR profiles from fingerprints on paper or evidence objects"). And that is to say nothing of the intentional DNA-evidence-tampering scandals that have surfaced in recent years. See, *e. g.,* Murphy, The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence, 95 Cal. L. Rev. 721, 772–773 (2007) (collecting examples). It gives short shrift to such risks to suggest that anyone—including respondent, who has twice confessed to his crime, has never recanted, and passed up the opportunity for DNA testing at trial—should be given a never-

before-recognized constitutional right to rummage through the State's genetic-evidence locker.

Third, even if every test was guaranteed to provide a conclusive answer, and even if no one ever contaminated a DNA sample, that still would not justify disregarding the other costs associated with the DNA access regime proposed by respondent. As the Court notes, recognizing a prisoner's freestanding right to access the State's DNA evidence would raise numerous policy questions, not the least of which is whether and to what extent the State is constitutionally obligated to collect and preserve such evidence. See *ante*, at 73–74. But the policy problems do not end there.

Even without our creation and imposition of a mandatory-DNA-access regime, state crime labs are already responsible for maintaining and controlling hundreds of thousands of new DNA samples every year. For example, in the year 2005, the State of North Carolina processed DNA samples in approximately 1,900 cases, while the Commonwealth of Virginia processed twice as many. See Office of State Budget and Management, Cost Study of DNA Testing and Analysis As Directed by Session Law 2005–267, Section 15.8, pp. 5, 8 (Mar. 1, 2006) (hereinafter North Carolina Study), http://www.osbm.state.nc.us/files/pdf_files/3-1-2006FinalDNAReport.pdf (all Internet materials as visited June 16, 2009, and available in Clerk of Court's case file); see also *id.*, at 8 (noting that the State of Iowa processed DNA samples in 1,500 cases in that year). Each case often entails many separate DNA samples. See Wisconsin Criminal Justice Study Commission, Position Paper: Decreasing the Turnaround Time for DNA Testing, p. 2 (hereinafter Wisconsin Study), http://www.wcjsc.org/WCJSC_Report_on_DNA_Backlog.pdf ("An average case consists of 8 samples"). And these data—which are now four years out of date—dramatically underestimate the States' current DNA-related caseloads, which expand at an average annual rate of around 24%. See Wisconsin Dept. of Justice, Review of State Crime Lab Re-

sources for DNA Analysis 6 (Feb. 12, 2007), http://www.doj.state.wi.us/news/files/dnaanalysisplan.pdf.

The resources required to process and analyze these hundreds of thousands of samples have created severe backlogs in state crime labs across the country. For example, the State of Wisconsin reports that it receives roughly 17,600 DNA samples per year, but its labs can process only 9,600. Wisconsin Study 2. Similarly, the State of North Carolina reports that "[i]t is not unusual for the [State] Crime Lab to have several thousand samples waiting to be outsourced due to the federal procedures for [the State's] grant. This is not unique to North Carolina but a national issue." North Carolina Study 9.

The procedures that the state labs use to handle these hundreds of thousands of DNA samples provide fertile ground for litigation. For example, in *Commonwealth* v. *Duarte*, 56 Mass. App. 714, 723, 780 N. E. 2d 99, 106 (2002), the defendant argued that "the use of a thermometer that may have been overdue for a standardization check rendered the DNA analysis unreliable and inadmissible" in his trial for raping a 13-year-old girl. The court rejected that argument and held "that the status of the thermometer went to the weight of the evidence, and not to its admissibility," *id.*, at 724, 780 N. E. 2d, at 106, and the court ultimately upheld Duarte's conviction after reviewing the testimony of the deputy director of the laboratory that the Commonwealth used for the DNA tests, see *ibid.* But the case nevertheless illustrates "that no detail of laboratory operation, no matter how minute, is exempt as a potential point on which a defense attorney will question the DNA evidence." Michaelis 68; see also *id.*, at 68–69 (discussing the policy implications of *Duarte*).

My point in recounting the burdens that postconviction DNA testing imposes on the Federal Government and the States is not to denigrate the importance of such testing. Instead, my point is that requests for postconviction DNA testing are not cost free. The Federal Government and the

States have a substantial interest in the implementation of rules that regulate such testing in a way that harnesses the unique power of DNA testing while also respecting the important governmental interests noted above. The Federal Government and the States have moved expeditiously to enact rules that attempt to perform this role. And as the Court holds, it would be most unwise for this Court, wielding the blunt instrument of due process, to interfere prematurely with these efforts.

B

I see no reason for such intervention in the present case. When a criminal defendant, for tactical purposes, passes up the opportunity for DNA testing at trial, that defendant, in my judgment, has no constitutional right to demand to perform DNA testing after conviction. Recognition of such a right would allow defendants to play games with the criminal justice system. A guilty defendant could forgo DNA testing at trial for fear that the results would confirm his guilt, and in the hope that the other evidence would be insufficient to persuade the jury to find him guilty. Then, after conviction, with nothing to lose, the defendant could demand DNA testing in the hope that some happy accident—for example, degradation or contamination of the evidence—would provide the basis for seeking postconviction relief. Denying the opportunity for such an attempt to game the criminal justice system should not shock the conscience of the Court.

There is ample evidence in this case that respondent attempted to game the system. At trial, respondent's lawyer made an explicit, tactical decision to forgo restriction-fragment-length-polymorphism (RFLP) testing in favor of less reliable DQ Alpha testing. Having forgone more accurate DNA testing once before, respondent's reasons for seeking it now are suspect. It is true that the STR testing respondent now seeks is even more advanced than the RFLP testing he declined—but his counsel did not decline RFLP testing because she thought it was not good enough; she de-

clined because she thought it was too good. *Osborne I*, 110 P. 3d 986, 990 (Alaska App. 2005). "[A] defendant should not be allowed to take a gambler's risk and complain only if the cards [fall] the wrong way." *Osborne* v. *State*, 163 P. 3d 973, 984 (Alaska App. 2007) (Mannheimer, J., concurring) (internal quotation marks omitted).

JUSTICE STEVENS contends that respondent should not be bound by his attorney's tactical decision and notes that respondent testified in the state postconviction proceeding that he strongly objected to his attorney's strategy. See *post*, at 97–98, n. 8. His attorney, however, had no memory of that objection, and the state court did not find that respondent's testimony was truthful.[3] Nor do we have reason to assume that respondent was telling the truth, particularly since he now claims that he lied at his parole hearing when he twice confessed to the crimes for which he was convicted.

In any event, even assuming for the sake of argument that respondent did object at trial to his attorney's strategy, it is a well-accepted principle that, except in a few carefully defined circumstances, a criminal defendant is bound by his attorney's tactical decisions unless the attorney provided constitutionally ineffective assistance. See *Vermont* v. *Brillon*, 556 U. S. 81, 90–91 (2009).[4] Here, the state postconviction

[3] The state court noted that respondent's trial counsel "'disbelieved Osborne's statement that he did not commit the crime'" and therefore "'elected to avoid the possibility of obtaining DNA test results that might have confirmed Osborne's culpability.'" *Osborne I*, 110 P. 3d, at 990. Given the reasonableness of trial counsel's judgment, the state court held that respondent's protestations (whether or not he made them) were irrelevant. *Id.*, at 991–992.

[4] In adopting rules regarding postconviction DNA testing, the Federal and State Governments may choose to alter the traditional authority of defense counsel with respect to DNA testing. For example, the federal statute provides that a prisoner's declination of DNA testing at trial bars a request for postconviction testing only if the prisoner knowingly and voluntarily waived that right in a proceeding occurring after the enactment of the federal statute. 18 U. S. C. §3600(a)(3)(A)(i). But Alaska has specifically decided to retain the general rule regarding the authority of

court rejected respondent's ineffective-assistance claim, *Osborne I*, *supra*, at 991–992; respondent does not challenge that holding; and we must therefore proceed on the assumption that his attorney's decision was reasonable and binding.[5]

* * *

If a state prisoner wants to challenge the State's refusal to permit postconviction DNA testing, the prisoner should proceed under the habeas statute, which duly accounts for the interests of federalism, comity, and finality. And in considering the merits of such a claim, the State's weighty interests cannot be summarily dismissed as "'arbitrary, or conscience shocking.'" *Post*, at 96–97 (STEVENS, J., dissenting). With these observations, I join the opinion of the Court.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, and with whom JUSTICE SOUTER joins as to Part I, dissenting.

The State of Alaska possesses physical evidence that, if tested, will conclusively establish whether respondent William Osborne committed rape and attempted murder. If he did, justice has been served by his conviction and sentence. If not, Osborne has needlessly spent decades behind bars while the true culprit has not been brought to justice. The DNA test Osborne seeks is a simple one, its cost modest, and

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defense counsel. See *Osborne I*, *supra*, at 991–992 (citing *Simeon* v. *State*, 90 P. 3d 181, 184 (Alaska App. 2004)).

[5] JUSTICE STEVENS is quite wrong to suggest that the application of this familiar principle in the present context somehow lessens the prosecution's burden to prove a defendant's guilt. *Post*, at 97–98, n. 8 (citing *Sandstrom* v. *Montana*, 442 U. S. 510 (1979); *In re Winship*, 397 U. S. 358 (1970)). Respondent is not challenging the sufficiency of the State's evidence at trial. Rather, he claims that he has a right to obtain evidence that may be useful to him in a variety of postconviction proceedings. The principle that the prosecution must prove its case beyond a reasonable doubt and the principle that a defendant has no obligation to prove his innocence are not implicated in any way by the issues in this case.

its results uniquely precise. Yet for reasons the State has been unable or unwilling to articulate, it refuses to allow Osborne to test the evidence at his own expense and to thereby ascertain the truth once and for all.

On two equally problematic grounds, the Court today blesses the State's arbitrary denial of the evidence Osborne seeks. First, while acknowledging that Osborne may have a due process right to access the evidence under Alaska's postconviction procedures, the Court concludes that Osborne has not yet availed himself of all possible avenues for relief in state court.[1] As both a legal and factual matter, that conclusion is highly suspect. More troubling still, based on a fundamental mischaracterization of the right to liberty that Osborne seeks to vindicate, the Court refuses to acknowledge "in the circumstances of this case" any right to access the evidence that is grounded in the Due Process Clause itself. Because I am convinced that Osborne has a constitutional right of access to the evidence he wishes to test and that, on the facts of this case, he has made a sufficient showing of entitlement to that evidence, I would affirm the decision of the Court of Appeals.

I

The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." §1. Our cases have frequently

[1] Because the Court assumes, *arguendo*, that Osborne's claim was properly brought under 42 U. S. C. §1983, rather than by an application for the writ of habeas corpus, I shall state only that I agree with the Ninth Circuit's endorsement of Judge Luttig's analysis of that issue. See 423 F. 3d 1050, 1053–1055 (2005) (citing *Harvey* v. *Horan*, 285 F. 3d 298, 308–309 (CA4 2002) (opinion respecting denial of rehearing en banc)); see also *McKithen* v. *Brown*, 481 F. 3d 89, 98 (CA2 2007) (agreeing that a claim seeking postconviction access to evidence for DNA testing may be properly brought as a §1983 suit); *Savory* v. *Lyons*, 469 F. 3d 667, 669 (CA7 2006) (same); *Bradley* v. *Pryor*, 305 F. 3d 1287, 1290–1291 (CA11 2002) (same).

recognized that protected liberty interests may arise "from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' . . . or it may arise from an expectation or interest created by state laws or policies." *Wilkinson* v. *Austin*, 545 U. S. 209, 221 (2005). Osborne contends that he possesses a right to access DNA evidence arising from both these sources.

Osborne first anchors his due process right in Alaska Stat. § 12.72.010(4) (2008). Under that provision, a person who has been "convicted of, or sentenced for, a crime may institute a proceeding for post-conviction relief if the person claims . . . that there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice." *Ibid.*[2] Osborne asserts that exculpatory DNA test results obtained using state-of-the-art Short Tandem Repeat (STR) and Mitochondrial (mtDNA) analysis would qualify as newly discovered evidence entitling him to relief under the state statute. The problem is that the newly discovered evidence he wishes to present cannot be generated unless he is first able to access the State's evidence—something he cannot do without the State's consent or a court order.

Although States are under no obligation to provide mechanisms for postconviction relief, when they choose to do so, the procedures they employ must comport with the demands of the Due Process Clause, see *Evitts* v. *Lucey*, 469 U. S. 387, 393 (1985), by providing litigants with fair opportunity to

[2] Ordinarily, claims under § 12.72.010(4) must be brought within one year after the conviction becomes final. § 12.72.020(a)(3)(A). However, the court may hear an otherwise untimely claim based on newly discovered evidence "if the applicant establishes due diligence in presenting the claim and sets out facts supported by evidence that is admissible and (A) was not known within . . . two years after entry of the judgment of conviction if the claim relates to a conviction; . . . (B) is not cumulative to the evidence presented at trial; (C) is not impeachment evidence; and (D) establishes by clear and convincing evidence that the applicant is innocent." § 12.72.020(b)(2) (2002).

assert their state-created rights. Osborne contends that by denying him an opportunity to access the physical evidence, the State has denied him meaningful access to state postconviction relief, thereby violating his right to due process.

Although the majority readily agrees that Osborne has a protected liberty interest in demonstrating his innocence with new evidence under Alaska Stat. § 12.72.010(4), see *ante*, at 68, it rejects the Ninth Circuit's conclusion that Osborne is constitutionally entitled to access the State's evidence. The Court concludes that the adequacy of the process afforded to Osborne must be assessed under the standard set forth in *Medina* v. *California*, 505 U. S. 437 (1992). Under that standard, Alaska's procedures for bringing a claim under § 12.72.010(4) will not be found to violate due process unless they "'offen[d] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgres[s] any recognized principle of fundamental fairness in operation.'" *Ante*, at 69 (quoting *Medina*, 505 U. S., at 446, 448).[3] After conducting a cursory review of the relevant statutory text, the Court concludes that Alaska's procedures are constitutional on their face.

While I agree that the statute is not facially deficient, the state courts' application of § 12.72.010(4) raises serious questions whether the State's procedures are fundamentally unfair in their operation. As an initial matter, it is not clear that Alaskan courts ordinarily permit litigants to utilize the state postconviction statute to obtain new evidence in the form of DNA tests. The majority assumes that such discov-

[3] Osborne contends that the Court should assess the validity of the State's procedures under the test set forth in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), rather than the more exacting test adopted by *Medina* v. *California*, 505 U. S. 437 (1992). In my view, we need not decide which standard governs because the state court's denial of access to the evidence Osborne seeks violates due process under either standard. See *Harvey*, 285 F. 3d, at 315 (Luttig, J.).

ery is possible based on a single, unpublished, nonprecedential decision from the Alaska Court of Appeals, see *ante*, at 70 (citing *Patterson* v. *State*, No. A–8814, 2006 WL 573797 (Mar. 8, 2006)), but the State concedes that no litigant yet has obtained evidence for such testing under the statute.[4]

Of even greater concern is the manner in which the state courts applied § 12.72.010(4) to the facts of this case. In determining that Osborne was not entitled to relief under the postconviction statute, the Alaska Court of Appeals concluded that the DNA testing Osborne wished to obtain could not qualify as "newly discovered" because it was available at the time of trial. See *Osborne* v. *State*, 110 P. 3d 986, 992 (2005) *(Osborne I)*. In his arguments before the state trial court and his briefs to the Alaska Court of Appeals, however, Osborne had plainly requested STR DNA testing, a form of DNA testing not yet in use at the time of his trial. See App. 171, 175; see also 521 F. 3d 1118, 1123, n. 2 (CA9 2008). The state appellate court's conclusion that the requested testing had been available at the time of trial was therefore clearly erroneous.[5] Given these facts, the majority's assertion that Osborne "attempt[ed] to sidestep state process" by failing "to use the process provided to him by the State" is unwarranted. *Ante*, at 70, 71.

The same holds true with respect to the majority's suggestion that the Alaska Constitution might provide additional protections to Osborne above and beyond those afforded under § 12.72.010(4). In Osborne's state postconviction proceedings, the Alaska Court of Appeals held out the possibil-

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[4] The State explained at oral argument that such testing was ordered in the *Patterson* case, but by the time access was granted, the relevant evidence had been destroyed. See Tr. of Oral Arg. 12.

[5] The majority avoids confronting this serious flaw in the state court's decision by treating its mistaken characterization of the nature of Osborne's request as if it were binding. See *ante*, at 71. But see *ante*, at 59, n. 2 (conceding "[i]t is not clear" whether the state court erred in reaching that conclusion).

ity that even when evidence does not meet the requirements of § 12.72.010(4), the State Constitution might offer relief to a defendant who is able to make certain threshold showings. See *Osborne I*, 110 P. 3d, at 995–996. On remand from that decision, however, the state trial court denied Osborne relief on the ground that he failed to show that (1) his conviction rested primarily on eyewitness identification; (2) there was a demonstrable doubt concerning his identity as the perpetrator; and (3) scientific testing would likely be conclusive on this issue. *Osborne* v. *State*, 163 P. 3d 973, 979–981 (Alaska App. 2007). The first two reasons reduce to an evaluation of the strength of the prosecution's original case—a consideration that carries little weight when balanced against evidence as powerfully dispositive as an exculpatory DNA test. The final reason offered by the state court—that further testing would not be conclusive on the issue of Osborne's guilt or innocence—is surely a relevant factor in deciding whether to release evidence for DNA testing. Nevertheless, the state court's conclusion that such testing would not be conclusive in this case is indefensible, as evidenced by the State's recent concession on that point. See also 521 F. 3d, at 1136–1139 (detailing why the facts of this case do not permit an inference that any exonerating test result would be less than conclusive).

Osborne made full use of available state procedures in his efforts to secure access to evidence for DNA testing so that he might avail himself of the postconviction relief afforded by the State of Alaska. He was rebuffed at every turn. The manner in which the Alaska courts applied state law in this case leaves me in grave doubt about the adequacy of the procedural protections afforded to litigants under Alaska Stat. § 12.72.010(4), and provides strong reason to doubt the majority's flippant assertion that if Osborne were "simply [to] see[k] the DNA through the State's discovery procedures, he might well get it." *Ante*, at 71. However, even

if the Court were correct in its assumption that Osborne might be given the evidence he seeks were he to present his claim in state court a second time, there should be no need for him to do so.

II

Wholly apart from his state-created interest in obtaining postconviction relief under Alaska Stat. § 12.72.010(4), Osborne asserts a right to access the State's evidence that derives from the Due Process Clause itself. Whether framed as a "substantive liberty interest . . . protected through a procedural due process right" to have evidence made available for testing, or as a substantive due process right to be free of arbitrary government action, see *Harvey* v. *Horan*, 285 F. 3d 298, 315, 319 (CA4 2002) (Luttig, J., respecting denial of rehearing en banc),[6] the result is the same: On the record now before us, Osborne has established his entitlement to test the State's evidence.

The liberty protected by the Due Process Clause is not a creation of the Bill of Rights. Indeed, our Nation has long recognized that the liberty safeguarded by the Constitution has far deeper roots. See Declaration of Independence ¶ 2 (holding it self-evident that "all men are . . . endowed by their Creator with certain unalienable Rights," among which are "Life, Liberty, and the pursuit of Happiness"); see also *Meachum* v. *Fano*, 427 U. S. 215, 230 (1976) (STEVENS, J., dissenting). The "most elemental" of the liberties protected by the Due Process Clause is "the interest in being free from physical detention by one's own government." *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 529 (2004) (plurality opinion); see *Foucha* v. *Louisiana*, 504 U. S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause").

[6] See *Harvey*, 285 F. 3d, at 318 (Luttig, J.) ("[T]he claimed right of access to evidence partakes of both procedural and substantive due process. And with a claim such as this, the line of demarcation is faint").

Although a valid criminal conviction justifies punitive detention, it does not entirely eliminate the liberty interests of convicted persons. For while a prisoner's "rights may be diminished by the needs and exigencies of the institutional environment, . . . [t]here is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff* v. *McDonnell*, 418 U. S. 539, 555–556 (1974); *Shaw* v. *Murphy*, 532 U. S. 223, 228–229 (2001) ("[I]ncarceration does not divest prisoners of all constitutional protections"). Our cases have recognized protected interests in a variety of postconviction contexts, extending substantive constitutional protections to state prisoners on the premise that the Due Process Clause of the Fourteenth Amendment requires States to respect certain fundamental liberties in the postconviction context. See, *e. g.*, *Thornburgh* v. *Abbott*, 490 U. S. 401, 407 (1989) (right to free speech); *Turner* v. *Safley*, 482 U. S. 78, 84 (1987) (right to marry); *Cruz* v. *Beto*, 405 U. S. 319, 322 (1972) *(per curiam)* (right to free exercise of religion); *Lee* v. *Washington*, 390 U. S. 333 (1968) *(per curiam)* (right to be free of racial discrimination); *Johnson* v. *Avery*, 393 U. S. 483 (1969) (right to petition government for redress of grievances). It is therefore far too late in the day to question the basic proposition that convicted persons such as Osborne retain a constitutionally protected measure of interest in liberty, including the fundamental liberty of freedom from physical restraint.

Recognition of this right draws strength from the fact that 46 States and the Federal Government have passed statutes providing access to evidence for DNA testing, and 3 additional States (including Alaska) provide similar access through court-made rules alone, see Brief for State of California et al. as *Amici Curiae* 3–4, n. 1, and 2; *ante*, at 62–63 (opinion of the Court). These legislative developments are consistent with recent trends in legal ethics recognizing that prosecutors are obliged to disclose all forms of exculpatory evidence that come into their possession following convic-

tion. See, *e. g.*, ABA Model Rules of Professional Conduct 3.8(g)–(h) (2008); see also *Imbler* v. *Pachtman*, 424 U. S. 409, 427, n. 25 (1976) ("[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction"). The fact that nearly all the States have now recognized some postconviction right to DNA evidence makes it more, not less, appropriate to recognize a limited federal right to such evidence in cases where litigants are unfairly barred from obtaining relief in state court.

Insofar as it is process Osborne seeks, he is surely entitled to less than "the full panoply of rights" that would be due a criminal defendant prior to conviction, see *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972). That does not mean, however, that our pretrial due process cases have no relevance in the postconviction context. In *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963), we held that the State violates due process when it suppresses "evidence favorable to an accused" that is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Although *Brady* does not directly provide for a postconviction right to such evidence, the concerns with fundamental fairness that motivated our decision in that case are equally present when convicted persons such as Osborne seek access to dispositive DNA evidence following conviction.

Recent scientific advances in DNA analysis have made "it literally possible to confirm guilt or innocence beyond any question whatsoever, at least in some categories of cases." *Harvey*, 285 F. 3d, at 305 (Luttig, J.). As the Court recognizes today, the powerful new evidence that modern DNA testing can provide is "unlike anything known before." *Ante*, at 62. Discussing these important forensic developments in his oft-cited opinion in *Harvey*, Judge Luttig explained that although "no one would contend that fairness, in the constitutional sense, requires a post-conviction right

of access or a right to disclosure anything approaching in scope that which is required pre-trial," in cases "where the government holds previously-produced forensic evidence, the testing of which concededly could prove beyond any doubt that the defendant did not commit the crime for which he was convicted, the very same principle of elemental fairness that dictates pre-trial production of all potentially exculpatory evidence dictates post-trial production of this infinitely narrower category of evidence." 285 F. 3d, at 317. It does so "out of recognition of the same systemic interests in fairness and ultimate truth." *Ibid.*

Observing that the DNA evidence in this case would be so probative of Osborne's guilt or innocence that it exceeds the materiality standard that governs the disclosure of evidence under *Brady*, the Ninth Circuit granted Osborne's request for access to the State's evidence. See 521 F. 3d, at 1134. In doing so, the Court of Appeals recognized that Osborne possesses a narrow right of postconviction access to biological evidence for DNA testing "where [such] evidence was used to secure his conviction, the DNA testing is to be conducted using methods that were unavailable at the time of trial and are far more precise than the methods that were then available, such methods are capable of conclusively determining whether Osborne is the source of the genetic material, the testing can be conducted without cost or prejudice to the State, and the evidence is material to available forms of post-conviction relief." *Id.*, at 1142. That conclusion does not merit reversal.

If the right Osborne seeks to vindicate is framed as purely substantive, the proper result is no less clear. "The touchstone of due process is protection of the individual against arbitrary action of government," *Meachum*, 427 U. S., at 226 (internal quotation marks omitted); *Wolff*, 418 U. S., at 558; *County of Sacramento* v. *Lewis*, 523 U. S. 833, 845–846 (1998). When government action is so lacking in justification that it "can properly be characterized as arbitrary, or

conscience shocking, in a constitutional sense," *Collins* v. *Harker Heights*, 503 U. S. 115, 128 (1992), it violates the Due Process Clause. In my view, the State's refusal to provide Osborne with access to evidence for DNA testing qualifies as arbitrary.

Throughout the course of state and federal litigation, the State has failed to provide any concrete reason for denying Osborne the DNA testing he seeks, and none is apparent. Because Osborne has offered to pay for the tests, cost is not a factor. And as the State now concedes, there is no reason to doubt that such testing would provide conclusive confirmation of Osborne's guilt or revelation of his innocence.[7] In the courts below, the State refused to provide an explanation for its refusal to permit testing of the evidence, see Brief for Respondent 33, and in this Court, its explanation has been, at best, unclear. Insofar as the State has articulated any reason at all, it appears to be a generalized interest in protecting the finality of the judgment of conviction from any possible future attacks. See Brief for Petitioners 18, 50.[8]

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[7] JUSTICE ALITO provides a detailed discussion of dangers such as laboratory contamination and evidence tampering that may reduce the reliability not only of DNA evidence, but of any type of physical forensic evidence. *Ante*, at 80–84 (concurring opinion). While no form of testing is error proof in every case, the degree to which DNA evidence has become a foundational tool of law enforcement and prosecution is indicative of the general reliability and probative power of such testing. The fact that errors may occur in the testing process is not a ground for refusing such testing altogether—were it so, such evidence should be banned at trial no less than in postconviction proceedings. More important still is the fact that the State now concedes there is no reason to doubt that if STR and mtDNA testing yielded exculpatory results *in this case*, Osborne's innocence would be established.

[8] In his concurring opinion, JUSTICE ALITO suggests other reasons that might motivate States to resist access to such evidence, including concerns over DNA testing backlogs and manipulation by defendants. See *ante*, at 83–84. Not only were these reasons not offered by the State of Alaska as grounds for its decision in this case, but they are not in themselves compelling. While state resource constraints might justify delays in the

While we have long recognized that States have an interest in securing the finality of their judgments, see, *e. g.*, *Duncan* v. *Walker*, 533 U. S. 167, 179 (2001); *Teague* v. *Lane*, 489 U. S. 288, 309 (1989) (plurality opinion); *McCleskey* v. *Zant*, 499 U. S. 467, 491–492 (1991), finality is not a stand-alone value that trumps a State's overriding interest in ensuring that justice is done in its courts and secured to its citizens. Indeed, when absolute proof of innocence is readily at hand, a State should not shrink from the possibility that error may have occurred. Rather, our system of justice is strengthened by "recogniz[ing] the need for, and imperative of, a safety valve in those rare instances where objective proof that the convicted actually did not commit the offense later becomes available through the progress of science." *Harvey*, 285 F. 3d, at 306 (Luttig, J.). DNA evidence has led to an extraordinary series of exonerations, not only in cases where the trial evidence was weak, but also in cases where the convicted parties confessed their guilt and where the

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testing of postconviction DNA evidence, they would not justify an outright ban on access to such evidence. And JUSTICE ALITO's concern that guilty defendants will "play games with the criminal justice system" with regard to the timing of their requests for DNA evidence is not only speculative, but gravely concerning. *Ante*, at 85. It bears remembering that criminal defendants are under no obligation to prove their innocence at trial; rather, the State bears the burden of proving their guilt. See *Sandstrom* v. *Montana*, 442 U. S. 510 (1979); *In re Winship*, 397 U. S. 358 (1970). Having no obligation to conduct pretrial DNA testing, a defendant should not be bound by a decision to forgo such testing at trial, particularly when, as in this case, the choice was made by counsel over the defendant's strong objection. See *Osborne I*, 110 P. 3d, at 990–991. (JUSTICE ALITO suggests there is reason to doubt whether Osborne asked his counsel to perform DNA testing prior to trial, *ante*, at 85–86. That fact was not disputed in the state courts, however. Although Osborne's trial counsel averred that she did "not have a present memory of Osborne's desire to have [a more specific discriminatory] test of his DNA done," she also averred that she was "willing to accept that he does" and that she "would have disagreed with him." 110 P. 3d, at 990 (internal quotation marks omitted).)

trial evidence against them appeared overwhelming.[9] The examples provided by *amici* of the power of DNA testing serve to convince me that the fact of conviction is not sufficient to justify a State's refusal to perform a test that will conclusively establish innocence or guilt.

This conclusion draws strength from the powerful state interests that offset the State's purported interest in finality *per se*. When a person is convicted for a crime he did not commit, the true culprit escapes punishment. DNA testing may lead to his identification. See Brief for Current and Former Prosecutors as *Amici Curiae* 16 (noting that in more than one-third of all exonerations DNA testing identified the actual offender). Crime victims, the law enforcement profession, and society at large share a strong interest in identifying and apprehending the actual perpetrators of vicious crimes, such as the rape and attempted murder that gave rise to this case.

The arbitrariness of the State's conduct is highlighted by comparison to the private interests it denies. It seems to me obvious that if a wrongly convicted person were to produce proof of his actual innocence, no state interest would be sufficient to justify his continued punitive detention. If such proof can be readily obtained without imposing a significant burden on the State, a refusal to provide access to such evidence is wholly unjustified.

In sum, an individual's interest in his physical liberty is one of constitutional significance. That interest would be vindicated by providing postconviction access to DNA evi-

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[9] See generally Brief for Current and Former Prosecutors as *Amici Curiae;* Brief for Jeanette Popp et al. as *Amici Curiae;* see also Brief for Individuals Exonerated by Post-Conviction DNA Testing as *Amici Curiae* 1–20. See also Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 109 (2008) (documenting that in 50% of cases in which DNA evidence exonerated a convicted person, reviewing courts had commented on the exoneree's likely guilt and in 10% of the cases had described the evidence supporting conviction as "'overwhelming'").

dence, as would the State's interest in ensuring that it punishes the true perpetrator of a crime. In this case, the State has suggested no countervailing interest that justifies its refusal to allow Osborne to test the evidence in its possession and has not provided any other nonarbitrary explanation for its conduct. Consequently, I am left to conclude that the State's failure to provide Osborne access to the evidence constitutes arbitrary action that offends basic principles of due process. On that basis, I would affirm the judgment of the Ninth Circuit.

III

The majority denies that Osborne possesses a cognizable substantive due process right under the "circumstances of this case," and offers two meager reasons for its decision. First, citing a general reluctance to "'expand the concept of substantive due process,'" *ante*, at 72 (quoting *Collins*, 503 U. S., at 125), the Court observes that there is no long history of postconviction access to DNA evidence. "'The mere novelty of such a claim,'" the Court asserts, "'is reason enough to doubt that "substantive due process" sustains it,'" *ante*, at 72 (quoting *Reno* v. *Flores*, 507 U. S. 292, 303 (1993)). The flaw is in the framing. Of course courts have not historically granted convicted persons access to physical evidence for STR and mtDNA testing. But, as discussed above, courts have recognized a residual substantive interest in both physical liberty and in freedom from arbitrary government action. It is Osborne's interest in those well-established liberties that justifies the Court of Appeals' decision to grant him access to the State's evidence for purposes of previously unavailable DNA testing.

The majority also asserts that this Court's recognition of a limited federal right of access to DNA evidence would be ill advised because it would "short circuit what looks to be a prompt and considered legislative response" by the States and Federal Government to the issue of access to DNA evidence. *Ante*, at 73. Such a decision, the majority warns,

would embroil the Court in myriad policy questions best left to other branches of government. *Ante*, at 72–74. The majority's arguments in this respect bear close resemblance to the manner in which the Court once approached the now-venerable right to counsel for indigent defendants. Before our decision in *Powell* v. *Alabama*, 287 U. S. 45 (1932), state law alone governed the manner in which counsel was appointed for indigent defendants. "Efforts to impose a minimum federal standard for the right to counsel in state courts routinely met the same refrain: 'in the face of these widely varying state procedures,' this Court refused to impose the dictates of 'due process' onto the states and 'hold invalid all procedure not reaching that standard.'" Brief for Current and Former Prosecutors as *Amici Curiae* 28, n. 8 (quoting *Bute* v. *Illinois*, 333 U. S. 640, 668 (1948)). When at last this Court recognized the Sixth Amendment right to counsel for all indigent criminal defendants in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), our decision did not impede the ability of States to tailor their appointment processes to local needs, nor did it unnecessarily interfere with their sovereignty. It did, however, ensure that criminal defendants were provided with the counsel to which they were constitutionally entitled.[10] In the same way, a decision to recognize a limited right of postconviction access to DNA testing would not prevent the States from creating procedures by which litigants

[10] The majority's position also resembles that taken by Justice Harlan in his dissent in *Miranda* v. *Arizona*, 384 U. S. 436, 523 (1966), in which he faulted the Court for its "ironic untimeliness." He noted that the Court's decision came at time when scholars, politicians, and law enforcement officials were beginning to engage in a "massive reexamination of criminal law enforcement procedures on a scale never before witnessed," and predicted that the practical effect of the Court's decision would be to "handicap seriously" those sound efforts. *Id.*, at 523–524. Yet time has vindicated the decision in *Miranda*. The Court's refusal to grant Osborne access to critical DNA evidence rests on a practical judgment remarkably similar to Justice Harlan's, and I find the majority's judgment today as profoundly incorrect as the *Miranda* minority's was yesterday.

request and obtain such access; it would merely ensure that States do so in a manner that is nonarbitrary.

While it is true that recent advances in DNA technology have led to a nationwide reexamination of state and federal postconviction procedures authorizing the use of DNA testing, it is highly unlikely that affirming the judgment of the Court of Appeals would significantly affect the use of DNA testing in any of the States that have already developed statutes and procedures for dealing with DNA evidence or would require the few States that have not yet done so to postpone the enactment of appropriate legislation.[11] Indeed, a holding by this Court that the policy judgments underlying that legislation rest on a sound constitutional foundation could only be constructive.

IV

Osborne has demonstrated a constitutionally protected right to due process which the State of Alaska thus far has

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[11] The United States and several States have voiced concern that the recognition of a limited federal right of access to DNA evidence might call into question reasonable limits placed on such access by federal and state statutes. See Brief for United States as *Amicus Curiae* 17–26; Brief for State of California et al. as *Amici Curiae* 1–16. For example, federal law and several state statutes impose the requirement that an applicant seeking postconviction DNA testing execute an affidavit attesting to his innocence before any request will be performed. See, *e. g.*, 18 U. S. C. § 3600(a)(1); Fla. Stat. § 925.11(2)(a)(3) (2007). Affirming the judgment of the Ninth Circuit would not cast doubt on the constitutionality of such a requirement, however, since Osborne was never asked to execute such an affidavit as a precondition to obtaining access to the State's evidence. Similarly, affirmance would not call into question the legitimacy of other reasonable conditions States may place on access to DNA testing, such as Alaska's requirement that test results be capable of yielding a clear answer with respect to guilt or innocence. "[D]ue process is flexible," *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972), and the manner in which it is provided may reasonably vary from State to State and case to case. So long as the limitations placed on a litigant's access to such evidence remain procedurally fair and nonarbitrary, they will comport with the demands of due process.

not vindicated and which this Court is both empowered and obliged to safeguard. On the record before us, there is no reason to deny access to the evidence and there are many reasons to provide it, not least of which is a fundamental concern in ensuring that justice has been done in this case. I would affirm the judgment of the Court of Appeals, and respectfully dissent from the Court's refusal to do so.

JUSTICE SOUTER, dissenting.

I respectfully dissent on the ground that Alaska has failed to provide the effective procedure required by the Fourteenth Amendment for vindicating the liberty interest in demonstrating innocence that the state law recognizes. I therefore join Part I of JUSTICE STEVENS's dissenting opinion.

I would not decide Osborne's broad claim that the Fourteenth Amendment's guarantee of due process requires our recognition at this time of a substantive right of access to biological evidence for DNA analysis and comparison. I would reserve judgment on the issue simply because there is no need to reach it; at a general level Alaska does not deny a right to postconviction testing to prove innocence, and in any event, Osborne's claim can be resolved by resort to the procedural due process requirement of an effective way to vindicate a liberty interest already recognized in state law, see *Evitts* v. *Lucey*, 469 U. S. 387, 393 (1985). My choice to decide this case on that procedural ground should not, therefore, be taken either as expressing skepticism that a new substantive right to test should be cognizable in some circumstances, or as implying agreement with the Court that it would necessarily be premature for the Judicial Branch to decide whether such a general right should be recognized.

There is no denying that the Court is correct when it notes that a claim of right to DNA testing, post-trial at that, is a novel one, but that only reflects the relative novelty of testing DNA, and in any event is not a sufficient reason alone to

reject the right asserted, see *Reno* v. *Flores*, 507 U. S. 292, 318–319 (1993) (O'Connor, J., concurring). Tradition is of course one serious consideration in judging whether a challenged rule or practice, or the failure to provide a new one, should be seen as violating the guarantee of substantive due process as being arbitrary, or as falling wholly outside the realm of reasonable governmental action. See *Poe* v. *Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting). We recognize the value and lessons of continuity with the past, but as Justice Harlan pointed out, society finds reasons to modify some of its traditional practices, *ibid.*, and the accumulation of new empirical knowledge can turn yesterday's reasonable range of the government's options into a due process anomaly over time.

As for determining the right moment for a court to decide whether substantive due process requires recognition of an individual right unsanctioned by tradition (or the invalidation of traditional law), I certainly agree with the Court that the beginning of wisdom is to go slow. Substantive due process expresses the conception that the liberty it protects is a freedom from arbitrary government action, from restraints lacking any reasonable justification, *id.*, at 541,[1] and a substantive due process claim requires attention to two closely related elements that call for great care on the part of a court. It is crucial, first, to be clear about whose understanding it is that is being taken as the touchstone of what is arbitrary and outside the sphere of reasonable judgment. And it is just as essential to recognize how much time society needs in order to work through a given issue before it makes sense to ask whether a law or practice on the subject is beyond the pale of reasonable choice, and subject to being struck down as violating due process.

It goes without saying that the conception of the reasonable looks to the prevailing understanding of the broad soci-

[1] *Mutatis mutandis*, the same is true of our notions of life and property, subject to the same due process guarantee.

ety, not to individual notions that a judge may entertain for himself alone, *id.*, at 542, 544, and in applying a national constitution the society of reference is the nation. On specific issues, widely shared understandings within the national society can change as interests claimed under the rubric of liberty evolve into recognition, see *Griswold* v. *Connecticut*, 381 U. S. 479 (1965) (personal privacy); *Lawrence* v. *Texas*, 539 U. S. 558 (2003) (sexual intimacy); see also *Washington* v. *Glucksberg,* 521 U. S. 702, 752 (1997) (SOUTER, J., concurring in judgment), or are recast in light of experience and accumulated knowledge, compare *Roe* v. *Wade*, 410 U. S. 113 (1973), with *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992) (joint opinion of O'Connor, KENNEDY, and SOUTER, JJ.).

Changes in societal understanding of the fundamental reasonableness of government actions work out in much the same way that individuals reconsider issues of fundamental belief. We can change our own inherited views just so fast, and a person is not labeled a stick-in-the-mud for refusing to endorse a new moral claim without having some time to work through it intellectually and emotionally. Just as attachment to the familiar and the limits of experience affect the capacity of an individual to see the potential legitimacy of a moral position, the broader society needs the chance to take part in the dialectic of public and political back and forth about a new liberty claim before it makes sense to declare unsympathetic state or national laws arbitrary to the point of being unconstitutional. The time required is a matter for judgment depending on the issue involved, but the need for some time to pass before a court entertains a substantive due process claim on the subject is not merely the requirement of judicial restraint as a general approach, but a doctrinal demand to be satisfied before an allegedly lagging legal regime can be held to lie beyond the discretion of reasonable political judgment.

Despite my agreement with the Court on this importance of timing, though, I do not think that the doctrinal requirement necessarily stands in the way of any substantive due process consideration of a postconviction right to DNA testing, even as a right that is freestanding. Given the pace at which DNA testing has come to be recognized as potentially dispositive in many cases with biological evidence, there is no obvious argument that considering DNA testing at a general level would subject wholly intransigent legal systems to substantive due process review prematurely. But, as I said, there is no such issue before us, for Alaska does not flatly deny access to evidence for DNA testing in postconviction cases.

In another case, a judgment about appropriate timing might also be necessary on issues of substantive due process at the more specific level of the State's conditions for exercising the right to test. Several such limitations are potentially implicated, including the need of a claimant to show that the test results would be material as potentially showing innocence, and the requirement that the testing sought be capable of producing new evidence not available at trial. But although I assume that avoiding prematurity is as much a doctrinal consideration in assessing the conditions affecting a substantive right as it is when the substantive right itself is the subject of a general claim,[2] there is no need here to resolve any timing issue that might be raised by challenges to these details.

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[2] It makes sense to approach these questions as governed by the same requirement to allow time for adequate societal and legislative consideration that substantive liberty interests should receive at a general level. As Judge Luttig has pointed out, there is no hermetic line between the substantive and the procedural in due process analysis, *Harvey* v. *Horan*, 285 F. 3d 298, 318–319 (CA4 2002) (opinion respecting denial of rehearing en banc), and in this case one could argue back and forth about the better characterization of various state conditions as being one or the other.

Osborne's objection here is not only to the content of the State's terms and conditions, but also to the adequacy of Alaska's official machinery in applying them, and there is no reason to defer consideration of this due process claim: given the conditions Alaska has placed on the right it recognizes, the due process guarantee requires the State to provide an effective procedure for proving entitlement to relief under that scheme, *Evitts*, 469 U. S., at 393, and the State has failed. On this issue, Osborne is entitled to relief. Alaska has presented no good reasons even on its own terms for denying Osborne the access to the evidence he seeks, and the inexplicable failure of the State to provide an effective procedure is enough to show a need for a 42 U. S. C. § 1983 remedy, and relief in this case. JUSTICE STEVENS deals with this failure in Part I of his dissent, which I join, and I emphasize only two points here.

In effect, Alaska argues against finding any right to relief in a federal § 1983 action because the procedure the State provides is reasonable and adequate to vindicate the post-trial liberty interest in testing evidence that the State has chosen to recognize.[3] When I first considered the State's position I thought Alaska's two strongest points were these: (1) that in Osborne's state litigation he failed to request access for the purpose of a variety of postconviction testing that could not have been done at time of trial (and thus sought no new evidence by his state-court petition); and (2) that he failed to aver actual innocence (and thus failed to place his oath behind the assertion that the evidence sought would be material to his postconviction claim). Denying him any relief under these circumstances, the argument ran,

[3] Alaska does not argue that the State's process for vindicating the right to test, however inadequate, defines the limit of the right it recognizes, with a consequence that, by definition, the liberty interest recognized by the State calls for no process for its vindication beyond what the State provides.

did not indicate any inadequacy in the state procedure that would justify resort to § 1983 for providing due process.

Yet the record shows that Osborne has been denied access to the evidence even though he satisfied each of these conditions. As for the requirement to claim testing by a method not available at trial, Osborne's state-court appellate brief specifically mentioned his intent to conduct short tandem repeat analysis, App. 171, 175, and the State points to no pleading, brief, or evidence that Osborne ever changed this request.

The State's reliance on Osborne's alleged failure to claim factual innocence is equally untenable. While there is no question that after conviction and imprisonment he admitted guilt under oath as a condition for becoming eligible for parole, the record before us makes it equally apparent that he claims innocence on oath now. His affidavit filed in support of his request for evidence under § 1983 contained the statement, "I have always maintained my innocence," *id.*, at 226, ¶ 2, followed by an explanation that his admission of guilt was a necessary gimmick to obtain parole, *id.*, at 227, ¶ 7. Since the State persists in maintaining that Osborne is not entitled to test its evidence, it is apparently mere makeweight for the State to claim that he is not entitled to § 1983 relief because he failed to claim innocence seriously and unequivocally.

This is not the first time the State has produced reasons for opposing Osborne's request that collapse upon inspection. Arguing before the Ninth Circuit, the State maintained that the DNA evidence Osborne sought was not material; that is, it argued that a test excluding Osborne as the source of semen in the blue condom, found near the bloody snow and spent shell casing in the secluded area where the victim was raped by one man, would not "establish that he was factually innocent" or even "undermine confidence in . . . the verdict." Reply Brief for Appellants in No. 06-35875 (2008), p. 18; see also 521 F. 3d 1118, 1136 (CA9 2008). Such an argument is

patently untenable, and the State now concedes that a favorable test could "conclusively establish Osborne's innocence." Reply to Brief in Opposition 8.

Standing alone, the inadequacy of each of the State's reasons for denying Osborne access to the DNA evidence he seeks would not make out a due process violation.[4] But taken as a whole the record convinces me that, while Alaska has created an entitlement of access to DNA evidence under conditions that are facially reasonable, the State has demonstrated a combination of inattentiveness and intransigence in applying those conditions that add up to procedural unfairness that violates the Due Process Clause.

[4] This Court is not in a position to correct individual errors of the Alaska Court of Appeals or Alaska officials, as § 1983 does not serve as a mechanism to review specific, unfavorable state-law determinations.

Syllabus

YEAGER *v.* UNITED STATES

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

No. 08–67. Argued March 23, 2009—Decided June 18, 2009

A federal indictment charged petitioner Yeager with securities and wire fraud for allegedly misleading the public about the virtues of a fiber-optic telecommunications system offered by his employer, a subsidiary of Enron Corp., and with insider trading for selling his Enron stock while in possession of material, nonpublic information about the new system's performance and value to Enron. The indictment also charged petitioner with money laundering for conducting various transactions with the proceeds of his stock sales. The jury acquitted Yeager on the fraud counts but failed to reach a verdict on the insider trading and money laundering counts. After the Government recharged him with some of the insider trading and money laundering counts, Yeager moved to dismiss the charges on the ground that the jury, by acquitting him on the fraud counts, had necessarily decided that he did not possess material, nonpublic information about the project's performance and value, and that the issue-preclusion component of the Double Jeopardy Clause therefore barred a second trial for insider trading and money laundering. The District Court denied the motion, and the Fifth Circuit affirmed, reasoning that the fact that the jury hung on the insider trading and money laundering counts—as opposed to acquitting petitioner—cast doubt on whether it had necessarily decided that petitioner did not possess material, nonpublic information. This inconsistency between the acquittals and the hung counts, the Fifth Circuit concluded, meant that the Government could prosecute petitioner anew for insider trading and money laundering.

Held: An apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the acquittals' preclusive force under the Double Jeopardy Clause. Pp. 117–126.

(a) This case is controlled by the reasoning in *Ashe* v. *Swenson*, 397 U. S. 436, where the Court squarely held that the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial. For double jeopardy purposes, the jury's inability to reach a verdict on Yeager's insider trading and money laundering counts was a nonevent that should be given no weight in the issue-preclusion analysis. To identify what a

jury necessarily determined at trial, courts should scrutinize the jury's decisions, not its failures to decide. A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it. Even if the verdict is "based upon an egregiously erroneous foundation," *Fong Foo* v. *United States*, 369 U. S. 141, 143, its finality is unassailable, see, *e. g.*, *Arizona* v. *Washington*, 434 U. S. 497, 503. Thus, if the possession of insider information was a critical issue of ultimate fact in all of the charges against Yeager, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element. Pp. 117–123.

(b) Neither *Richardson* v. *United States*, 468 U. S. 317, nor *United States* v. *Powell*, 469 U. S. 57, supports the Government's argument that it can retry Yeager for insider trading or money laundering. *Richardson*'s conclusion that a jury's "failure . . . to reach a verdict is not an event which terminates jeopardy," 468 U. S., at 325, did not open the door to using a hung count to ignore the preclusive effect of a jury's acquittal, but was simply a rejection of the argument—similar to the Government's today—that a mistrial is an event of significance. Also rejected is the contention that an acquittal can never preclude retrial on a hung count because it would impute irrationality to the jury in violation of *Powell*'s rule that issue preclusion is "predicated on the assumption that the jury acted rationally," 469 U. S., at 68. The Court's refusal in *Powell* and in *Dunn* v. *United States*, 284 U. S. 390, to impugn the legitimacy of jury verdicts that, on their face, were logically inconsistent shows, *a fortiori*, that a potentially inconsistent hung count could not command a different result. Pp. 123–125.

(c) The Government has argued that, even if hung counts cannot enter the issue-preclusion analysis, Yeager has failed to show that the jury's acquittals necessarily resolved in his favor an issue of ultimate fact that must be proved to convict him of insider trading and money laundering. Having granted certiorari on the assumption that the Fifth Circuit ruled correctly that the acquittals meant the jury found that Yeager did not have insider information that contradicted what was presented to the public, this Court declines to engage in a fact-intensive analysis of the voluminous record that is unnecessary to resolve the narrow legal question at issue. If the Court of Appeals chooses, it may revisit its factual analysis in light of the Government's arguments before this Court. Pp. 125–126.

521 F. 3d 367, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SOUTER, GINSBURG, and BREYER, JJ., joined, and in which KENNEDY,

J., joined as to Parts I–III and V. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 126. SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined, *post*, p. 127. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 133.

Samuel J. Buffone argued the cause for petitioner. With him on the briefs were *Ryan M. Malone* and *J. A. Canales.*

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were then-*Acting Solicitor General Kneedler*, *Acting Assistant Attorney General Glavin*, *Matthew D. Roberts*, and *Joseph C. Wyderko.**

JUSTICE STEVENS delivered the opinion of the Court.

In *Dunn* v. *United States*, 284 U. S. 390, 393 (1932), the Court, speaking through Justice Holmes, held that a logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict. The question presented in this case is whether an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts affects the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment. We hold that it does not.

I

In 1997, Enron Corporation (Enron) acquired a telecommunications business that it expanded and ultimately renamed Enron Broadband Services (EBS). Petitioner F. Scott Yeager served as Senior Vice President of Strategic Development for EBS from October 1, 1998, until his employment was terminated a few months before Enron filed for bankruptcy on December 2, 2001. During his tenure, petitioner

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*Briefs of *amici curiae* urging reversal were filed for Criminal Law Professors by *Jeffrey A. Lamken;* for the National Association of Criminal Defense Lawyers by *Kevin C. Newsom*, *Jack W. Selden*, and *Joshua L. Dratel;* and for the Texas Criminal Defense Lawyers Association et al. by *J. Craig Jett*, *Greg Westfall*, and *Susan Hays.*

played an active role in EBS's attempt to develop a nationwide fiber-optic telecommunications system called the Enron Intelligent Network (EIN).

In the summer of 1999, Enron announced that EBS would become a "'core'" Enron business and a major part of its overall strategy. App. 11. Thereafter, Enron issued press releases touting the advanced capabilities of EIN and claiming that the project was "'lit,'" or operational. *Id.*, at 10. On January 20, 2000, at the company's annual equity analyst conference, petitioner and others allegedly made false and misleading statements about the value and performance of the EIN project. On January 21, 2000, the price of Enron stock rose from $54 to $67. The next day it reached $72. At that point petitioner sold more than 100,000 shares of Enron stock that he had received as part of his compensation. During the next several months petitioner sold an additional 600,000 shares. All told, petitioner's stock sales generated more than $54 million in proceeds and $19 million in personal profit. As for the EIN project, its value turned out to be illusory. The "intelligent" network showcased to the public in the press releases and at the analyst conference was riddled with technological problems and never fully developed.

On November 5, 2004, a grand jury returned a "Fifth Superseding Indictment" charging petitioner with 126 counts of five federal offenses: (1) conspiracy to commit securities and wire fraud; (2) securities fraud; (3) wire fraud; (4) insider trading; and (5) money laundering.[1] The Government's theory of prosecution was that petitioner—acting in concert with other Enron executives—purposefully deceived the

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[1] See 18 U. S. C. § 371 (conspiracy to commit fraud against the United States); 15 U. S. C. § 78j(b) (1994 ed.), § 78ff (2000 ed.), and 17 CFR § 240.10b–5 (2004) (securities fraud); 18 U. S. C. § 1343 (2000 ed.) (wire fraud); 15 U. S. C. § 78j(b) (1994 ed.), § 78ff (2000 ed.), and 17 CFR § 240.10b5–1 (insider trading); 18 U. S. C. § 1957 (money laundering).

public about the EIN project in order to inflate the value of Enron's stock and, ultimately, to enrich himself.[2] *Id.*, at 6.

Count 1 of the indictment described in some detail the alleged conspiracy to commit securities fraud and wire fraud and included as overt acts the substantive offenses charged in counts 2 through 6. Count 2, the securities fraud count, alleged that petitioner made false and misleading statements at the January 20, 2000, analyst conference or that he failed to state facts necessary to prevent statements made by others from being misleading. Counts 3 through 6 alleged that petitioner and others committed four acts of wire fraud when they issued four EBS-related press releases in 2000. Counts 27 through 46, the insider trading counts, alleged that petitioner made 20 separate sales of Enron stock "while in the possession of material non-public information regarding the technological capabilities, value, revenue and business performance of [EBS]." *Id.*, at 31. And counts 67 through 165, the money laundering counts, described 99 financial transactions involving petitioner's use of the proceeds of his sales of Enron stock, which the indictment characterized as "criminally derived property." *Id.*, at 37. To simplify our discussion, we shall refer to counts 1 through 6 as the "fraud counts" and the remaining counts as the "insider trading counts."

The trial lasted 13 weeks. After four days of deliberations, the jury notified the court that it had reached agreement on some counts but had deadlocked on others. The judge then gave the jury an *Allen* charge, see *Allen* v. *United States*, 164 U. S. 492, 501–502 (1896), urging the jurors to reexamine the grounds for their opinions and to continue deliberations "until the end of the day" to achieve a final verdict on all counts. 56 Tr. 13724 (July 20, 2005). When the jury failed to break the deadlock, the court told

[2] While petitioner was charged with 126 counts, the indictment included 176 counts in all, covering conduct by executives purportedly involved in the alleged fraud.

the jurors that it would "take their verdict" instead of prolonging deliberations. *Id.*, at 13725. The jury acquitted petitioner on the fraud counts but failed to reach a verdict on the insider trading counts. The court entered judgment on the acquittals and declared a mistrial on the hung counts.

On November 9, 2005, the Government obtained a new indictment against petitioner. This "Eighth Superseding Indictment" recharged petitioner with some, but not all, of the insider trading counts on which the jury had previously hung. App. 188. The new indictment refined the Government's case: Whereas the earlier indictment had named multiple defendants, the new indictment dealt exclusively with petitioner. And instead of alleging facts implicating a broader fraudulent scheme, the new indictment focused on petitioner's knowledge of the EIN project and his failure to disclose that information to the public before selling his Enron stock.

Petitioner moved to dismiss all counts in the new indictment on the ground that the acquittals on the fraud counts precluded the Government from retrying him on the insider trading counts.[3] He argued that the jury's acquittals had necessarily decided that he did not possess material, nonpublic information about the performance of the EIN project and its value to Enron. In petitioner's view, because reprosecution for insider trading would require the Government to prove that critical fact, the issue-preclusion component of the Double Jeopardy Clause barred a second trial of that issue and mandated dismissal of all of the insider trading counts.

The District Court denied the motion. After reviewing the trial record, the court disagreed with petitioner's reading of what the jury necessarily decided. In the court's telling,

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[3] Petitioner had also moved to dismiss the relevant counts in the earlier indictment in response to the Government's assertion that it could reprosecute petitioner for the previously hung counts under that indictment as well. See 521 F. 3d 367, 370, n. 4 (CA5 2008).

the jury likely concluded that petitioner "did not knowingly and willfully participate in the scheme to defraud described in the conspiracy, securities fraud, and wire fraud counts." 446 F. Supp. 2d 719, 735 (SD Tex. 2006). The court therefore concluded that the question whether petitioner possessed insider information was not necessarily resolved in the first trial and could be litigated anew in a second prosecution.

The Court of Appeals disagreed with the District Court's analysis of the record, but nevertheless affirmed. It reasoned that petitioner "did not dispute" the Government's theory that he "helped shape the message" of the allegedly fraudulent presentations made at the analyst conference, and therefore rejected the District Court's conclusion that the jury had "acquitted [petitioner] on the groun[d] that he did not participate in the fraud." 521 F. 3d 367, 377 (CA5 2008). Based on its independent review of the record, the Court of Appeals instead concluded that "the jury must have found when it acquitted [petitioner] that [he] did not have any insider information that contradicted what was presented to the public." *Id.*, at 378. The court acknowledged that this factual determination would normally preclude the Government from retrying petitioner for insider trading or money laundering.

The court was nevertheless persuaded that a truly rational jury, having concluded that petitioner did not have any insider information, would have *acquitted* him on the insider trading counts. That the jury failed to acquit, and instead hung on those counts, was pivotal in the court's issue-preclusion analysis. Considering "the hung counts along with the acquittals," the court found it impossible "to decide with any certainty what the jury necessarily determined." *Ibid.* Relying on Circuit precedent, *United States* v. *Larkin*, 605 F. 2d 1360 (1979), the court concluded that the conflict between the acquittals and the hung counts barred the application of issue preclusion in this case. 521 F. 3d, at 378–379.

Several courts have taken the contrary view and have held that a jury's failure to reach a verdict on some counts should play no role in determining the preclusive effect of an acquittal. See *United States* v. *Ohayon*, 483 F. 3d 1281 (CA11 2007); *United States* v. *Romeo*, 114 F. 3d 141 (CA9 1997); *United States* v. *Bailin*, 977 F. 2d 270 (CA7 1992); *United States* v. *Frazier*, 880 F. 2d 878 (CA6 1989). Others have sided with the Fifth Circuit. See *United States* v. *Howe*, 538 F. 3d 820 (CA8 2008); *United States* v. *Aguilar-Aranceta*, 957 F. 2d 18 (CA1 1992); *United States* v. *White*, 936 F. 2d 1326 (CADC 1991). We granted certiorari to resolve the conflict, 555 U. S. 1028 (2008), and now reverse.

II

The Double Jeopardy Clause of the Fifth Amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

While we have decided an exceptionally large number of cases interpreting this provision, see, *e. g.*, *United States* v. *DiFrancesco*, 449 U. S. 117, 126–127 (1980) (collecting cases), most of our decisions have found more guidance in the common-law ancestry of the Clause than in its brief text. Thus, for example, while the risk of being fined or imprisoned implicates neither "life" nor "limb," our early cases held that double jeopardy protection extends to punishments that are not "*positively* covered by the *language* of [the] amendment." *Ex parte Lange*, 18 Wall. 163, 170 (1874). As we explained, "[i]t is very clearly the *spirit* of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection." *Ibid.*

Our cases have recognized that the Clause embodies two vitally important interests. The first is the "deeply ingrained" principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subject-

ing him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U. S. 184, 187–188 (1957); see *Benton* v. *Maryland*, 395 U. S. 784, 795 (1969); *DiFrancesco*, 449 U. S., at 127–128. The second interest is the preservation of "the finality of judgments." *Crist* v. *Bretz*, 437 U. S. 28, 33 (1978).

The first interest is implicated whenever the State seeks a second trial after its first attempt to obtain a conviction results in a mistrial because the jury has failed to reach a verdict. In these circumstances, however, while the defendant has an interest in avoiding multiple trials, the Clause does not prevent the Government from seeking to reprosecute. Despite the argument's textual appeal, we have held that the second trial does not place the defendant in jeopardy "twice." *Richardson* v. *United States*, 468 U. S. 317, 323 (1984); see 3 J. Story, Commentaries on the Constitution § 1781, pp. 659–660 (1833). Instead, a jury's inability to reach a decision is the kind of "manifest necessity" that permits the declaration of a mistrial and the continuation of the initial jeopardy that commenced when the jury was first impaneled. See *Arizona* v. *Washington*, 434 U. S. 497, 505–506 (1978); *United States* v. *Perez*, 9 Wheat. 579, 580 (1824). The "interest in giving the prosecution one complete opportunity to convict those who have violated its laws" justifies treating the jury's inability to reach a verdict as a nonevent that does not bar retrial. *Washington*, 434 U. S., at 509.

While the case before us involves a mistrial on the insider trading counts, the question presented cannot be resolved by asking whether the Government should be given one complete opportunity to convict petitioner on those charges. Rather, the case turns on the second interest at the core of the Clause. We must determine whether the interest in preserving the finality of the jury's judgment on the fraud counts, including the jury's finding that petitioner did not

possess insider information, bars a retrial on the insider trading counts. This requires us to look beyond the Clause's prohibition on being put in jeopardy "twice"; the jury's acquittals unquestionably terminated petitioner's jeopardy with respect to the issues finally decided in those counts. The proper question, under the Clause's text, is whether it is appropriate to treat the insider trading charges as the "same offence" as the fraud charges. Our opinion in *Ashe* v. *Swenson*, 397 U. S. 436 (1970), provides the basis for our answer.

In *Ashe*, we squarely held that the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial. In that case, six poker players were robbed by a group of masked men. Ashe was charged with—and acquitted of—robbing Donald Knight, one of the six players. The State sought to retry Ashe for the robbery of another poker player only weeks after the first jury had acquitted him. The second prosecution was successful: Facing "substantially stronger" testimony from "witnesses [who] were for the most part the same," *id.*, at 439–440, Ashe was convicted and sentenced to a 35-year prison term. We concluded that the subsequent prosecution was constitutionally prohibited. Because the only contested issue at the first trial was whether Ashe was one of the robbers, we held that the jury's verdict of acquittal collaterally estopped the State from trying him for robbing a different player during the same criminal episode. *Id.*, at 446. We explained that "when an issue of ultimate fact has once been determined by a valid and final judgment" of acquittal, it "cannot again be litigated" in a second trial for a separate offense. *Id.*, at 443.[4] To decipher what

[4] Although the doctrine of collateral estoppel had developed in civil litigation, we had already extended it to criminal proceedings when *Ashe* was decided. The justification for this application was first offered by Justice Holmes, who observed that "[i]t cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are

a jury has necessarily decided, we held that courts should "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.*, at 444 (internal quotation marks omitted). We explained that the inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ibid.* (quoting *Sealfon* v. *United States*, 332 U. S. 575, 579 (1948); internal quotation marks omitted).

Unlike *Ashe*, the case before us today entails a trial that included multiple counts rather than a trial for a single offense. And, while *Ashe* involved an acquittal for that single offense, this case involves an acquittal on some counts and a mistrial declared on others. The reasoning in *Ashe* is nevertheless controlling because, for double jeopardy purposes, the jury's inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts are entitled to the same effect as Ashe's acquittal.

As noted above, see *supra*, at 116, the Court of Appeals reasoned that the hung counts must be considered to determine what issues the jury decided in the first trial. Viewed in isolation, the court explained, the acquittals on the fraud charges would preclude retrial because they appeared to support petitioner's argument that the jury decided he lacked insider information. 521 F. 3d, at 378. Viewed alongside the hung counts, however, the acquittals appeared less decisive. The problem, as the court saw it, was that, if "the jury found that [petitioner] did not have insider information, then the jury, acting rationally, would also have ac-

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less than those that protect from a liability in debt." *United States* v. *Oppenheimer*, 242 U. S. 85, 87 (1916). Currently, the more descriptive term "issue preclusion" is often used in lieu of "collateral estoppel." See Restatement (Second) of Judgments § 27 (1980).

quitted [him] of the insider trading counts." *Ibid.* The fact that the jury hung was a logical wrinkle that made it impossible for the court "to decide with any certainty what the jury necessarily determined." *Ibid.* Because petitioner failed to show what the jury decided, *id.*, at 380, the court refused to find the Government precluded from pursuing the hung counts in a new prosecution.

The Court of Appeals' issue-preclusion analysis was in error. A hung count is not a "relevant" part of the "record of [the] prior proceeding." See *Ashe*, 397 U. S., at 444 (internal quotation marks omitted). Because a jury speaks only through its verdict, its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle. A mistried count is therefore nothing like the other forms of record material that *Ashe* suggested should be part of the preclusion inquiry. *Ibid.;* see also Black's Law Dictionary 1301 (8th ed. 2004) (defining "record" as the "official report of the proceedings in a case, including the filed papers, a verbatim transcript of the trial or hearing (if any), and tangible exhibits"). Unlike the pleadings, the jury charge, or the evidence introduced by the parties, there is no way to decipher what a hung count represents. Even in the usual sense of "relevance," a hung count hardly "make[s] the existence of any fact . . . more probable or less probable." Fed. Rule Evid. 401. A host of reasons—sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few—could work alone or in tandem to cause a jury to hang.[5] To ascribe meaning to a hung count would presume an ability to identify which factor was at play in the jury room. But that is not

[5] Indeed, there were many indications that the jury in this case could have been exhausted after the 13-week trial. See Reply Brief for Petitioner 9–10 (cataloging numerous "statements on the record [that] reveal the very real possibility that the jurors cut their deliberations short out of exhaustion").

reasoned analysis; it is guesswork.[6] Such conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return.

A contrary conclusion would require speculation into what transpired in the jury room. Courts properly avoid such explorations into the jury's sovereign space, see *United States* v. *Powell*, 469 U. S. 57, 66 (1984); Fed. Rule Evid. 606(b), and for good reason. The jury's deliberations are secret and not subject to outside examination. If there is to be an inquiry into what the jury decided, the "evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration." *Packet Co.* v. *Sickles*, 5 Wall. 580, 593 (1867); see also *Vaise* v. *Delaval*, 99 Eng. Rep. 944 (K. B. 1785) (Lord Mansfield, C. J.) (refusing to rely on juror affidavits to impeach a verdict reached by a coin flip); J. Wigmore, Evidence §2349 (McNaughton rev. 1961 and Supp. 1991).

Accordingly, we hold that the consideration of hung counts has no place in the issue-preclusion analysis. Indeed, if it were relevant, the fact that petitioner has already survived one trial should be a factor cutting in favor of, rather than against, applying a double jeopardy bar. To identify what a jury necessarily determined at trial, courts should scrutinize a jury's decisions, not its failures to decide. A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it. Even if the verdict is "based upon an egregiously erroneous

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[6] It would also require too much of the defendant. To preclude retrial, he must show that the jury necessarily decided an issue in his favor. Yet, to borrow from the Court of Appeals, "[b]ecause it is impossible to determine why [a] jury hung," 521 F. 3d, at 379, the defendant will have to rebut all inferences about what *may have* motivated the jury to hang without the ability to seek conclusive proof. See Fed. Rule Evid. 606(b). There is no reason to impose such a burden on a defendant.

foundation," *Fong Foo* v. *United States*, 369 U. S. 141, 143 (1962) *(per curiam)*, its finality is unassailable. See, *e. g.*, *Washington*, 434 U. S., at 503; *Sanabria* v. *United States*, 437 U. S. 54, 64 (1978). Thus, if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element.

III

The Government relies heavily on two of our cases, *Richardson* v. *United States*, 468 U. S. 317, and *United States* v. *Powell*, 469 U. S. 57, to argue that it is entitled to retry petitioner on the insider trading counts. Neither precedent can bear the weight the Government places on it.

In *Richardson*, the defendant was indicted on three counts of narcotics violations. The jury acquitted him on one count but hung on the others. Richardson moved to bar retrial on the hung counts, insisting that reprosecution would place him twice in jeopardy for the same offense. Unlike petitioner in this case, Richardson did not argue that retrial was barred because the jury's verdict of acquittal meant that it necessarily decided an essential fact in his favor. He simply asserted that the hung counts, standing alone, shielded him from reprosecution. We disagreed and held that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." 468 U. S., at 325. "[T]he failure of the jury to reach a verdict," we explained, "is not an event which terminates jeopardy." *Ibid.* From this the Government extrapolates the altogether different principle that retrial is *always* permitted whenever a jury convicts on some counts and hangs on others. Brief for United States 23–24. But *Richardson* was not so broad. Rather, our conclusion was a rejection of the argument—similar to the one the Government urges today—that a mis-

trial is an event of significance. In so holding, we did not open the door to using a mistried count to ignore the preclusive effect of a jury's acquittal.

The Government next contends that an acquittal can never preclude retrial on a mistried count because it would impute irrationality to the jury in violation of the rule articulated in *Powell*, 469 U. S. 57. In *Powell*, the defendant was charged with various drug offenses. The jury acquitted Powell of the substantive drug charges but convicted her of using a telephone in "'committing and in causing and facilitating'" those same offenses. *Id.*, at 59–60. Powell attacked the verdicts on appeal as irrationally inconsistent and urged the reversal of her convictions. She insisted that "collateral estoppel should apply to verdicts rendered by a single jury, to preclude acceptance of a guilty verdict on a telephone facilitation count where the jury acquits the defendant of the predicate felony." *Id.*, at 64. We rejected this argument, reasoning that issue preclusion is "predicated on the assumption that the jury acted rationally." *Id.*, at 68.

Arguing that a jury that acquits on some counts while inexplicably hanging on others is not rational, the Government contends that issue preclusion is as inappropriate in this case as it was in *Powell*. There are two serious flaws in this line of reasoning. First, it takes *Powell*'s treatment of inconsistent *verdicts* and imports it into an entirely different context involving both *verdicts* and seemingly inconsistent *hung counts*. But the situations are quite dissimilar. In *Powell*, respect for the jury's verdicts counseled giving each verdict full effect, however inconsistent. As we explained, the jury's verdict "brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *Id.*, at 67. By comparison, hung counts have never been accorded respect as a matter of law or history, and are not similar to jury verdicts in any relevant sense. By equating them, the Government's argument fails. Second, the Government's reliance on *Powell* assumes that a

mistried count can, in context, be evidence of irrationality. But, as we explained above, see *supra*, at 121–122, the fact that a jury hangs is evidence of nothing—other than, of course, that it has failed to decide anything. By relying on hung counts to question the basis of the jury's verdicts, the Government violates the very assumption of rationality it invokes for support.

At bottom, the Government misreads our cases that have rejected attempts to question the validity of a jury's verdict. In *Powell* and, before that, in *Dunn*, 284 U. S. 390, we were faced with jury verdicts that, on their face, were logically inconsistent and yet we refused to impugn the legitimacy of either verdict. In this case, there is merely a *suggestion* that the jury may have acted irrationally. And instead of resting that suggestion on a verdict, the Government relies on a hung count, the thinnest reed of all. If the Court in *Powell* and *Dunn* declined to use a clearly inconsistent verdict to second-guess the soundness of another verdict, then, *a fortiori*, a potentially inconsistent hung count could not command a different result.

IV

One final matter requires discussion. The Government argues that even if we conclude (as we do) that acquittals can preclude retrial on counts on which the same jury hangs, we should nevertheless affirm the judgment of the Court of Appeals because petitioner failed to show that the jury necessarily resolved in his favor an issue of ultimate fact that the Government must prove in order to convict him of insider trading and money laundering. See Brief for United States 41–45. Given the length and complexity of the proceedings, this factual dispute is understandable. The District Court and Court of Appeals each read the record differently, disagreeing as to what the jury necessarily decided in its acquittals. Compare 446 F. Supp. 2d, at 735 ("[T]he jury necessarily determined that Defendant Yeager did not know-

ingly and willfully participate or agree to participate in a scheme to defraud in connection with the alleged false statements or material omissions made at the analyst conference and press releases"), with 521 F. 3d, at 378 ("[T]he jury must have found when it acquitted Yeager that Yeager himself did not have any insider information that contradicted what was presented to the public"). Our grant of certiorari was based on the assumption that the Court of Appeals' interpretation of the record was correct. We recognize the Government's right, as the prevailing party in the Court of Appeals, to "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington* v. *Confederated Bands and Tribes of Yakima Nation*, 439 U. S. 463, 476, n. 20 (1979). But we decline to engage in a fact-intensive analysis of the voluminous record, an undertaking unnecessary to the resolution of the narrow legal question we granted certiorari to answer. If it chooses, the Court of Appeals may revisit its factual analysis in light of the Government's arguments before this Court.

V

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

It is so ordered.

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

I join Parts I–III and V of the Court's opinion but cannot join Part IV. In my view the concerns expressed by JUSTICE ALITO are well justified. *Post*, p. 133 (dissenting opinion). It is insufficient for the Court to say that, on remand, the Court of Appeals "may," "[i]f it chooses," "revisit its factual analysis." *Ante* this page. The correct course would be to require the Court of Appeals to do so.

As JUSTICE ALITO explains, the judgments of acquittal preclude the Government from retrying petitioner on the issue of his possession of insider information if, and only if, "it would have been *irrational* for the jury to acquit without finding that fact." *Post*, at 134; see *Ashe* v. *Swenson*, 397 U. S. 436, 444 (1970) (retrial not precluded if " 'a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose' ").

For the reasons given by JUSTICE ALITO, there are grounds here to question whether petitioner has met this demanding standard. *Post*, at 134–135. The District Court, which was the court most familiar with the record, found that petitioner could not make this showing because a rational jury could have acquitted him of securities fraud on a different basis—namely, that petitioner did not cause the misleading statements to be made. *Post*, at 135–136. The Court of Appeals' contrary analysis is not convincing. *Post*, at 136.

The Court of Appeals held the Double Jeopardy Clause permits petitioner's retrial because, in that court's view, the acquitted counts were inconsistent with the jury's inability to reach a verdict on other counts. 521 F. 3d 367, 379 (CA5 2008). The Court today corrects that misreading of the Double Jeopardy Clause. The question remains whether the Clause permits petitioner's retrial for the quite distinct reason JUSTICE ALITO describes. On remand, the Court of Appeals should reexamine this question.

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The Court today holds that this proscription, as interpreted in *Ashe* v. *Swenson*, 397 U. S. 436 (1970), sometimes bars retrial of hung counts if the jury acquits on factually related counts. Because that result neither accords with the original meaning

of the Double Jeopardy Clause nor is required by the Court's precedents, I dissent.

I

Today's opinion begins with the proclamation that this Court has "found more guidance in the common-law ancestry of the [Double Jeopardy] Clause than its brief text." *Ante*, at 117. Would that it were so. This case would be easy indeed if our cases had adhered to the Clause's original meaning. The English common-law pleas of *auterfoits acquit* and *auterfoits convict*, on which the Clause was based, barred only repeated "prosecution for the same identical act *and* crime." 4 W. Blackstone, Commentaries on the Laws of England 330 (1769) (emphasis added). See also *Grady* v. *Corbin*, 495 U. S. 508, 530–535 (1990) (SCALIA, J., dissenting). As described by Sir Matthew Hale, "a man acquitted for stealing [a] horse" could be later "arraigned and convict[ed] for stealing the saddle, tho both were done at the same time." 2 Pleas of the Crown 246 (1736). Under the common-law pleas, the jury's acquittal of Yeager on the fraud counts would have posed no bar to further prosecution for the distinct crimes of insider trading and money laundering.

But that is water over the dam. In *Ashe*, the Court departed from the original meaning of the Double Jeopardy Clause, holding that it precludes successive prosecutions on distinct crimes when facts essential to conviction of the second crime have necessarily been resolved in the defendant's favor by a verdict of acquittal of the first crime. 397 U. S., at 445–446.[1] Even if I am to adhere to *Ashe* on *stare decisis*

[1] Because this case arises in federal court, the federal doctrine of issue preclusion might have prevented the Government from retrying Yeager even without *Ashe*'s innovation. See *United States* v. *Oppenheimer*, 242 U. S. 85, 87 (1916). But the District Court held that the jury in this case had not necessarily decided that Yeager lacked inside information (the fact that Yeager claims the Government is barred from relitigating), 446 F. Supp. 2d 719, 735 (SD Tex. 2006), and jurisdiction for this interlocutory appeal of that holding comes by way of the collateral order doctrine, which

grounds, cf. *Grady*, *supra*, at 528 (SCALIA, J., dissenting), today's holding is an illogical extension of that case. *Ashe* held only that the Clause sometimes bars successive prosecution of facts found during "a prior proceeding." 397 U. S., at 444. But today the Court bars retrial on hung counts after what was not, under this Court's theory of "continuing jeopardy," *Justices of Boston Municipal Court* v. *Lydon*, 466 U. S. 294, 308 (1984), a prior proceeding but simply an earlier stage of the same proceeding.

As a historical matter, the common-law pleas could be invoked only once "there ha[d] been a conviction or an acquittal—after a complete trial." *Crist* v. *Bretz*, 437 U. S. 28, 33 (1978). This Court has extended the protections of the Double Jeopardy Clause by holding that jeopardy attaches earlier: at the time a jury is empanelled and sworn. *Id.*, at 38. Although one might think that this early attachment would mean that any second trial with a new jury would constitute a second jeopardy, the Court amended its innovation by holding that discharge of a deadlocked jury does not "terminat[e] the original jeopardy," *Richardson* v. *United States*, 468 U. S. 317, 325 (1984). Under this continuing-jeopardy principle, retrial after a jury has failed to reach a verdict is not a new trial but part of the same proceeding.[2]

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encompasses claims of former jeopardy, *Abney* v. *United States*, 431 U. S. 651, 662 (1977). We have not accorded the same privilege to litigants asserting issue preclusion.

[2] That the Government issued a new indictment after the mistrial in this case does not alter the fact that, for double jeopardy purposes, retrial would have been part of the same, initial proceeding. As a matter of practice, it seems that prosecutors and courts treat retrials after mistrials as part of the same proceeding by filing superseding indictments under the original docket number. See, *e. g.*, Superseding Information in *United States* v. *Pena*, Case No. 8:03–cr–476–T–23EAJ (MD Fla., Feb. 17, 2005). The Court implies that the new indictment in this case materially refined the charges, *ante*, at 115, but the only relevant changes were dropping of the other defendants and elimination of a few counts and related factual allegations. Compare App. 6–71 with App. 188–200.

Today's holding is inconsistent with this principle. It interprets the Double Jeopardy Clause, for the first time, to have effect internally within a single prosecution, even though the "'criminal proceedings against [the] accused have not run their full course.'" *Lydon, supra,* at 308 (quoting *Price* v. *Georgia*, 398 U. S. 323, 326 (1970)). As a conceptual matter, it makes no sense to say that events occurring within a single prosecution can cause an accused to be "twice put in jeopardy." U. S. Const., Amdt. 5. And our cases, until today, have acknowledged that. Ever since *Dunn* v. *United States*, 284 U. S. 390, 393 (1932), we have refused to set aside convictions that were inconsistent with acquittals in the same trial; and we made clear in *United States* v. *Powell*, 469 U. S. 57, 64–65 (1984), that *Ashe* does not mandate a different result. There is no reason to treat perceived inconsistencies between hung counts and acquittals any differently.

Richardson accentuates the point. Under our cases, if an appellate court reverses a conviction for lack of constitutionally sufficient evidence, that determination constitutes an acquittal which, under the Double Jeopardy Clause, precludes further prosecution. *Burks* v. *United States*, 437 U. S. 1, 11 (1978). In *Richardson*, the defendant sought to prevent retrial after a jury failed to reach a verdict, claiming that the case should not have gone to the jury because the Government failed to present sufficient evidence. 468 U. S., at 322–323. The Court held that the Double Jeopardy Clause was inapplicable because there had not been an "event, such as an acquittal, which terminate[d] the original jeopardy." *Id.*, at 325. I do not see why the Double Jeopardy Clause effect of a jury acquittal on a different count should be any different from the Double Jeopardy Clause effect of the prosecution's failure to present a case sufficient to go to the jury on the same count. In both cases, the predicate necessary for Double Jeopardy Clause preclusion of a new prosecution exists: in the former, the factual findings implicit in the jury's verdict of acquittal, in the latter, the State's presentation of

a case so weak that it would have demanded a jury verdict of acquittal. In both cases, it seems to me, the Double Jeopardy Clause cannot be invoked because the jeopardy with respect to the retried count *has not terminated.*

The acquittals here did not, as the majority argues, "unquestionably terminat[e] [Yeager's] jeopardy with respect to the *issues* finally decided" in those counts. *Ante,* at 119 (emphasis added). Jeopardy is commenced and terminated charge by charge, not issue by issue. And if the prosecution's failure to present sufficient evidence at a first trial cannot prevent retrial on a hung count because the retrial is considered part of the same proceeding, then there is no basis for invoking *Ashe* to prevent retrial in the present case. If a conviction can stand with a contradictory acquittal when both are pronounced at the same trial, there is no reason why an acquittal should prevent the State from pressing for a contradictory conviction in the continuation of the prosecution on the hung counts.

II

The Court's extension of *Ashe* to these circumstances cannot even be justified based on the rationales underlying that holding. Invoking issue preclusion to bar *seriatim* prosecutions has the salutary effect of preventing the Government from circumventing acquittals by forcing defendants "to 'run the gantlet' a second time" on effectively the same charges. 397 U. S., at 446. In cases where the prosecution merely seeks to get "one full and fair opportunity to convict" on all charges brought in an initial indictment, *Ohio* v. *Johnson,* 467 U. S. 493, 502 (1984), there is no risk of such gamesmanship. We have said that "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Id.,* at 500, n. 9.

Moreover, barring retrial when a jury acquits on some counts and hangs on others bears only a tenuous relationship to preserving the finality of "an issue of ultimate fact [actu-

ally] determined by a valid and final judgment." *Ashe*, *supra*, at 443. There is no clear, unanimous jury finding here. In the unusual situation in which a factual finding upon which an acquittal must have been based would also logically require an acquittal on the hung count, all that can be said for certain is that the conflicting dispositions are irrational—the result of "mistake, compromise, or lenity." *Powell*, *supra*, at 65. It is at least as likely that the irrationality consisted of failing to make the factual finding necessary to support the acquittal as it is that the irrationality consisted of failing to adhere to that factual finding with respect to the hung count. While I agree that courts should avoid speculation as to why a jury reached a particular result, *ante*, at 121–122, the Court's opinion steps in the wrong direction by pretending that the acquittals here mean something that they in all probability do not.[3] *Powell*, *supra*, at 69, concluded that "the best course to take is simply to insulate jury verdicts" from review on grounds of inconsistency. In my view the same conclusion applies to claims that inconsistency will arise from proceeding to conviction on hung counts.

The burdens created by the Court's opinion today are likely to be substantial. The *Ashe* inquiry will require courts to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U. S., at 444 (internal quotation marks omitted). What is more, our holding in *Abney* v. *United States*, 431 U. S. 651 (1977), ensures that every defendant in Yeager's shoes will be enti-

[3] The Court claims that a jury's failure to reach a verdict is not relevant evidence, *ante*, at 121, but its justifications for that statement are utterly unpersuasive. It is obvious that a failure to reach a verdict on one count "make[s] the existence" of a factual finding on a necessary predicate for both counts substantially "less probable," Fed. Rule Evid. 401; how the Court can believe otherwise is beyond me.

tled to an immediate interlocutory appeal (and petition for certiorari) whenever his *Ashe* claim is rejected by the trial court. *Abney*, *supra*, at 662.

* * *

Until today, this Court has consistently held that retrial after a jury has been unable to reach a verdict is part of the original prosecution and that there can be no second jeopardy where there has been no second prosecution. Because I believe holding that line against this extension of *Ashe* is more consistent with the Court's cases and with the original meaning of the Double Jeopardy Clause, I would affirm the judgment.

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

I join JUSTICE SCALIA's dissenting opinion. When a jury acquits on some counts but cannot reach agreement on others, I do not think that the Double Jeopardy Clause precludes retrial on the "hung" counts.

As a result of today's decision, however, the law is now to the contrary, and I write separately to note that the Court's holding makes it imperative that the doctrine of issue preclusion be applied with the rigor prescribed in *Ashe* v. *Swenson*, 397 U. S. 436 (1970). Loose application of the doctrine will lead to exceedingly complicated and protracted litigation, both in the trial court and on appeal, and may produce unjust results.

Ashe made it clear that an acquittal on one charge precludes a subsequent trial on a different charge only if "a rational jury" could not have acquitted on the first charge without finding in the defendant's favor on a factual issue that the prosecution would have to prove in order to convict in the later trial. *Id.*, at 444. This is a demanding standard. The second trial is not precluded simply because it is unlikely—or even very unlikely—that the original jury ac-

quitted without finding the fact in question. Only if it would have been *irrational* for the jury to acquit without finding that fact is the subsequent trial barred. And the defendant has the burden of showing that "the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling* v. *United States*, 493 U. S. 342, 350 (1990).

The situation presented in a case like the one now before us—where the jury acquits on some counts but cannot reach a verdict on others—calls for special care in the application of the *Ashe* standard. In such a situation, the conclusion that the not-guilty verdicts preclude retrial on the hung counts necessarily means that the jury did not act rationally. But courts should begin with the presumption that a jury's actions can rationally be reconciled. In an analogous situation—where it is claimed that a verdict must be set aside on the ground that the findings set out in a jury's answers to special interrogatories are inconsistent—"it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.'" *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U. S. 108, 119 (1963) (quoting *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355, 364 (1962)). A similar approach is appropriate here.

In the present case, there is reason to question whether the *Ashe* standard was met. It is clear that the fraud counts required proof of an element not necessary for conviction on the insider trading charge, namely, that petitioner "caused" material misstatements or omissions to be made at the January 20, 2000, analyst conference and in the press releases that formed the basis for the wire fraud counts. See App. 107 (jury instruction on count two (securities fraud)), 118 (jury instruction on counts three through six (wire fraud)). And it is far from apparent that the jury's not-guilty verdict

on the fraud counts could not have rationally been based on a determination that this element—that petitioner caused the material misstatements or omissions—was not proved beyond a reasonable doubt.

The District Court Judge, who was of course familiar with the trial evidence, analyzed this issue as follows:

> "The theory of the defense, evident in closing argument and the direct testimony of Defendant Yeager, argued that Defendant Yeager did not participate in the crafting of the statements in the press releases; did not participate in the creation of slides or statements presented at the analysts conference; and did not reach an agreement with any other person to make false, misleading, or deceptive statements or material omissions of fact." App. to Pet. for Cert. 55a.

The record provides support for the District Court's analysis. In his summation, petitioner's attorney argued that "Scott Yeager had nothing to do with Counts 3 to 6 [the securities and wire fraud counts]." 54 Tr. 13384 (July 13, 2005). With respect to the January 20, 2000, conference that provided the basis for the securities fraud count, petitioner's attorney emphasized that his client "didn't say anything." *Id.*, at 13365. Counsel reiterated that petitioner "didn't make a presentation. He didn't make a statement." *Ibid.; id.*, at 13394. Counsel's summation on this point summarized portions of petitioner's trial testimony in which he minimized his involvement in matters relating to the conference. See 39 *id.*, at 9932–9933, 9938–9947, and 9953 (June 17, 2005).

With respect to the press releases on which the wire fraud counts were based, petitioner's attorney argued: "Scott Yeager had nothing to do with the press releases." 54 *id.*, at 13384. "We didn't make any press releases." *Id.*, at 13394. "Show me the evidence. Show me where Scott participated in a press release." *Id.*, at 13406. Again, counsel's comments in summation tracked petitioner's testimony denying

participation in the press releases. See 39 *id.*, at 9911, 9913; 54 *id.*, at 13384.

The above portions of the record suggest that a rational jury might have found that petitioner did not "cause" the misstatements or omissions at the conference or in the press releases. In light of the length and complexity of the trial record, I am not in a position to say with certainty that the *Ashe* standard was not met in this case, but the brief discussion of this question in the opinion of the Court of Appeals does not satisfactorily show that the District Court's analysis was incorrect. Concluding that the not-guilty verdict on the securities fraud count could not have been based on a finding that respondent did not cause the misstatements or omissions at the conference, the Court of Appeals stated that petitioner "did not dispute" that he "helped shape the message of the conference presentations." App. to Pet. for Cert. 20a. But there is surely tension between that statement and the previously mentioned portions of petitioner's trial testimony and the defense summation.

Because the Court of Appeals held that *Ashe* does not apply when a jury acquits on some counts and hangs on others, that court's analysis of the possible grounds for the jury's securities fraud verdict was not necessary to support the court's decision. Now that this Court has held that *Ashe* does govern in this context, a reexamination of the possible grounds for the fraud count acquittals is warranted.

Syllabus

TRAVELERS INDEMNITY CO. ET AL. *v.* BAILEY ET AL.

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

No. 08–295. Argued March 30, 2009—Decided June 18, 2009*

As part of the 1986 reorganization plan of the Johns-Manville Corporation (Manville), an asbestos supplier and manufacturer of asbestos-containing products, the Bankruptcy Court approved a settlement providing that Manville's insurers, including The Travelers Indemnity Company and related companies (Travelers), would contribute to the corpus of the Manville Personal Injury Settlement Trust (Trust), and releasing those insurers from any "Policy Claims," which were channeled to the Trust. "Policy Claims" include, as relevant here, "claims" and "allegations" against the insurers "based upon, arising out of or relating to" the Manville insurance policies. The settlement agreement and reorganization plan were approved by the Bankruptcy Court (1986 Orders) and were affirmed by the District Court and the Second Circuit. Over a decade later plaintiffs began filing asbestos actions against Travelers in state courts (Direct Actions), often seeking to recover from Travelers not for Manville's wrongdoing but for Travelers' own alleged violations of state consumer-protection statutes or of common law duties. Invoking the 1986 Orders, Travelers asked the Bankruptcy Court to enjoin 26 Direct Actions. Ultimately, a settlement was reached, in which Travelers agreed to make payments to compensate the Direct Action claimants, contingent on the court's order clarifying that the Direct Actions were, and remained, prohibited by the 1986 Orders. The court made extensive factual findings, uncontested here, concluding that Travelers derived its knowledge of asbestos from its insurance relationship with Manville and that the Direct Actions are based on acts or omissions by Travelers arising from or related to the insurance policies. It then approved the settlement and entered an order (Clarifying Order), which provided that the 1986 Orders barred the pending Direct Actions and various other claims. Objectors to the settlement (respondents here) appealed. The District Court affirmed, but the Second Circuit reversed. Agreeing that the Bankruptcy Court had jurisdiction to interpret and enforce the 1986 Orders, the Circuit nevertheless held

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*Together with No. 08–307, *Common Law Settlement Counsel* v. *Bailey et al.*, also on certiorari to the same court.

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that the Bankruptcy Court lacked jurisdiction to enjoin the Direct Actions because those actions sought not to recover based on Manville's conduct, but to recover directly from Travelers for its own conduct.

Held: The terms of the injunction bar the Direct Actions against Travelers, and the finality of the Bankruptcy Court's 1986 Orders generally stands in the way of challenging their enforceability. Pp. 147–156.

(a) The Direct Actions are "Policy Claims" enjoined as against Travelers by the 1986 Orders, which covered, *inter alia*, "claims" and "allegations" "relating to" Travelers' insurance coverage of Manville. In a statute, "[t]he phrase 'in relation to' is expansive," *Smith* v. *United States*, 508 U. S. 223, 237, and so is its reach here. While it would be possible to suggest that a "claim" only relates to Travelers' insurance coverage if it seeks recovery based upon Travelers' specific contractual obligation to Manville, "allegations" is not amenable to such a narrow construction and clearly reaches factual assertions that relate in a more comprehensive way to Travelers' dealings with Manville. The Bankruptcy Court's detailed factual findings place the Direct Actions within the terms of the 1986 Orders. Contrary to respondents' argument, the 1986 Orders contain no language limiting "Policy Claims" to claims derivative of Manville's liability. Even if, before the entry of the 1986 Orders, Travelers understood the proposed injunction to bar only such derivative claims, where a court order's plain terms unambiguously apply, as they do here, they are entitled to their effect. If it is black-letter law that an unambiguous private contract's terms must be enforced irrespective of the parties' subjective intent, it is also clear that a court, such as the Bankruptcy Court here, should enforce a court order, a public governmental act, according to its unambiguous terms. Pp. 148–151.

(b) Because the 1986 Orders became final on direct review over two decades ago, whether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 was not properly before the Second Circuit in 2008 and is not properly before this Court. The Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior orders, see *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 239, and it explicitly retained jurisdiction to enforce its injunctions when it issued the 1986 Orders. The Second Circuit erred in holding the 1986 Orders unenforceable according to their terms on the ground that the Bankruptcy Court had exceeded its jurisdiction in 1986. On direct appeal of the 1986 Orders, any objector was free to argue that the Bankruptcy Court had exceeded its jurisdiction, and the District Court or Court of Appeals could have raised such concerns *sua sponte*. But once those orders became final on direct review, they became res judicata to the "'parties

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and those in privity with them.'" *Nevada* v. *United States*, 463 U. S. 110, 130. So long as respondents or those in privity with them were parties to Manville's bankruptcy proceeding, and were given a fair chance to challenge the Bankruptcy Court's subject-matter jurisdiction, they cannot challenge it now by resisting enforcement of the 1986 Orders. The Second Circuit's willingness to entertain this collateral attack cannot be squared with res judicata and the practical necessity served by that rule. Almost a quarter century after the 1986 Orders were entered, the time to prune them is over. Pp. 151–154.

(c) This holding is narrow. The Court neither resolves whether a bankruptcy court, in 1986 or today, could properly enjoin claims against nondebtor insurers that are not derivative of the debtor's wrongdoing, nor decides whether any particular respondent is bound by the 1986 Orders, which is a question that the Second Circuit did not consider. P. 155.

517 F. 3d 52, 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. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 156.

Barry R. Ostrager argued the cause for petitioners in both cases. With him on the briefs in No. 08–295 were *Myer O. Sigal, Jr.*, *Andrew T. Frankel*, *Robert J. Pfister*, and *Elizabeth A. Warren*. *Ronald Barliant*, *Kathryn A. Pamenter*, and *Kenneth S. Ulrich* filed briefs for petitioner in No. 08–307.

Samuel Issacharoff argued the cause for respondents Bailey et al. With him on the briefs were *Samuel Estreicher*, *Sander L. Esserman*, and *Jason R. Searcy*. *Jacob C. Cohn* argued the cause for respondent Chubb Indemnity Insurance Co. With him on the brief was *William P. Shelley*.†

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†*Paul J. Watford* filed a brief for Resolute Management, Inc., as *amicus curiae* urging reversal in No. 08–295.

Richard Lieb filed a brief for Jagdeep S. Bhandari et al. as *amici curiae* urging affirmance in both cases.

James L. Patton, Jr., and *Rolin P. Bissell* filed a brief for Future Claimants Representatives as *amici curiae* in both cases.

JUSTICE SOUTER delivered the opinion of the Court.

As an element of the 1986 reorganization plan of the Johns-Manville Corporation (Manville), the United States Bankruptcy Court for the Southern District of New York enjoined certain lawsuits against Manville's insurers, including The Travelers Indemnity Company and its affiliates (Travelers). The question is whether the injunction bars state-law actions against Travelers based on allegations either of its own wrongdoing while acting as Manville's insurer or of its misuse of information obtained from Manville as its insurer. We hold that the terms of the injunction bar the actions and that the finality of the Bankruptcy Court's orders following the conclusion of direct review generally stands in the way of challenging the enforceability of the injunction.

I

From the 1920s to the 1970s, Manville was, by most accounts, the largest supplier of raw asbestos and manufacturer of asbestos-containing products in the United States, *In re Johns-Manville Corp.*, 517 F. 3d 52, 55–56 (CA2 2008), and for much of that time Travelers was Manville's primary liability insurer. *In re Johns-Manville Corp.*, No. 82 B 11656 etc. (Bkrtcy. Ct. SDNY 2004), App. to Pet. for Cert. in No. 08–295, pp. 111a–112a (hereinafter Bkrtcy. Ct. Op.). As studies began to link asbestos exposure to respiratory disease and thousands of lawsuits were filed against Manville, Travelers, as the insurer, worked closely with Manville to learn what its insured knew and to assess the dangers of asbestos exposure; it evaluated Manville's potential liability and defenses, and paid Manville's litigation costs. *Id.*, at 114a–117a, 121a–122a. In 1982, the prospect of overwhelming liability led Manville to file for bankruptcy protection in the Southern District of New York.

It thus became incumbent on the Bankruptcy Court to devise "a plan of reorganization for [Manville] which would provide for payment to holders of present or known asbestos

health related claims . . . and [to] those persons who had not yet manifested an injury but who would manifest symptoms of asbestos-related illnesses at some future time." *In re Johns-Manville Corp.*, 97 B. R. 174, 176 (Bkrtcy. Ct. SDNY 1989). The ensuing reorganization plan created the Manville Personal Injury Settlement Trust (Trust) to pay all asbestos claims against Manville, which would be channeled to the Trust. See *Kane* v. *Johns-Manville Corp.*, 843 F. 2d 636, 640–641 (CA2 1988); *In re Johns-Manville Corp.*, 340 B. R. 49, 54 (SDNY 2006). The Trust has since paid out more than $3.2 billion to over 600,000 claimants. Bkrtcy. Ct. Op. 136a–137a.

In the period leading up to the reorganization, Manville and its insurers litigated over the scope and limits of liability coverage, and Travelers faced suits by third parties, such as Manville factory workers and vendors of Manville products, seeking compensation under the insurance policies. There was also litigation among the insurers themselves, who brought various indemnity claims, contribution claims, and cross-claims. *Id.*, at 132a–134a. In a settlement described as the "cornerstone" of the Manville reorganization, the insurers agreed to provide most of the initial corpus of the Trust, with a payment of $770 million to the bankruptcy estate, $80 million of it from Travelers. *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F. 2d 89, 90 (CA2 1988); Bkrtcy. Ct. Op. 134a; *In re Johns-Manville Corp.*, 68 B. R. 618, 621 (Bkrtcy. Ct. SDNY 1986).

There would have been no such payment without the injunction at the heart of the present dispute. The December 18, 1986, order of the Bankruptcy Court approving the insurance settlement agreements (Insurance Settlement Order) provides that, upon the insurers' payment of the settlement funds to the Trust, "all Persons are permanently restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer

Group." App. to Pet. for Cert. in No. 08–295, at 446a. The Insurance Settlement Order goes on to provide that the insurers are "released from any and all Policy Claims," which are to be channeled to the Trust. *Ibid.* The order defines "Policy Claims" as "any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against . . . any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies." *Id.*, at 439a. The insurers were entitled "to terminate the settlements if the injunctive orders [were] not issued or if they [were] set aside on appeal." *MacArthur*, *supra*, at 90.

The Insurance Settlement Order was incorporated by reference in the Bankruptcy Court's December 22, 1986, order confirming Manville's Second Amended and Restated Plan of Reorganization (Confirmation Order).[1] App. to Pet. for Cert. in No. 08–295, at 271a–272a. Both the Confirmation Order and the Insurance Settlement Order (collectively, 1986 Orders) were affirmed by the District Court, see *In re Johns-Manville Corp.*, 78 B. R. 407 (SDNY 1987), and the Court of Appeals for the Second Circuit, see *MacArthur*, *supra; Kane*, *supra.*

Nonetheless, over a decade later plaintiffs started filing asbestos actions against Travelers in various state courts, cases that have been spoken of in this litigation as Direct Actions. They are of two sorts. The Statutory Direct Actions are brought under state consumer-protection statutes, and allege that Travelers conspired with other insurers and with asbestos manufacturers to hide the dangers of asbestos and to raise a fraudulent "state of the art" (or "'no duty to warn'") defense to personal injury claims. Bkrtcy. Ct. Op.

[1] The Confirmation Order itself contains an additional injunction barring certain claims against the settling insurance companies. App. to Pet. for Cert. in No. 08–295, pp. 286a–288a. That injunction does not bear on our decision, and we do not consider it.

140a–143a. The Common Law Direct Actions claim that Travelers violated common law duties by failing to warn the public about the dangers of asbestos or by acting to keep its knowledge of those dangers from the public. *Id.*, at 143a–147a. It is undisputed that many of the plaintiffs seek to recover from Travelers, not indirectly for Manville's wrongdoing, but for Travelers' own alleged violations of state law. See 517 F. 3d, at 63.[2]

In 2002, Travelers invoked the terms of the 1986 Orders in moving the Bankruptcy Court to enjoin 26 Direct Actions pending in state courts. *Id.*, at 58. The court issued a temporary restraining order, repeatedly extended, and referred the parties to mediation, which led to settlements between Travelers and three sets of plaintiffs in both Statutory and Common Law Direct Actions. Bkrtcy. Ct. Op. 103a–104a. Under the settlement terms Travelers would pay more than $400 million to settlement funds to compensate Direct Action claimants, contingent upon the entry of an order by the Bankruptcy Court clarifying that the Direct Actions were, and remained, prohibited by the 1986 Orders. *Id.*, at 150a–152a. The settlement requires claimants seeking payment from the settlement funds to grant Travelers a release from further liability, separate and apart from Travelers' protection under the 1986 Orders. *Id.*, at 151a–152a.

After notice of the settlement was given to potential claimants, the Bankruptcy Court (the same judge who had issued the 1986 Orders) held an evidentiary hearing and made extensive factual findings that are not challenged here. The

[2] A true "direct action" suit is "[a] lawsuit by a person claiming against an insured but suing the insurer directly instead of pursuing compensation indirectly through the insured." Black's Law Dictionary 491 (8th ed. 2004). Because many of the suits at issue seek to hold Travelers liable for independent wrongdoing rather than for a legal wrong by Manville, they are not direct actions in the terms of strict usage. Nonetheless, because the suits are referred to as "direct actions" in the decisions of the Bankruptcy Court, the District Court, and the Court of Appeals, we call them that as well, in the interest of simplicity. See 517 F. 3d, at 55, n. 4.

court determined that "Travelers[']' knowledge of the hazards of asbestos was derived from its nearly three decade insurance relationship with Manville and the performance by Travelers of its obligations under the Policies, including through the underwriting, loss control activities, defense obligations and generally through its lengthy and confidential insurance relationship under the policies." *Id.*, at 128a–129a. In sum, the Bankruptcy Court found that "Travelers learned virtually everything it knew about asbestos from its relationship with Manville." *Id.*, at 131a.

As for the Direct Actions, the court saw "[t]he gravamen of the Statutory Direct Action Lawsuits" as "center[ing] on Travelers[']' defense of Manville in asbestos-related claims." *Id.*, at 142a. The court read the "alleged factual predicate" of the Common Law Direct Actions as being "essentially identical to the statutory actions: Travelers . . . influence[d] Manville's purported failure to disclose knowledge about asbestos hazards; Travelers defended Manville; Travelers advanced the state of the art defense; and Travelers coordinated Manville's national defense effort." *Id.*, at 147a (citations omitted). The court understood "the direct action claims against Travelers [to be] inextricably intertwined with Travelers[']' long relationship as Manville's insurer," *id.*, at 169a, and found that "[a]fter the Court preliminarily enjoined prosecution of Direct Action Claims against Travelers pending final ruling on the merits, certain plaintiffs' lawyers violated the letter and the spirit of this Court's rulings by simply deleting the term 'Manville' from their complaints—but leaving the substance unchanged," *id.*, at 147a.

Hence, the court's conclusion that "[t]he evidence in this proceeding establishes that the gravamen of Direct Action Claims were acts or omissions by Travelers arising from or relating to Travelers[']' insurance relationship with Manville." *Id.*, at 173a. Finding that the "claims against Travelers based on such actions or omissions necessarily 'arise out of' and [are] 'related to'" the insurance policies,

ibid., which compelled Travelers to defend Manville against asbestos-related claims, *id.*, at 173a–176a, the Bankruptcy Court held that the Direct Actions "are—and always have been—permanently barred" by the 1986 Orders, *id.*, at 170a.

The settlement was accordingly approved and an order dated August 17, 2004 (Clarifying Order), was entered, providing that the 1986 Orders barred the pending Direct Actions and "[t]he commencement or prosecution of all actions and proceedings against Travelers that directly or indirectly are based upon, arise out of or relate to Travelers['] insurance relationship with Manville or Travelers['] knowledge or alleged knowledge concerning the hazards of asbestos," including claims for contribution or indemnification. *Id.*, at 95a. The Clarifying Order does not, however, block "the commencement and prosecution of claims against Travelers by policyholders other than Manville . . . for insurance proceeds or other obligations arising under any policy of insurance provided by Travelers to a policyholder other than Manville." *Id.*, at 96a. The Clarifying Order also separately disclaims that it enjoins bringing

> "claims arising from contractual obligations by Travelers to policyholders other than Manville, as long as Travelers['] alleged liability or the proof required to establish Travelers['] alleged liability is unrelated to any knowledge Travelers gained from its insurance relationship with Manville or acts, errors, omissions or evidence related to Travelers['] insurance relationship with Manville." *Ibid.*

Some individual claimants and Chubb Indemnity Insurance Company (Chubb), respondents before this Court, objected to the settlement and subsequently appealed.[3] So far

[3] Chubb is a codefendant with Travelers in certain Common Law Direct Actions, and the Clarifying Order prevents it from bringing contribution and indemnity claims against Travelers under certain circumstances. See Brief for Respondent Chubb 16.

as it matters here, the District Court affirmed, but the Court of Appeals for the Second Circuit reversed. In presenting the case to the Second Circuit the objectors argued that the Direct Actions fall outside the scope of the 1986 Orders and that the Clarifying Order erroneously expands those orders to bar actions beyond the Bankruptcy Court's subject-matter jurisdiction and statutory authority. Travelers and the settling claimants responded that the Clarifying Order is consistent with the terms of the 1986 Orders, that this reading of the 1986 Orders does not generate any jurisdictional or other statutory concerns, and that the Second Circuit's prior rejection of a challenge to the Insurance Settlement Order in *MacArthur*, 837 F. 2d 89, is controlling.

In its opinion explaining the judgment under review here, the Second Circuit recognized that "[i]t is undisputed that the bankruptcy court had continuing jurisdiction to interpret and enforce its own 1986 orders," and that "there is no doubt that the bankruptcy court had jurisdiction to clarify its prior orders." 517 F. 3d, at 60–61. It also had "little doubt that, in a literal sense, the instant claims against Travelers 'arise out of' its provision of insurance coverage to Manville," *id.*, at 67, and the court emphasized that "[t]he bankruptcy court's extensive factual findings regarding Manville's all-encompassing presence in the asbestos industry and its extensive relationship with Travelers support this notion" that the subjects of the Clarifying Order fall within the scope of the 1986 Orders, *ibid.* The Circuit nevertheless held that the Bankruptcy Court could not, in enforcing the 1986 Orders, "enjoin claims over which it had no jurisdiction," *id.*, at 61, and that "[t]he ancillary jurisdiction courts possess to enforce their own orders is itself limited by the jurisdictional limits of the order sought to be enforced," *id.*, at 65, n. 22 (internal quotation marks omitted). See also *id.*, at 65 ("The fact that our case involves a clarification of the bankruptcy court's prior order does not alter the jurisdictional predicate necessary to enjoin third-party non-debtor claims").

The Court of Appeals found that "the jurisdictional analysis by the lower courts falls short," *id.*, at 62, in failing to recognize the significance of the fact that the Direct Actions "do not seek to collect on the basis of Manville's conduct," but rather "seek to recover directly from Travelers, a non-debtor insurer, for its own alleged misconduct," *id.*, at 63. The Court of Appeals held that the Bankruptcy Court mistook its jurisdiction when it enjoined "claims brought against a third-party non-debtor solely on the basis of that third-party's financial contribution to a debtor's estate," because "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate." *Id.*, at 66.

In reaching this result, the court explained that its prior decision in *MacArthur* was not controlling, as there a Manville asbestos distributor had challenged the authority of the Bankruptcy Court to bar it from collecting out of Manville's own insurance coverage. 517 F. 3d, at 62. Here, by contrast, "Travelers candidly admits that both the statutory and common law claims seek damages from Travelers that are *unrelated* to the policy proceeds." *Id.*, at 63. The Court of Appeals also considered the 1994 enactment of 11 U. S. C. § 524(g), which provides explicit statutory authority for a bankruptcy court to order the channeling of claims against a debtor's insurers to the bankruptcy estate, but the court understood § 524(g) to be "limited to situations where a third party has derivative liability for the claims against the debtor" and "was not intended to reach non-derivative claims." 517 F. 3d, at 68 (ellipsis and internal quotation marks omitted).

We granted certiorari, 555 U. S. 1083 (2009), and now reverse.

II

The Bankruptcy Court correctly understood that the Direct Actions fall within the scope of the 1986 Orders, as suits

of this sort always have. The Court of Appeals, however, believed it was free to look beyond the terms of the 1986 Orders and so treated the action as one "concern[ing] the outer reaches of a bankruptcy court's jurisdiction." 517 F. 3d, at 55. This, we think, was error. If this were a direct review of the 1986 Orders, the Court of Appeals would indeed have been dutybound to consider whether the Bankruptcy Court had acted beyond its subject-matter jurisdiction. See *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 514 (2006); *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884). But the 1986 Orders became final on direct review over two decades ago, and Travelers' response to the Circuit's jurisdictional ruling is correct: whether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 was not properly before the Court of Appeals in 2008 and is not properly before us.

A

We begin at our point of agreement with the Second Circuit, that the Direct Actions are "Policy Claims" enjoined as against Travelers by the language of the 1986 Orders, which covered "claims, demands, allegations, duties, liabilities and obligations" against Travelers, known or unknown at the time, "based upon, arising out of or relating to" Travelers' insurance coverage of Manville. App. to Pet. for Cert. in No. 08–295, at 439a. In a statute, "[t]he phrase 'in relation to' is expansive," *Smith* v. *United States*, 508 U. S. 223, 237 (1993), and so is its reach here, where "Policy Claims" covers not only "claims," but even "allegations" relating to the insurance coverage. Although it would be possible (albeit quite a stretch) to suggest that a "claim" only relates to Travelers' insurance coverage if it seeks recovery based upon Travelers' specific contractual obligation to Manville, "allegations" is not even remotely amenable to such a narrow construction and clearly reaches factual assertions that re-

late in a more comprehensive way to Travelers' dealings with Manville.

The Bankruptcy Court's uncontested factual findings drive the point home. In substance, the Bankruptcy Court found that the Direct Actions seek to recover against Travelers either for supposed wrongdoing in its capacity as Manville's insurer or for improper use of information that Travelers obtained from Manville as its insurer. These actions so clearly involve "claims" (and, all the more so, "allegations") "based upon, arising out of or relating to" Travelers' insurance coverage of Manville, that we have no need here to stake out the ultimate bounds of the injunction. There is, of course, a cutoff at some point, where the connection between the insurer's action complained of and the insurance coverage would be thin to the point of absurd. See *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S. 316, 335 (1997) (SCALIA, J., concurring) ("[A]pplying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else"); *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 655 (1995). But the detailed findings of the Bankruptcy Court place the Direct Actions within the terms of the 1986 Orders without pushing the limits.

Respondents argue that this is just revisionism perpetrated by the Clarifying Order, which they say improperly expanded the scope of the 1986 Orders to enjoin the Direct Actions. Their position appears to be that the 1986 Orders only bar actions against insurers seeking to recover derivatively for Manville's wrongdoing, but not actions to recover for Travelers' own misconduct, no matter what its relationship to Travelers' coverage of Manville. But this simply is not what the 1986 Orders say. The definition of "Policy Claims" contains nothing limiting it to derivative actions,

and there is language in the 1986 Orders directly to the contrary: the 1986 Orders not only enjoin bringing expansively defined "Policy Claims" against the settling insurers, but they go on to provide that the injunction has no application to a claim previously brought against a settling insurer "seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims." App. to Pet. for Cert. in No. 08–295, at 446a. There is no doubt about the implication, that this same sort of claim brought after the 1986 Orders become final will be barred. There would have been no need for this exception if "Policy Claims" were limited to claims against Travelers for Manville's wrongdoing.

Respondents seek further refuge in evidence that before entry of the 1986 Orders some parties to the Manville bankruptcy (including Travelers) understood the proposed injunction to bar only claims derivative of Manville's liability. They may well be right about that: we are in no position to engage in factfinding on this point, but there certainly are statements in the record that seem to support respondents' contention. See App. for Respondent Chubb 1a–3a, 5a, 13a–14a. But be that as it may, where the plain terms of a court order unambiguously apply, as they do here, they are entitled to their effect. See, *e. g.*, *Negrón-Almeda* v. *Santiago*, 528 F. 3d 15, 23 (CA1 2008) ("[A] court must carry out and enforce an order that is clear and unambiguous on its face"); *United States* v. *Spallone*, 399 F. 3d 415, 421 (CA2 2005) ("[I]f a judgment is clear and unambiguous, a court must adopt, and give effect to, the plain meaning of the judgment" (internal quotation marks omitted)). If it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent, see 11 R. Lord, Williston on Contracts § 30:4 (4th ed. 1999), it is all the clearer that a court should enforce a court order, a public

governmental act, according to its unambiguous terms.[4] This is all the Bankruptcy Court did.

B

Given the Clarifying Order's correct reading of the 1986 Orders, the only question left is whether the Bankruptcy Court had subject-matter jurisdiction to enter the Clarifying Order. The answer here is easy: as the Second Circuit recognized, and respondents do not dispute, the Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior orders. See *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 239 (1934). What is more, when the Bankruptcy Court issued the 1986 Orders it explicitly retained jurisdiction to enforce its injunctions. See App. to Pet. for Cert. in No. 08–295, at 284a–286a.

The Court of Appeals, however, went on to a different jurisdictional enquiry. It held that the 1986 Orders could not be enforced according to their terms because, as the panel saw it, the Bankruptcy Court had exceeded its jurisdiction when it issued the orders in 1986. We think, though, that it was error for the Court of Appeals to reevaluate the Bankruptcy Court's exercise of jurisdiction in 1986.

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[4] Even if we found the 1986 Orders to be ambiguous as applied to the Direct Actions, and even if we concluded that it would be proper to look to the parties' communications to resolve that ambiguity, it is far from clear that respondents would be entitled to upset the Bankruptcy Court's interpretation of the 1986 Orders. Numerous Courts of Appeals have held that a bankruptcy court's interpretation of its own confirmation order is entitled to substantial deference. See *In re Shenango Group Inc.*, 501 F. 3d 338, 346 (CA3 2007); *In re Dow Corning Corp.*, 456 F. 3d 668, 675 (CA6 2006); *In re Optical Technologies, Inc.*, 425 F. 3d 1294, 1300 (CA11 2005); *In re Dial Business Forms, Inc.*, 341 F. 3d 738, 744 (CA8 2003); *In re National Gypsum Co.*, 219 F. 3d 478, 484 (CA5 2000); *In re Casse*, 198 F. 3d 327, 333 (CA2 1999); *In re Tomlin*, 105 F. 3d 933, 941 (CA4 1997); *Monarch Life Ins. Co.* v. *Ropes & Gray*, 65 F. 3d 973, 983 (CA1 1995); *In re Weber*, 25 F. 3d 413, 416 (CA7 1994). Because the 1986 Orders clearly cover the Direct Actions, we need not determine the proper standard of review.

On direct appeal of the 1986 Orders, anyone who objected was free to argue that the Bankruptcy Court had exceeded its jurisdiction, and the District Court or Court of Appeals could have raised such concerns *sua sponte.* In fact, one objector argued just that. In *MacArthur,* a distributor of Manville asbestos claimed to be a coinsured under certain Manville insurance policies and argued that the 1986 Orders exceeded the Bankruptcy Court's jurisdiction by preventing the distributor from recovering under the policies; the Second Circuit disagreed, concluding that the Bankruptcy Court had not stepped outside its jurisdiction or statutory authority.[5] See 837 F. 2d, at 91–94. But once the 1986 Orders became final on direct review (whether or not proper exercises of bankruptcy court jurisdiction and power), they became res judicata to the "'parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'" *Nevada* v. *United States,* 463 U. S. 110, 130 (1983) (quoting *Cromwell* v. *County of Sac,* 94 U. S. 351, 352 (1877)).

Those orders are not any the less preclusive because the attack is on the Bankruptcy Court's conformity with its subject-matter jurisdiction, for "[e]ven subject-matter jurisdiction . . . may not be attacked collaterally." *Kontrick* v. *Ryan,* 540 U. S. 443, 455, n. 9 (2004). See also *Chicot County*

[5] We agree with the Court of Appeals that *MacArthur* only resolved the narrow question whether the Bankruptcy Court could enjoin derivative claims against the insurers and did not address whether the 1986 Orders, in their entirety, were proper. We note *MacArthur* merely to illustrate the obvious: the 1986 Orders were subject to challenge, on jurisdictional grounds or otherwise, on direct review. The dissent suggests that *MacArthur* limited the scope of the 1986 Orders to derivative claims, see *post,* at 156, 162–163 (opinion of STEVENS, J.), but it did not. The question whether the Bankruptcy Court had enjoined or could properly enjoin nonderivative claims was not at issue in *MacArthur,* and the court did not answer it.

Drainage Dist. v. *Baxter State Bank*, 308 U. S. 371, 376 (1940) ("[Federal courts] are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally"). So long as respondents or those in privity with them were parties to the Manville bankruptcy proceeding, and were given a fair chance to challenge the Bankruptcy Court's subject-matter jurisdiction, they cannot challenge it now by resisting enforcement of the 1986 Orders. See *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702, n. 9 (1982) ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment"); *Chicot County*, *supra*, at 375 ("[T]hese bondholders, having the opportunity to raise the question of invalidity, were not the less bound by the decree because they failed to raise it").[6]

[6] The rule is not absolute, and we have recognized rare situations in which subject-matter jurisdiction is subject to collateral attack. See, *e. g.*, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, 514 (1940) (a collateral attack on subject-matter jurisdiction is permissible "where the issue is the waiver of [sovereign] immunity"); *Kalb* v. *Feuerstein*, 308 U. S. 433, 439–440, 444 (1940) (where debtor's petition for relief was pending in bankruptcy court and federal statute affirmatively divested other courts of jurisdiction to continue foreclosure proceedings, state-court foreclosure judgment was subject to collateral attack). More broadly, the Restatement (Second) of Judgments § 12, p. 115 (1980), describes three exceptional circumstances in which a collateral attack on subject-matter jurisdiction is permitted:

"(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or

"(2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or

The willingness of the Court of Appeals to entertain this sort of collateral attack cannot be squared with res judicata and the practical necessity served by that rule. "It is just as important that there should be a place to end as that there should be a place to begin litigation," *Stoll* v. *Gottlieb*, 305 U. S. 165, 172 (1938), and the need for finality forbids a court called upon to enforce a final order to "tunnel back . . . for the purpose of reassessing prior jurisdiction de novo," *In re Optical Technologies, Inc.*, 425 F. 3d 1294, 1308 (CA11 2005). If the law were otherwise, and "courts could evaluate the jurisdiction that they may or may not have had to issue a final judgment, the rules of res judicata . . . would be entirely short-circuited." *Id.*, at 1307; see *Willy* v. *Coastal Corp.*, 503 U. S. 131, 137 (1992) ("[T]he practical concern with providing an end to litigation justifies a rule preventing collateral attack on subject-matter jurisdiction"). Almost a quarter century after the 1986 Orders were entered, the time to prune them is over.[7]

"(3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction."

This is no occasion to address whether we adopt all of these exceptions. Respondents do not claim any of them, and we do not see how any would apply here. This is not a situation, for example, in which a bankruptcy court decided to conduct a criminal trial, or to resolve a custody dispute, matters "so plainly beyond the court's jurisdiction" that a different result might be called for.

[7] Respondents point out that it is Travelers, not they, who moved the Bankruptcy Court to enforce the 1986 Orders. But who began the present proceedings has no bearing on the application of res judicata; to the extent respondents argue that the 1986 Orders should not be enforced according to their terms because of a jurisdictional flaw in 1986, this argument is an impermissible collateral attack. And to the extent respondents disclaim any initial intent to mount such an attack, this too is irrelevant, since the decision of the Court of Appeals is what we review and find at odds with finality.

III

Our holding is narrow. We do not resolve whether a bankruptcy court, in 1986 or today, could properly enjoin claims against nondebtor insurers that are not derivative of the debtor's wrongdoing. As the Court of Appeals noted, in 1994 Congress explicitly authorized bankruptcy courts, in some circumstances, to enjoin actions against a nondebtor "alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability . . . arises by reason of . . . the third party's provision of insurance to the debtor or a related party," and to channel those claims to a trust for payments to asbestos claimants. 11 U. S. C. § 524(g)(4)(A)(ii). On direct review today, a channeling injunction of the sort issued by the Bankruptcy Court in 1986 would have to be measured against the requirements of § 524 (to begin with, at least). But owing to the posture of this litigation, we do not address the scope of an injunction authorized by that section.[8]

Nor do we decide whether any particular respondent is bound by the 1986 Orders. We have assumed that respondents are bound, but the Court of Appeals did not consider this question. Chubb, in fact, relying on *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591 (1997), and *Ortiz* v. *Fibreboard Corp.*, 527 U. S. 815 (1999), has maintained that it was not given constitutionally sufficient notice of the 1986 Orders, so that due process absolves it from following them, whatever their scope. See 340 B. R., at 68. The District Court rejected this argument, *id.*, at 68–69, but the Court of Appeals did not reach it, 517 F. 3d, at 60, n. 17. On remand, the Court of Appeals can take up this objection and any others that respondents have preserved.

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[8] Section 524(h) provides that under some circumstances § 524(g) operates retroactively to validate an injunction. We need not decide whether those circumstances are present here.

IV

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

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

The Court holds that the plain terms of an injunction entered by the Bankruptcy Court as part of the 1986 reorganization of Johns-Manville Corporation (Manville) bar actions against Manville's insurers for their own wrongdoing. I disagree. In my view, the injunction bars only those claims against Manville's insurers seeking to recover from the bankruptcy estate for Manville's misconduct, not those claims seeking to recover against the insurers for their own misconduct. This interpretation respects the limits of the Bankruptcy Court's power; it is consistent with the Court of Appeals' understanding when it upheld the 1986 injunction on direct review and with Congress' codification of the Manville bankruptcy approach for future asbestos proceedings in 11 U. S. C. § 524(g); and it makes sense of Travelers' payment of $445 million in 2004 in exchange for a Bankruptcy Court order that supposedly "clarified" an unambiguous injunction.

Because the 1986 injunction has never meant what the Court today assumes, respondents' challenge is not an impermissible collateral attack. The Court of Appeals correctly concluded that the Bankruptcy Court's 2004 order improperly enjoined the state-law claims at issue in this proceeding.

I

At the heart of the dispute in this litigation is the distinction between two types of lawsuits seeking recovery from Manville's primary insurer, The Travelers Indemnity Company, and its affiliates (together, Travelers). The first class,

which I shall call "insurer actions," comprises suits in which the plaintiff is asserting that Travelers, as an insurer of Manville, has a duty to satisfy the plaintiff's claim against Manville. Plaintiffs in that class include not only members of the public exposed to asbestos but also Manville factory workers and vendors of Manville products. The second class, which I shall call "independent actions," comprises suits in which the plaintiff is asserting that Travelers is liable for its own misconduct. Plaintiffs in these suits have alleged both violations of state consumer-protection laws and breaches of common-law duties. See *ante*, at 142–143.

Suits that are called "direct actions" in the proceedings below and in the Court's opinion may fall in either category, but as the Court acknowledges the "true" definition of that term describes only insurer actions. *Ante*, at 143, n. 2; see Black's Law Dictionary 491 (8th ed. 2004). True direct actions are lawsuits in which a plaintiff claims that she was injured by Manville and seeks recovery directly from its insurer without first obtaining a judgment against Manville. The global settlement that made the 1986 reorganization of Manville possible clearly encompassed all such direct actions; Manville's insurers paid $770 million, including $80 million from Travelers, into the Manville Personal Injury Settlement Trust (Manville Trust) to which these actions would be channeled. But many of the claims that gave rise to the instant litigation allege no breach of duty by Manville and seek no recovery from the Manville Trust. See *ante*, at 143, n. 2. They are claims against Travelers based on its own alleged violations of state statutes and common-law rules. Thus, even though the Court calls these claims "direct actions," they are nothing of the sort. They are independent actions.

Some of the independent actions are based on facts concerning Travelers' insurance relationship with Manville. A number of suits, for example, allege that Travelers acquired

information about asbestos-related hazards from Manville that it had a duty to disclose to third parties.[1] This sort of factual nexus does not, however, transform an independent action into an insurer action. Instead, the question remains whether a suit seeks to recover from Travelers for Manville's wrongdoing or instead seeks to recover from Travelers for its own wrongdoing, making no claim on Manville's insurance policy proceeds or other assets of the Manville bankruptcy estate.

Recognizing the distinction between insurer actions and independent actions, the Court of Appeals held that the Bankruptcy Court had improperly enjoined the latter in its 2004 order.[2] Without ruling on the extent of the Bankruptcy Court's power, see *ante*, at 155, the Court today concludes that the 1986 injunction unambiguously barred independent actions and that the Bankruptcy Court's 2004 order simply clarified, and did not enlarge, the scope of that injunction. Based on that premise, the Court holds that respondents are challenging the Bankruptcy Court's authority to have issued the injunction in 1986, and it deems the challenge an impermissible collateral attack. I disagree with both the Court's understanding of the 1986 injunction and its attendant res judicata analysis.

II

The 1986 order of the Bankruptcy Court approving the insurance settlement agreements (Insurance Settlement Order), which was incorporated by reference in the order

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[1] The theories asserted in many of the state-law actions are novel, and, as the Court of Appeals noted, these claims "have met with almost universal failure in the state courts." *In re Johns-Manville Corp.*, 517 F. 3d 52, 68 (CA2 2008).

[2] The Court of Appeals noted that the Bankruptcy Court had not considered whether the various actions at issue were properly classified as insurer actions or independent actions, and it remanded for the Bankruptcy Court to undertake this assessment.

confirming Manville's plan of reorganization, includes three related protections for Manville's insurers, each focused on the company's insurance policies. It releases the insurers from all "Policy Claims," channels these claims to the Manville Trust, and permanently enjoins all persons from commencing or continuing a proceeding for "Policy Claims" against a settling insurer. App. to Pet. for Cert. in No. 08–295, pp. 445a–446a. The Insurance Settlement Order defines "Policy Claims" as:

> "any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the [Manville] Group or against any or all members of the Settling Insurer Group *based upon, arising out of or relating to any or all of the Policies.*" *Id.*, at 439a (emphasis added).[3]

Focusing on the italicized phrase, and particularly the term "relating to," the Court declares that this language "is not even remotely amenable" to a construction that excludes independent actions and "clearly reaches factual assertions that relate in a more comprehensive way to Travelers' dealings with Manville." *Ante*, at 148–149. Thus, it concludes that "the plain terms of [the] court order unambiguously" bar independent actions. *Ante*, at 150.

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[3] As the Court notes, the order confirming Manville's reorganization plan contains an additional injunction barring claims against the settling insurance companies. *Ante*, at 142, n. 1. The language in that order enjoins only insurer actions. See App. to Pet. for Cert. in No. 08–295, pp. 286a–288a (enjoining actions against settling insurance companies seeking, directly or indirectly, to recover on or with respect to a "Claim, Interest or Other Asbestos Obligation"); *id.*, at 56a, n. 6 (defining "Other Asbestos Obligation" as an obligation arising directly or indirectly from acts or omissions of a debtor). The parties accordingly focus on whether the Insurance Settlement Order enjoins independent actions.

The Court doth protest too much. Indeed, despite its insistence that the definition of "Policy Claims" is unambiguous, the Court quickly concludes that it cannot apply the "based upon, arising out of or relating to" language literally because there is a "cutoff at some point, where the connection between the insurer's action complained of and the insurance coverage would be thin to the point of absurd." *Ante,* at 149. Presumably, for instance, the Court would not deem enjoined a state-law claim for personal injuries caused by a Travelers' agent's reckless driving while en route to the courthouse to defend Manville even though, in a literal sense, this suit relates to (perhaps even arises out of) Travelers' performance of its policy obligations to Manville. The Court determines that it need not "stake out the ultimate bounds of the injunction" because it can rely on the Bankruptcy Court's "uncontested factual findings" that the particular independent actions at issue fall within the category that it had intended to enjoin. *Ibid.*

If the definition of the term "Policy Claims" is not amenable to a purely literal construction and the Court must look beyond the four corners of the Insurance Settlement Order to ascertain its meaning, however, the Bankruptcy Court's factual findings in 2004 are not the best guide. I would instead construe the order with reference to the limits of the Bankruptcy Court's authority—limits that were well understood by the insurers during the original settlement negotiations—and with reference to the Court of Appeals' interpretation of the Insurance Settlement Order when it upheld it against a jurisdictional challenge in 1988.

We should not lightly assume that the Bankruptcy Court entered an order that exceeded its authority. When a bankruptcy proceeding is commenced, the bankruptcy court acquires control of the debtor's assets and the power to discharge its debts. A bankruptcy court has no authority, however, to adjudicate, settle, or enjoin claims against non-

debtors that do not affect the debtor's estate. Because Travelers' insurance policies were a significant asset of the Manville bankruptcy estate, the Bankruptcy Court had the power to channel claims to the insurance proceeds to the Manville Trust. But this by no means gave it the power to enjoin claims against nondebtors like Travelers that had no impact on the bankruptcy estate. Thus, even accepting the Bankruptcy Court's representation in 2004 that it had "meant to provide the broadest protection possible" to the settling insurers, App. to Pet. for Cert. in No. 08–295, at 172a, such relief could not include protection from independent actions.

That the Bankruptcy Court was without authority to enjoin independent actions was well understood by both Manville and Travelers during their settlement negotiations. In Manville's memorandum in support of the Insurance Settlement Order, it clarified that it did "not seek to have [the Bankruptcy] Court release its Settling Insurers from any claims by third parties based on the Insurer's own tortious misconduct towards the third party" but rather sought only to release the insurers "from the rights Manville might itself have against them or rights derivative of Manville's rights under the policies being compromised and settled." App. for Respondent Chubb Indemnity Insurance Co. 5a. This understanding reflected not only the basic fact that the settlement was between Manville and its insurers (and not third parties), but also the parties' knowledge that the "Second Circuit [had held] that the bankruptcy courts lack power to discharge 'independent' claims of third parties against nondebtors." *Id.*, at 5a–6a.

Travelers similarly acknowledged the limits of the Bankruptcy Court's power. Noting that "[t]he court has *in rem* jurisdiction over the Policies and thus the power to enter appropriate orders to protect that jurisdiction," it stated that "the injunction is intended only to restrain claims against the *res* (*i. e.*, the Policies) which are or may be as-

serted, against the Settling Insurers." *Id.*, at 13a–14a;[4] see also *id.*, at 10a (memorandum of the legal representative of the Bankruptcy Court noting that "[a]ll parties seem to agree that any injunction, channeling order and release is limited to this Court's jurisdiction over the *res*"). In short, it was apparent to the settling parties, and no doubt also to the Bankruptcy Court, that the court lacked the power to enjoin third-party claims against nondebtors that did not affect the debtor's estate.

When the Court of Appeals upheld the injunction barring the assertion of "Policy Claims" against Manville's insurers it, too, understood these limits of the Bankruptcy Court's authority. MacArthur Corporation, a Manville asbestos distributor, claimed to be a coinsured under Manville's insurance policies by virtue of "vendor endorsements" in those policies entitling distributors to insurance coverage for claims arising from their sale of Manville products. MacArthur argued that the Bankruptcy Court lacked authority to issue the Insurance Settlement Order, which prevented it from suing the insurers, because this order constituted a *de facto* discharge in bankruptcy of nondebtor parties not entitled to Chapter 11 protection. In rejecting MacArthur's argument, the Court of Appeals did not hold that the Bankruptcy Court possessed the authority to enjoin all actions against the insurers bearing some factual connection to Manville. Rather, it held that MacArthur had misconstrued the scope of the Bankruptcy Court's order, which precluded "only those suits against the settling insurers that arise out of or relate to Manville's insurance policies." *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F. 2d 89, 91 (CA2 1988).

The Court of Appeals reasoned that this language enjoined MacArthur's claims because "MacArthur's rights as an in-

[4] This statement of Travelers' intent belies the Bankruptcy Court's suggestion that enjoining independent actions was a necessary condition of Travelers' contribution to the Manville estate. See App. to Pet. for Cert. in No. 08–295, at 170a–173a.

sured vendor are completely derivative of Manville's rights as the primary insured." *Id.*, at 92. Just as asbestos victims were "barred from asserting direct actions against the insurers," so too was MacArthur barred because "*in both instances, third parties seek to collect out of the proceeds of Manville's insurance policies on the basis of Manville's conduct.*" *Id.*, at 92–93 (emphasis added). The Court of Appeals further held that, because Manville's policies were property of the bankruptcy estate, the Bankruptcy Court had "properly issued the orders pursuant to its equitable and statutory powers to dispose of the debtor's property free and clear of third-party interests and to channel those interests to the proceeds thereby created." *Id.*, at 91.

As the Court of Appeals recognized in the instant proceedings, its earlier interpretation of the Insurance Settlement Order in *MacArthur* did not and does not extend to the independent actions at issue in the instant suit: "Travelers candidly admits that both the statutory and common law claims seek damages from Travelers that are *unrelated* to the policy proceeds, quite unlike the claims in *MacArthur* . . . where plaintiffs sought indemnification or compensation for the tortious wrongs of Manville to be paid out of the proceeds of Manville's insurance policies." *In re Johns-Manville Corp.*, 517 F. 3d 52, 63 (CA2 2008). Also in contrast to *MacArthur*, "the claims at issue here do not seek to collect on the basis of Manville's conduct. . . . Instead, the Plaintiffs seek to recover directly from Travelers, a non-debtor insurer, for its own alleged misconduct." *Ibid.*

The Court of Appeals' interpretation of the 1986 Insurance Settlement Order as enjoining only insurer actions and not independent actions is further supported by a statutory provision patterned after the Manville settlement. In the Bankruptcy Reform Act of 1994, Congress adopted 11 U. S. C. §524(g) to expressly authorize the approach of the Manville bankruptcy in future asbestos-related bankruptcies. In granting bankruptcy courts the power to provide injunc-

tive relief to nondebtors, Congress stated that courts may bar an action directed against a third party who "is alleged to be *directly or indirectly liable for the conduct of, claims against, or demands on the debtor* to the extent such alleged liability of such third party arises by reason of . . . the third party's provision of insurance to the debtor or a related party." § 524(g)(4)(A)(ii) (emphasis added). As the italicized language makes clear, the statute permits a bankruptcy court to enjoin actions seeking to proceed against a nondebtor insurer for a debtor's wrongdoing, but it does not confer power to enjoin independent actions arising out of the insurer's own wrongdoing. See generally *In re Combustion Engineering, Inc.*, 391 F. 3d 190, 235, n. 47 (CA3 2004) (explaining that § 524(g), like the Manville injunction, is limited to insurer actions). Had Congress interpreted "Policy Claims" in the manner the Court does today, and had it sought to codify that definition, it would have used broader language.

Finally, it is worth asking why Travelers paid more than $400 million in 2004 to three new settlement funds in exchange for the Bankruptcy Court's order "clarifying" that the independent actions "are—and always have been—permanently barred" by the 1986 injunction. App. to Pet. for Cert. in No. 08–295, at 170a. If the 1986 injunction were as clear as the Court assumes, surely Travelers would not have paid $445 million—more than five times the amount of its initial contribution to the Manville Trust—to obtain a redundant piece of paper.

In sum, I believe the 1986 Insurance Settlement Order did not enjoin independent actions of the sort giving rise to these proceedings. A contrary conclusion ignores the limits of the Bankruptcy Court's authority, the Court of Appeals' interpretation of the order upheld on direct review in 1988, Congress' approval of the Manville reorganization, and Travelers' own conduct during both the 1986 and 2004 settlement negotiations.

III

The Court's holding that respondents' challenge is an impermissible collateral attack is predicated on its determination that the 1986 Insurance Settlement Order plainly enjoined their independent actions. See *ante*, at 149–151. Because I disagree with this premise, I also disagree with the Court's preclusion analysis. In challenging the Bankruptcy Court's 2004 order "clarifying" the scope of the Insurance Settlement Order, respondents were in fact timely appealing an order that *rewrote* the scope of the 1986 injunctions. Their objection could not have been raised on direct appeal of the 1986 order because it was not an objection to anything in that order. And, of course, the Court of Appeals did not rule on a challenge to the enjoining of independent actions during direct review, as the Court acknowledges. See *ante*, at 152, n. 5. To the contrary, it interpreted the 1986 order as reaching only insurer actions. Thus, there neither was nor reasonably could have been a prior challenge that the 1986 order impermissibly enjoined independent actions.

Because the Court regards respondents' challenge as a collateral attack, it brushes aside their jurisdictional objection to the Bankruptcy Court's 2004 order on the ground that "the Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior orders." *Ante*, at 151. But neither respondents nor the Court of Appeals contested that point. Rather, respondents argued that the Bankruptcy Court was not merely interpreting and enforcing its prior orders and that it had no jurisdiction to enjoin the independent actions when it approved the 2004 settlements. The Court of Appeals accordingly examined whether the 2004 order improperly expanded the scope of the 1986 injunction and concluded that it did, thereby enjoining claims that were beyond the Bankruptcy Court's power to enjoin.

In my view, the judgment of the Court of Appeals was correct. The 1986 Insurance Settlement Order did not bar

independent actions, and the Bankruptcy Court lacked any basis for enjoining those actions in 2004. The independent actions have no effect on the bankruptcy estate, and "bankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor." *Celotex Corp.* v. *Edwards*, 514 U. S. 300, 309, n. 6 (1995). The Court of Appeals thus correctly concluded that the Bankruptcy Court had impermissibly enjoined "claims against Travelers that were predicated, as a matter of state law, on Travelers' own alleged misconduct and were unrelated to Manville's insurance policy proceeds and the *res* of the Manville estate." 517 F. 3d, at 68.

IV

Because I am persuaded that the 1986 Insurance Settlement Order did not encompass independent actions and that the Bankruptcy Court improperly enjoined such actions in 2004, I respectfully dissent.

Syllabus

GROSS *v.* FBL FINANCIAL SERVICES, INC.

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

No. 08–441. Argued March 31, 2009—Decided June 18, 2009

Petitioner Gross filed suit, alleging that respondent (FBL) demoted him in violation of the Age Discrimination in Employment Act of 1967 (ADEA), which makes it unlawful for an employer to take adverse action against an employee "because of such individual's age," 29 U. S. C. § 623(a). At the close of trial, and over FBL's objections, the District Court instructed the jury to enter a verdict for Gross if he proved, by a preponderance of the evidence, that he was demoted and his age was a motivating factor in the demotion decision, and told the jury that age was a motivating factor if it played a part in the demotion. It also instructed the jury to return a verdict for FBL if it proved that it would have demoted Gross regardless of age. The jury returned a verdict for Gross. The Eighth Circuit reversed and remanded for a new trial, holding that the jury had been incorrectly instructed under the standard established in *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, for cases under Title VII of the Civil Rights Act of 1964 when an employee alleges that he suffered an adverse employment action because of both permissible and impermissible considerations—*i. e.*, a "mixed-motives" case.

Held: A plaintiff bringing an ADEA disparate-treatment claim must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. Pp. 173–180.

(a) Because Title VII is materially different with respect to the relevant burden of persuasion, this Court's interpretation of the ADEA is not governed by Title VII decisions such as *Price Waterhouse* and *Desert Palace, Inc.* v. *Costa*, 539 U. S. 90, 94–95. This Court has never applied Title VII's burden-shifting framework to ADEA claims and declines to do so now. When conducting statutory interpretation, the Court "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Federal Express Corp.* v. *Holowecki*, 552 U. S. 389, 393. Unlike Title VII, which has been amended to explicitly authorize discrimination claims where an improper consideration was "a motivating factor" for the adverse

action, see 42 U. S. C. §§2000e–2(m) and 2000e–5(g)(2)(B), the ADEA does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it added §§2000e–2(m) and 2000e–5(g)(2)(B) to Title VII, even though it contemporaneously amended the ADEA in several ways. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally, see *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 256, and "negative implications raised by disparate provisions are strongest" where the provisions were "considered simultaneously when the language raising the implication was inserted," *Lindh* v. *Murphy*, 521 U. S. 320, 330. Pp. 173–175.

(b) The ADEA's text does not authorize an alleged mixed-motives age discrimination claim. The ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act. See *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604, 610. To establish a disparate-treatment claim under this plain language, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision. See *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U. S. 639, 653–654. It follows that under §623(a)(1), the plaintiff retains the burden of persuasion to establish that "but-for" cause. This Court has previously held this to be the burden's proper allocation in ADEA cases, see, *e. g.*, *Kentucky Retirement Systems* v. *EEOC*, 554 U. S. 135, 139–143, 148–150, and nothing in the statute's text indicates that Congress has carved out an exception for a subset of ADEA cases. Where a statute is "silent on the allocation of the burden of persuasion," "the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims." *Schaffer* v. *Weast*, 546 U. S. 49, 56. Hence, the burden of persuasion is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment action. Pp. 175–178.

(c) This Court rejects petitioner's contention that the proper interpretation of the ADEA is nonetheless controlled by *Price Waterhouse*, which initially established that the burden of persuasion shifted in alleged mixed-motives Title VII claims. It is far from clear that the Court would have the same approach were it to consider the question today in the first instance. Whatever *Price Waterhouse*'s deficiencies in retrospect, it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply. The problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims. Cf. *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 47. Pp. 178–179.

526 F. 3d 356, vacated and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post,* p. 180. BREYER, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, *post,* p. 190.

Eric Schnapper argued the cause for petitioner. With him on the briefs were *Beth A. Townsend* and *Michael J. Carroll.*

Lisa S. Blatt argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were then-*Acting Solicitor General Kneedler*, *Acting Assistant Attorney General King*, *Deputy Solicitor General Katyal*, *Dennis J. Dimsey*, *Angela M. Miller*, *James L. Lee*, *Carolyn L. Wheeler*, and *Jennifer S. Goldstein.*

Carter G. Phillips argued the cause for respondent. With him on the brief were *Frank Harty*, *Debra L. Hulett*, and *Jordan B. Hansell.**

JUSTICE THOMAS delivered the opinion of the Court.

The question presented by the petitioner in this case is whether a plaintiff must present direct evidence of age dis-

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**Michael L. Foreman*, *Audrey Wiggins*, *Sarah Crawford*, *Joseph M. Sellers*, *Christine E. Webber*, *Jenny R. Yang*, *Vincent A. Eng*, *John Trasvina*, *Nina Perales*, *Elise Sandra Shore*, *Judith L. Lichtman*, *Dina Lassow*, and *Jocelyn Samuels* filed a brief for the Lawyers' Committee for Civil Rights Under Law et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States of America by *Glen D. Nager*, *Shay Dvoretzky*, *Robin S. Conrad*, and *Shane B. Kawka;* for the Equal Employment Advisory Council by *Rae T. Vann;* and for the National School Boards Association by *Francisco M. Negrón, Jr.*, *Lisa E. Soronen*, and *Amy M. Steketee.*

Briefs of *amici curiae* were filed for AARP by *Thomas W. Osborne*, *Laurie A. McCann*, *Daniel B. Kohrman*, and *Melvin R. Radowitz;* for the American Association for Justice by *Jeffrey L. Needle* and *Les Weisbrod;* for the National Employment Lawyers Association by *Douglas B. Huron*, *Stephen Z. Chertkof*, and *Paul W. Mollica;* and for the National Federation of Independent Business Small Business Legal Center et al. by *Alan D. Berkowitz*, *Jeffrey W. Rubin*, *Karen R. Harned*, and *Elizabeth Milito.*

crimination in order to obtain a mixed-motives jury instruction in a suit brought under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.* Because we hold that such a jury instruction is never proper in an ADEA case, we vacate the decision below.

I

Petitioner Jack Gross began working for respondent FBL Financial Group, Inc. (FBL), in 1971. As of 2001, Gross held the position of claims administration director. But in 2003, when he was 54 years old, Gross was reassigned to the position of claims project coordinator. At that same time, FBL transferred many of Gross' job responsibilities to a newly created position—claims administration manager. That position was given to Lisa Kneeskern, who had previously been supervised by Gross and who was then in her early forties. App. to Pet. for Cert. 15a, 23a (District Court opinion). Although Gross (in his new position) and Kneeskern received the same compensation, Gross considered the reassignment a demotion because of FBL's reallocation of his former job responsibilities to Kneeskern.

In April 2004, Gross filed suit in District Court, alleging that his reassignment to the position of claims project coordinator violated the ADEA, which makes it unlawful for an employer to take adverse action against an employee "because of such individual's age." 29 U. S. C. § 623(a). The case proceeded to trial, where Gross introduced evidence suggesting that his reassignment was based at least in part on his age. FBL defended its decision on the grounds that Gross' reassignment was part of a corporate restructuring and that Gross' new position was better suited to his skills. See App. to Pet. for Cert. 23a (District Court opinion).

At the close of trial, and over FBL's objections, the District Court instructed the jury that it must return a verdict for Gross if he proved, by a preponderance of the evidence, that FBL "demoted [him] to claims projec[t] coordinator" and

that his "age was a motivating factor" in FBL's decision to demote him. App. 9–10. The jury was further instructed that Gross' age would qualify as a "'motivating factor,' if [it] played a part or a role in [FBL]'s decision to demote [him]." *Id.*, at 10. The jury was also instructed regarding FBL's burden of proof. According to the District Court, the "verdict must be for [FBL] . . . if it has been proved by the preponderance of the evidence that [FBL] would have demoted [Gross] regardless of his age." *Ibid.* The jury returned a verdict for Gross, awarding him $46,945 in lost compensation. *Id.*, at 8.

FBL challenged the jury instructions on appeal. The United States Court of Appeals for the Eighth Circuit reversed and remanded for a new trial, holding that the jury had been incorrectly instructed under the standard established in *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989). See 526 F. 3d 356, 358 (2008). In *Price Waterhouse*, this Court addressed the proper allocation of the burden of persuasion in cases brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e *et seq.*, when an employee alleges that he suffered an adverse employment action because of both permissible and impermissible considerations—*i. e.*, a "mixed-motives" case. 490 U. S., at 232, 244–247 (plurality opinion). The *Price Waterhouse* decision was splintered. Four Justices joined a plurality opinion, see *id.*, at 231–258, Justices White and O'Connor separately concurred in the judgment, see *id.*, at 258–261 (opinion of White, J.); *id.*, at 261–279 (opinion of O'Connor, J.), and three Justices dissented, see *id.*, at 279–295 (opinion of KENNEDY, J.). Six Justices ultimately agreed that if a Title VII plaintiff shows that discrimination was a "motivating" or a "'substantial'" factor in the employer's action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration. See *id.*, at 258 (plurality opinion); *id.*, at 259–260 (opinion of White, J.); *id.*, at 276 (opinion

of O'Connor, J.). Justice O'Connor further found that to shift the burden of persuasion to the employer, the employee must present "direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision." *Ibid.*

In accordance with Circuit precedent, the Court of Appeals identified Justice O'Connor's opinion as controlling. See 526 F. 3d, at 359 (citing *Erickson* v. *Farmland Industries, Inc.*, 271 F. 3d 718, 724 (CA8 2001)). Applying that standard, the Court of Appeals found that Gross needed to present "[d]irect evidence . . . sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." 526 F. 3d, at 359 (internal quotation marks omitted). In the Court of Appeals' view, "direct evidence" is only that evidence that "show[s] a specific link between the alleged discriminatory animus and the challenged decision." *Ibid.* (internal quotation marks omitted). Only upon a presentation of such evidence, the Court of Appeals held, should the burden shift to the employer "'to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor.'" *Ibid.* (quoting *Price Waterhouse*, *supra*, at 276 (opinion of O'Connor, J.)).

The Court of Appeals thus concluded that the District Court's jury instructions were flawed because they allowed the burden to shift to FBL upon a presentation of a preponderance of *any* category of evidence showing that age was a motivating factor—not just "direct evidence" related to FBL's alleged consideration of age. See 526 F. 3d, at 360. Because Gross conceded that he had not presented direct evidence of discrimination, the Court of Appeals held that the District Court should not have given the mixed-motives instruction. *Ibid.* Rather, Gross should have been held to the burden of persuasion applicable to typical, non-mixed-motives claims; the jury thus should have been instructed

only to determine whether Gross had carried his burden of "prov[ing] that age was the determining factor in FBL's employment action." See *ibid.*

We granted certiorari, 555 U. S. 1066 (2008), and now vacate the decision of the Court of Appeals.

II

The parties have asked us to decide whether a plaintiff must "present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case." Pet. for Cert. i. Before reaching this question, however, we must first determine whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA.[1] We hold that it does not.

A

Petitioner relies on this Court's decisions construing Title VII for his interpretation of the ADEA. Because Title VII is materially different with respect to the relevant burden of persuasion, however, these decisions do not control our construction of the ADEA.

In *Price Waterhouse*, a plurality of the Court and two Justices concurring in the judgment determined that once a "plaintiff in a Title VII case proves that [the plaintiff's membership in a protected class] played a motivating part in an

[1] Although the parties did not specifically frame the question to include this threshold inquiry, "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." This Court's Rule 14.1; see also *City of Sherrill* v. *Oneida Indian Nation of N. Y.*, 544 U. S. 197, 214, n. 8 (2005) ("'Questions not explicitly mentioned but essential to the analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented'" (quoting R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 414 (8th ed. 2002))); *Ballard* v. *Commissioner*, 544 U. S. 40, 46–47, and n. 2 (2005) (evaluating "a question anterior" to the "questions the parties raised").

employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [that factor] into account." 490 U. S., at 258; see also *id.*, at 259–260 (opinion of White, J.); *id.*, at 276 (opinion of O'Connor, J.). But as we explained in *Desert Palace, Inc.* v. *Costa*, 539 U. S. 90, 94–95 (2003), Congress has since amended Title VII by explicitly authorizing discrimination claims in which an improper consideration was "a motivating factor" for an adverse employment decision. See 42 U. S. C. § 2000e–2(m) (providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice" (emphasis added)); § 2000e–5(g)(2)(B) (restricting the remedies available to plaintiffs proving violations of § 2000e–2(m)).

This Court has never held that this burden-shifting framework applies to ADEA claims. And, we decline to do so now. When conducting statutory interpretation, we "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Federal Express Corp.* v. *Holowecki*, 552 U. S. 389, 393 (2008). Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e–2(m) and 2000e–5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways, see Civil Rights Act of 1991, § 115, 105 Stat. 1079; *id.*, § 302, at 1088.

We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.

See *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 256 (1991). Furthermore, as the Court has explained, "negative implications raised by disparate provisions are strongest" when the provisions were "considered simultaneously when the language raising the implication was inserted." *Lindh* v. *Murphy*, 521 U. S. 320, 330 (1997). As a result, the Court's interpretation of the ADEA is not governed by Title VII decisions such as *Desert Palace* and *Price Waterhouse*.[2]

B

Our inquiry therefore must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim. It does not. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Assn.* v. *South Coast Air Quality Management Dist.*, 541

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[2] JUSTICE STEVENS argues that the Court must incorporate its past interpretations of Title VII into the ADEA because "the substantive provisions of the ADEA were derived *in haec verba* from Title VII," *post*, at 183 (dissenting opinion) (internal quotation marks omitted), and because the Court has frequently applied its interpretations of Title VII to the ADEA, see *post*, at 183–185. But the Court's approach to interpreting the ADEA in light of Title VII has not been uniform. In *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581 (2004), for example, the Court declined to interpret the phrase "because of . . . age" in 29 U. S. C. § 623(a) to bar discrimination against people of all ages, even though the Court had previously interpreted "because of . . . race [or] sex" in Title VII to bar discrimination against people of all races and both sexes, see 540 U. S., at 584, 592, n. 5. And the Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), utilized in Title VII cases is appropriate in the ADEA context. See *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 142 (2000); *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U. S. 308, 311 (1996). In this instance, it is the textual differences between Title VII and the ADEA that prevent us from applying *Price Waterhouse* and *Desert Palace* to federal age discrimination claims.

U. S. 246, 252 (2004) (internal quotation marks omitted). The ADEA provides, in relevant part, that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U. S. C. § 623(a)(1) (emphasis added).

The words "because of" mean "by reason of: on account of." 1 Webster's Third New International Dictionary 194 (1966); see also 1 Oxford English Dictionary 746 (1933) (defining "because of" to mean "[b]y reason *of*, on account *of*" (italics in original)); The Random House Dictionary of the English Language 132 (1966) (defining "because" to mean "by reason; on account"). Thus, the ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act. See *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604, 610 (1993) (explaining that the claim "cannot succeed unless the employee's protected trait actually played a role in [the employer's decisionmaking] process *and had a determinative influence on the outcome*" (emphasis added)). To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision. See *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U. S. 639, 653–654 (2008) (recognizing that the phrase, "by reason of," requires at least a showing of "but for" causation (internal quotation marks omitted)); *Safeco Ins. Co. of America* v. *Burr*, 551 U. S. 47, 63–64, and n. 14 (2007) (observing that "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition" and that the statutory phrase, "based on," has the same meaning as the phrase, "because of" (internal quotation marks omitted)); cf. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984)

("An act or omission is not regarded as a cause of an event if the particular event would have occurred without it").[3]

It follows, then, that under § 623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the "but-for" cause of the employer's adverse action. Indeed, we have previously held that the burden is allocated in this manner in ADEA cases. See *Kentucky Retirement Systems* v. *EEOC*, 554 U. S. 135, 139–143, 148–150 (2008); *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 141, 143 (2000). And nothing in the statute's text indicates that Congress has carved out an exception to that rule for a subset of ADEA cases. Where the statutory text is "silent on the allocation of the burden of persuasion," we "begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." *Schaffer* v. *Weast*, 546 U. S. 49, 56 (2005); see also *Meacham* v. *Knolls Atomic Power Laboratory*, 554 U. S. 84, 92 (2008) ("Absent some reason to believe that Congress intended otherwise, . . . we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief" (internal quotation marks omitted)). We have no warrant to depart from the general rule in this setting.

Hence, the burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment action. A plaintiff must prove by a preponderance of the evidence (which may

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[3] JUSTICE BREYER contends that there is "nothing unfair or impractical" about hinging liability on whether "forbidden motive . . . play[ed] a role in the employer's decision." *Post*, at 191, 192 (dissenting opinion). But that is a decision for Congress to make. See *Florida Dept. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U. S. 33, 52 (2008). Congress amended Title VII to allow for employer liability when discrimination "was *a motivating factor* for any employment practice, even though other factors also motivated the practice," 42 U. S. C. § 2000e–2(m) (emphasis added), but did not similarly amend the ADEA, see *supra*, at 173–174. We must give effect to Congress' choice. See *14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 270 (2009).

be direct or circumstantial) that age was the "but-for" cause of the challenged employer decision. See *Reeves*, *supra*, at 141–143, 147.[4]

III

Finally, we reject petitioner's contention that our interpretation of the ADEA is controlled by *Price Waterhouse*, which initially established that the burden of persuasion shifted in alleged mixed-motives Title VII claims.[5] In any event, it is far from clear that the Court would have the same approach were it to consider the question today in the first

[4] Because we hold that ADEA plaintiffs retain the burden of persuasion to prove all disparate-treatment claims, we do not need to address whether plaintiffs must present direct, rather than circumstantial, evidence to obtain a burden-shifting instruction. There is no heightened evidentiary requirement for ADEA plaintiffs to satisfy their burden of persuasion that age was the "but-for" cause of their employer's adverse action, see 29 U. S. C. § 623(a), and we will imply none. "Congress has been unequivocal when imposing heightened proof requirements" in other statutory contexts, including in other subsections within Title 29, when it has seen fit. See *Desert Palace, Inc.* v. *Costa*, 539 U. S. 90, 99 (2003); see also, *e. g.*, 25 U. S. C. § 2504(b)(2)(B) (imposing "clear and convincing evidence" standard); 29 U. S. C. § 722(a)(2)(A) (same).

[5] JUSTICE STEVENS also contends that we must apply *Price Waterhouse* under the reasoning of *Smith* v. *City of Jackson*, 544 U. S. 228 (2005). See *post*, at 186. In *Smith*, the Court applied to the ADEA its pre-1991 interpretation of Title VII with respect to disparate-impact claims despite Congress' 1991 amendment adding disparate-impact claims to Title VII but not the ADEA. 544 U. S., at 240. But the amendments made by Congress in this same legislation, which added the "motivating factor" language to Title VII, undermine JUSTICE STEVENS' argument. Congress not only explicitly added "motivating factor" liability to Title VII, see *supra*, at 173–175, but it also partially abrogated *Price Waterhouse*'s holding by eliminating an employer's complete affirmative defense to "motivating factor" claims, see 42 U. S. C. § 2000e–5(g)(2)(B). If such "motivating factor" claims were already part of Title VII, the addition of § 2000e–5(g)(2)(B) alone would have been sufficient. Congress' careful tailoring of the "motivating factor" claim in Title VII, as well as the absence of a provision parallel to § 2000e–2(m) in the ADEA, confirms that we cannot transfer the *Price Waterhouse* burden-shifting framework into the ADEA.

instance. Cf. *14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 270 (2009) (declining to "introduc[e] a qualification into the ADEA that is not found in its text"); *Meacham*, *supra*, at 102 (explaining that the ADEA must be "read . . . the way Congress wrote it").

Whatever the deficiencies of *Price Waterhouse* in retrospect, it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply. For example, in cases tried to a jury, courts have found it particularly difficult to craft an instruction to explain its burden-shifting framework. See, *e. g.*, *Tyler* v. *Bethlehem Steel Corp.*, 958 F. 2d 1176, 1179 (CA2 1992) (referring to "the murky water of shifting burdens in discrimination cases"); *Visser* v. *Packer Engineering Associates, Inc.*, 924 F. 2d 655, 661 (CA7 1991) (en banc) (Flaum, J., dissenting) ("The difficulty judges have in formulating [burden-shifting] instructions and jurors have in applying them can be seen in the fact that jury verdicts in ADEA cases are supplanted by judgments notwithstanding the verdict or reversed on appeal more frequently than jury verdicts generally"). Thus, even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims. Cf. *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 47 (1977) (reevaluating precedent that was subject to criticism and "continuing controversy and confusion"); *Payne* v. *Tennessee*, 501 U. S. 808, 839–844 (1991) (SOUTER, J., concurring).[6]

[6] Gross points out that the Court has also applied a burden-shifting framework to certain claims brought in contexts other than pursuant to Title VII. See Brief for Petitioner 54–55 (citing, *inter alia*, *NLRB* v. *Transportation Management Corp.*, 462 U. S. 393, 401–403 (1983) (claims brought under the National Labor Relations Act (NLRA)); *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977) (constitutional claims)). These cases, however, do not require the Court to adopt his contra statutory position. The case involving the NLRA did not require the Court to decide in the first instance whether burden shifting should apply as the

IV

We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. Accordingly, we vacate 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 SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. § 621 *et seq.*, makes it unlawful for an employer to discriminate against any employee "because of" that individual's age, § 623(a). The most natural reading of this statutory text prohibits adverse employment actions motivated in whole or in part by the age of the employee. The "but-for" causation standard endorsed by the Court today was advanced in JUSTICE KENNEDY's dissenting opinion in *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 279 (1989), a case construing identical language in Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–2(a)(1). Not only did the Court reject the but-for standard in that case, but so too did Congress when it amended Title VII in 1991. Given this unambiguous history, it is particularly inappropriate for the Court, on its own initiative, to adopt an interpretation of the

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Court instead deferred to the National Labor Relation Board's determination that such a framework was appropriate. See *NLRB*, *supra*, at 400–403. And the constitutional cases such as *Mt. Healthy* have no bearing on the correct interpretation of ADEA claims, which are governed by statutory text.

causation requirement in the ADEA that differs from the established reading of Title VII. I disagree not only with the Court's interpretation of the statute, but also with its decision to engage in unnecessary lawmaking. I would simply answer the question presented by the certiorari petition and hold that a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motives instruction.

I

The Court asks whether a mixed-motives instruction is ever appropriate in an ADEA case. As it acknowledges, this was not the question we granted certiorari to decide.[1] Instead, the question arose for the first time in respondent's brief, which asked us to "overrule *Price Waterhouse* with respect to its application to the ADEA." Brief for Respondent 26 (boldface type deleted). In the usual course, this Court would not entertain such a request raised only in a merits brief: "'We would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari, cf. this Court's Rule 15.2, thereby assuring adequate preparation time for those likely affected and wishing to participate.'" *Alabama* v. *Shelton*, 535 U. S. 654, 660, n. 3 (2002) (quoting *South Central Bell Telephone Co.* v. *Alabama*, 526 U. S. 160, 171 (1999)). Yet the Court is unconcerned that the question it chooses to answer has not been briefed by the parties or interested *amici curiae*. Its failure to consider the views of the United States, which represents the agency charged with administering the ADEA, is especially irresponsible.[2]

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[1] "The question presented by the petitioner in this case is whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the [ADEA]." *Ante*, at 169–170.

[2] The United States filed an *amicus curiae* brief supporting petitioner on the question presented. At oral argument, the Government urged that the Court should not reach the issue it takes up today. See Tr. of Oral Arg. 20–21, 28–29.

Unfortunately, the majority's inattention to prudential Court practices is matched by its utter disregard of our precedent and Congress' intent. The ADEA provides that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U. S. C. § 623(a)(1) (emphasis added). As we recognized in *Price Waterhouse* when we construed the identical "because of" language of Title VII, see 42 U. S. C. § 2000e–2(a)(1) (making it unlawful for an employer "to fail or refuse to hire or to discharge any individual . . . with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin" (emphasis added)), the most natural reading of the text proscribes adverse employment actions motivated in whole or in part by the age of the employee.

In *Price Waterhouse*, we concluded that the words "'because of' such individual's . . . sex . . . mean that gender must be irrelevant to employment decisions." 490 U. S., at 240 (plurality opinion) (emphasis deleted); see also *id.*, at 260 (White, J., concurring in judgment). To establish a violation of Title VII, we therefore held, a plaintiff had to prove that her sex was a motivating factor in an adverse employment decision.[3] We recognized that the employer had an affirmative defense: It could avoid a finding of liability by proving

[3] Although Justice White stated that the plaintiff had to show that her sex was a "substantial" factor, while the plurality used the term "motivating" factor, these standards are interchangeable, as evidenced by Justice White's quotation of *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977): "'[T]he burden was properly placed upon [the plaintiff to show that the illegitimate criterion] was a "substantial factor"—or, *to put it in other words*, that it was a "motivating factor"'" in the adverse decision. *Price Waterhouse*, 490 U. S., at 259 (emphasis added); see also *id.*, at 249 (plurality opinion) (using "substantial" and "motivating" interchangeably).

that it would have made the same decision even if it had not taken the plaintiff's sex into account. *Id.*, at 244–245 (plurality opinion). But this affirmative defense did not alter the meaning of "because of." As we made clear, when "an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex." *Id.*, at 241; see also *id.*, at 260 (White, J., concurring in judgment). We readily rejected the dissent's contrary assertion. "To construe the words 'because of' as colloquial shorthand for 'but-for' causation," we said, "is to misunderstand them." *Id.*, at 240 (plurality opinion).[4]

Today, however, the Court interprets the words "because of" in the ADEA "as colloquial shorthand for 'but-for' causation." *Ibid.* That the Court is construing the ADEA rather than Title VII does not justify this departure from precedent. The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply "with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'" *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 121 (1985) (quoting *Lorillard* v. *Pons*, 434 U. S. 575, 584 (1978)). See generally *Northcross* v. *Board of Ed. of Memphis City Schools*, 412 U. S. 427, 428 (1973) *(per curiam)*. For this reason, JUSTICE KENNEDY's dissent in *Price Waterhouse* assumed the plurality's mixed-motives framework extended to the ADEA, see 490 U. S., at 292, and the Courts of Appeals

[4] We were no doubt aware that dictionaries define "because of" as "by reason of" or "on account of." *Ante*, at 176–177. Contrary to the majority's bald assertion, however, this does not establish that the term denotes but-for causation. The dictionaries the Court cites do not, for instance, define "because of" as "*solely* by reason of" or "*exclusively* on account of." In *Price Waterhouse*, we recognized that the words "because of" do not mean "*solely* because of," and we held that the inquiry "commanded by the words" of the statute was whether gender was a motivating factor in the employment decision. 490 U. S., at 241 (plurality opinion).

to have considered the issue unanimously have applied *Price Waterhouse* to ADEA claims.[5]

The Court nonetheless suggests that applying *Price Waterhouse* would be inconsistent with our ADEA precedents. In particular, the Court relies on our statement in *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604, 610 (1993), that "[a disparate-treatment] claim 'cannot succeed unless the employee's protected trait actually played a role in [the employer's decisionmaking] process *and had a determinative influence on the outcome.*'" *Ante*, at 176. The italicized phrase is at best inconclusive as to the meaning of the ADEA's "because of" language, however, as other passages in *Hazen Paper Co.* demonstrate. We also stated, for instance, that the ADEA "requires the employer to *ignore* an employee's age," 507 U. S., at 612 (emphasis added), and noted that "[w]hen the employer's decision is *wholly motivated* by factors other than age," there is no violation, *id.*, at 611 (emphasis altered). So too, we indicated the "possibility of dual liability under [the Employee Retirement Income Security Act of 1974] and the ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status," *id.*, at 613—a classic mixed-motives scenario.

Moreover, both *Hazen Paper Co.* and *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133 (2000), on which the majority also relies, support the conclusion that the ADEA

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[5] See *Febres* v. *Challenger Caribbean Corp.*, 214 F. 3d 57 (CA1 2000); *Ostrowski* v. *Atlantic Mut. Ins. Cos.*, 968 F. 2d 171 (CA2 1992); *Starceski* v. *Westinghouse Elec. Corp.*, 54 F. 3d 1089 (CA3 1995); *EEOC* v. *Warfield-Rohr Casket Co.*, 364 F. 3d 160 (CA4 2004); *Rachid* v. *Jack In The Box, Inc.*, 376 F. 3d 305 (CA5 2004); *Wexler* v. *White's Fine Furniture, Inc.*, 317 F. 3d 564 (CA6 2003); *Visser* v. *Packer Eng. Assocs., Inc.*, 924 F. 2d 655 (CA7 1991) (en banc); *Hutson* v. *McDonnell Douglas Corp.*, 63 F. 3d 771 (CA8 1995); *Lewis* v. *YMCA*, 208 F. 3d 1303 (CA11 2000) *(per curiam);* see also *Gonzagowski* v. *Widnall*, 115 F. 3d 744, 749 (CA10 1997).

should be interpreted consistently with Title VII. In those non-mixed-motives ADEA cases, the Court followed the standards set forth in non-mixed-motives Title VII cases including *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), and *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981). See, *e. g.*, *Reeves*, 530 U. S., at 141–143; *Hazen Paper Co.*, 507 U. S., at 610. This by no means indicates, as the majority reasons, that *mixed-motives* ADEA cases should follow those standards. Rather, it underscores that ADEA standards are generally understood to conform to Title VII standards.

II

The conclusion that "because of" an individual's age means that age was a motivating factor in an employment decision is bolstered by Congress' reaction to *Price Waterhouse* in the 1991 Civil Rights Act. As part of its response to "a number of recent decisions by the United States Supreme Court that sharply cut back on the scope and effectiveness of [civil rights] laws," H. R. Rep. No. 102–40, pt. 2, p. 2 (1991) (hereinafter H. R. Rep.), Congress eliminated the affirmative defense to liability that *Price Waterhouse* had furnished employers and provided instead that an employer's same-decision showing would limit only a plaintiff's remedies. See § 2000e–5(g)(2)(B). Importantly, however, Congress ratified *Price Waterhouse*'s interpretation of the plaintiff's burden of proof, rejecting the dissent's suggestion in that case that but-for causation was the proper standard. See § 2000e–2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice").

Because the 1991 Act amended only Title VII and not the ADEA with respect to mixed-motives claims, the Court reasonably declines to apply the amended provisions to the

ADEA.[6] But it proceeds to ignore the conclusion compelled by this interpretation of the Act: *Price Waterhouse*'s construction of "because of" remains the governing law for ADEA claims.

Our recent decision in *Smith* v. *City of Jackson*, 544 U. S. 228, 240 (2005), is precisely on point, as we considered in that case the effect of Congress' failure to amend the disparate-impact provisions of the ADEA when it amended the corresponding Title VII provisions in the 1991 Act. Noting that "the relevant 1991 amendments expanded the coverage of Title VII [but] did not amend the ADEA or speak to the subject of age discrimination," we held that "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." *Ibid.* (discussing *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989)); see also *Meacham* v. *Knolls Atomic Power Laboratory*, 554 U. S. 84, 98 (2008). If the *Wards Cove* disparate-impact framework that Congress flatly repudiated in the Title VII context continues to apply to ADEA claims, the mixed-motives framework that Congress substantially endorsed surely applies.

Curiously, the Court reaches the opposite conclusion, relying on Congress' partial ratification of *Price Waterhouse* to argue against that case's precedential value. It reasons that if the 1991 amendments do not apply to the ADEA, *Price Waterhouse* likewise must not apply because Congress effectively codified *Price Waterhouse*'s holding in the amendments. *Ante*, at 173–175. This does not follow. To the contrary, the fact that Congress endorsed this Court's

[6] There is, however, some evidence that Congress intended the 1991 mixed-motives amendments to apply to the ADEA as well. See H. R. Rep., pt. 2, at 4 (noting that a "number of other laws banning discrimination, including . . . the Age Discrimination in Employment Act (ADEA), 29 U. S. C. § 621, et seq., are modeled after and have been interpreted in a manner consistent with Title VII," and that "these other laws modeled after Title VII [should] be interpreted consistently in a manner consistent with Title VII as amended by this Act," including the mixed-motives provisions).

interpretation of the "because of" language in *Price Waterhouse* (even as it rejected the employer's affirmative defense to liability) provides all the more reason to adhere to that decision's motivating-factor test. Indeed, Congress emphasized in passing the 1991 Act that the motivating-factor test was consistent with its original intent in enacting Title VII. See, *e. g.*, H. R. Rep., pt. 2, at 17 ("When enacting the Civil Rights Act of 1964, Congress made clear that it intended to prohibit all invidious consideration of sex, race, color, religion, or national origin in employment decisions" (emphasis deleted)); *id.*, at 2 (stating that the Act "reaffirm[ed] that any reliance on prejudice in making employment decisions is illegal"); see also H. R. Rep., pt. 1, at 45; S. Rep. No. 101–315, pp. 6, 22 (1990).

The 1991 amendments to Title VII also provide the answer to the majority's argument that the mixed-motives approach has proved unworkable. *Ante*, at 179. Because Congress has codified a mixed-motives framework for Title VII cases—the vast majority of antidiscrimination lawsuits—the Court's concerns about that framework are of no moment. Were the Court truly worried about difficulties faced by trial courts and juries, moreover, it would not reach today's decision, which will further complicate every case in which a plaintiff raises both ADEA and Title VII claims.

The Court's resurrection of the but-for causation standard is unwarranted. *Price Waterhouse* repudiated that standard 20 years ago, and Congress' response to our decision further militates against the crabbed interpretation the Court adopts today. The answer to the question the Court has elected to take up—whether a mixed-motives jury instruction is ever proper in an ADEA case—is plainly yes.

III

Although the Court declines to address the question we granted certiorari to decide, I would answer that question by following our unanimous opinion in *Desert Palace, Inc.* v.

Costa, 539 U. S. 90 (2003). I would accordingly hold that a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motives instruction.

The source of the direct-evidence debate is Justice O'Connor's opinion concurring in the judgment in *Price Waterhouse*. Writing only for herself, Justice O'Connor argued that a plaintiff should be required to introduce "direct evidence" that her sex motivated the decision before the plurality's mixed-motives framework would apply. 490 U. S., at 276.[7] Many courts have treated Justice O'Connor's opinion in *Price Waterhouse* as controlling for both Title VII and ADEA mixed-motives cases in light of our statement in *Marks* v. *United States*, 430 U. S. 188, 193 (1977), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" Unlike the cases *Marks* addressed, however, *Price Waterhouse* garnered five votes for a single rationale: Justice White agreed with the plurality as to the motivating-factor test, see *supra*, at 182, n. 3; he disagreed only as to the type of evidence an employer was required to submit to prove that the same result would have occurred absent the unlawful motivation. Taking the plurality to demand objective evidence, he wrote separately to express his view that an employer's credible testimony could suffice. 490 U. S., at 261. Because Justice White provided a fifth vote for the "rationale explaining the result" of the *Price Waterhouse* decision, *Marks*, 430 U. S., at 193, his concurrence is properly understood as controlling, and he,

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[7] While Justice O'Connor did not define precisely what she meant by "direct evidence," we contrasted such evidence with circumstantial evidence in *Desert Palace, Inc.* v. *Costa*, 539 U. S. 90 (2003). That Justice O'Connor might have intended a different definition does not affect my conclusion, as I do not believe a plaintiff is required to introduce any special type of evidence to obtain a mixed-motives instruction.

like the plurality, did not require the introduction of direct evidence.

Any questions raised by *Price Waterhouse* as to a direct-evidence requirement were settled by this Court's unanimous decision in *Desert Palace*, in which we held that a plaintiff need not introduce direct evidence to meet her burden in a mixed-motives case under Title VII, as amended by the Civil Rights Act of 1991. In construing the language of § 2000e–2(m), we reasoned that the statute did not mention, much less require, a heightened showing through direct evidence and that "Congress has been unequivocal when imposing heightened proof requirements." 539 U. S., at 99. The statute's silence with respect to direct evidence, we held, meant that "we should not depart from the '[c]onventional rul[e] of civil litigation . . . [that] requires a plaintiff to prove his case by a preponderance of the evidence', . . . using 'direct or circumstantial evidence.'" *Ibid.* (quoting *Price Waterhouse*, 490 U. S., at 253 (plurality opinion), and *Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711 (1983)). We also recognized the Court's consistent acknowledgment of the utility of circumstantial evidence in discrimination cases.

Our analysis in *Desert Palace* applies with equal force to the ADEA. Cf. *ante*, at 178, n. 4. As with the 1991 amendments to Title VII, no language in the ADEA imposes a heightened direct-evidence requirement, and we have specifically recognized the utility of circumstantial evidence in ADEA cases. See *Reeves*, 530 U. S., at 147 (cited by *Desert Palace*, 539 U. S., at 99–100). Moreover, in *Hazen Paper Co.*, we held that an award of liquidated damages for a "willful" violation of the ADEA did not require proof of the employer's motivation through direct evidence, 507 U. S., at 615, and we have similarly rejected the imposition of special evidentiary rules in other ADEA cases. See, *e. g.*, *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506 (2002); *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U. S. 308 (1996). *Desert Palace* thus confirms the answer provided by the plurality

and Justice White in *Price Waterhouse:* An ADEA plaintiff need not present direct evidence of discrimination to obtain a mixed-motives instruction.

IV

The Court's endorsement of a different construction of the same critical language in the ADEA and Title VII is both unwise and inconsistent with settled law. The but-for standard the Court adopts was rejected by this Court in *Price Waterhouse* and by Congress in the Civil Rights Act of 1991. Yet today the Court resurrects the standard in an unabashed display of judicial lawmaking. I respectfully dissent.

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

I agree with JUSTICE STEVENS that mixed-motive instructions are appropriate in the Age Discrimination in Employment Act of 1967 context. And I join his opinion. The Court rejects this conclusion on the ground that the words "because of" require a plaintiff to prove that age was the "but-for" cause of his employer's adverse employment action. *Ante*, at 176–177. But the majority does not explain why this is so. The words "because of" do not inherently require a showing of "but-for" causation, and I see no reason to read them to require such a showing.

It is one thing to require a typical tort plaintiff to show "but-for" causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of "but-for" causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a "but-for" relation when we consider, not physical forces, but the mind-related characterizations that constitute motive. Sometimes we speak of *determining* or *discovering* motives, but more often we *ascribe* motives, after an event, to an individual in light

of the individual's thoughts and other circumstances present at the time of decision. In a case where we characterize an employer's actions as having been taken out of multiple motives, say, both because the employee was old and because he wore loud clothing, to apply "but-for" causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.

All that a plaintiff can know for certain in such a context is that the forbidden motive did play a role in the employer's decision. And the fact that a jury has found that age did play a role in the decision justifies the use of the word "because," *i. e.*, the employer dismissed the employee because of his age (and other things). See *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 239–242 (1989) (plurality opinion). I therefore would see nothing wrong in concluding that the plaintiff has established a violation of the statute.

But the law need not automatically assess liability in these circumstances. In *Price Waterhouse*, the plurality recognized an affirmative defense where the defendant could show that the employee would have been dismissed regardless. The law permits the employer this defense, not because the forbidden motive, age, had no role in the *actual* decision, but because the employer can show that he would have dismissed the employee anyway in the *hypothetical* circumstance in which his age-related motive was absent. And it makes sense that this would be an affirmative defense, rather than part of the showing of a violation, precisely because the defendant is in a better position than the plaintiff to establish how he would have acted in this hypothetical situation. See *id.*, at 242; cf. *ante*, at 185 (STEVENS, J., dissenting) (describing

the Title VII framework). I can see nothing unfair or impractical about allocating the burdens of proof in this way.

The instruction that the District Court gave seems appropriate and lawful. It says, in pertinent part:

> "Your verdict must be for plaintiff if all the following elements have been proved by the preponderance of the evidence:
>
> . . . . .
>
> "[The] plaintiff's age was a motivating factor in defendant's decision to demote plaintiff.
>
> "However, your verdict must be for defendant . . . if it has been proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age.
>
> . . . . .
>
> "As used in these instructions, plaintiff's age was 'a motivating factor,' if plaintiff's age played a part or a role in the defendant's decision to demote plaintiff. However, plaintiff's age need not have been the only reason for defendant's decision to demote plaintiff." App. 9–10.

For these reasons as well as for those set forth by JUSTICE STEVENS, I respectfully dissent.

Syllabus

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE *v.* HOLDER, ATTORNEY GENERAL, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 08–322. Argued April 29, 2009—Decided June 22, 2009

The appellant is a small utility district with an elected board. Because it is located in Texas, it is required by § 5 of the Voting Rights Act of 1965 (Act) to seek federal preclearance before it can change anything about its elections, even though there is no evidence it has ever discriminated on the basis of race in those elections. The district filed suit seeking relief under the "bailout" provision in § 4(a) of the Act, which allows a "political subdivision" to be released from the preclearance requirements if certain conditions are met. The district argued in the alternative that, if § 5 were interpreted to render it ineligible for bailout, § 5 was unconstitutional. The Federal District Court rejected both claims. It concluded that bailout under § 4(a) is available only to counties, parishes, and subunits that register voters, not to an entity like the district that does not register its own voters. It also concluded that a 2006 amendment extending § 5 for 25 years was constitutional.

Held:

1. The historic accomplishments of the Voting Rights Act are undeniable, but the Act now raises serious constitutional concerns. The preclearance requirement represents an intrusion into areas of state and local responsibility that is otherwise unfamiliar to our federal system. Some of the conditions that the Court relied upon in upholding this statutory scheme in *South Carolina* v. *Katzenbach*, 383 U. S. 301, and *City of Rome* v. *United States*, 446 U. S. 156, have unquestionably improved. Those improvements are no doubt due in significant part to the Act itself, and stand as a monument to its success, but the Act imposes current burdens and must be justified by current needs. The Act also differentiates between the States in ways that may no longer be justified.

At the same time, the Court recognizes that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform." *Blodgett* v. *Holden*, 275 U. S. 142, 147–148 (Holmes, J., concurring). Here the District Court found that the sizable record compiled by Congress to support extension of § 5 doc-

umented continuing racial discrimination and that § 5 deterred discriminatory changes.

The Court will not shrink from its duty "as the bulwark of a limited Constitution against legislative encroachments," The Federalist No. 78, but "[i]t is . . . well-established . . . that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case," *Escambia County* v. *McMillan*, 466 U. S. 48, 51. Here, the district also raises a statutory claim that it is eligible to bail out under §§ 4 and 5, and that claim is sufficient to resolve the appeal. Pp. 201–206.

2. The Act must be interpreted to permit all political subdivisions, including the district, to seek to bail out from the preclearance requirements. It is undisputed that the district is a "political subdivision" in the ordinary sense, but the Act also provides a narrower definition in § 14(c)(2): "'[P]olitical subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." The court below concluded that the district did not qualify for § 4(a) bailout under this definition, but specific precedent, the Act's structure, and underlying constitutional concerns compel a broader reading.

This Court has already established that § 14(c)(2)'s definition does not apply to the term "political subdivision" in § 5's preclearance provision. See, *e. g.*, *United States* v. *Sheffield Bd. of Comm'rs*, 435 U. S. 110. Rather, the "definition was intended to operate only for purposes of determining which political units in nondesignated States may be separately designated for coverage under § 4(b)." *Id.*, at 128–129. "[O]nce a State has been [so] designated . . . , [the] definition . . . has no 'operative significance in determining [§ 5's] reach.'" *Dougherty County Bd. of Ed.* v. *White*, 439 U. S. 32, 44. In light of these decisions, § 14(c)(2)'s definition should not constrict the availability of bailout either.

The Government responds that any such argument is foreclosed by *City of Rome*. In 1982, however, Congress expressly repudiated *City of Rome*. Thus, *City of Rome*'s logic is no longer applicable. The Government's contention that the district is subject to § 5 under *Sheffield* not because it is a "political subdivision" but because it is a "State" is counterintuitive and similarly untenable after the 1982 amendments. The Government's contrary interpretation has helped to render the bailout provision all but a nullity. Since 1982, only 17 jurisdictions—out of the more than 12,000 covered political subdivisions—have successfully bailed out of the Act. It is unlikely that Congress intended the provision to have such limited effect. Pp. 206–211.

573 F. Supp. 2d 221, reversed and remanded.

Syllabus

ROBERTS, C. J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, SOUTER, GINSBURG, BREYER, and ALITO, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part, *post,* p. 212.

Gregory S. Coleman argued the cause for appellant. With him on the briefs was *Christian J. Ward.*

Deputy Solicitor General Katyal argued the cause for the federal appellee. With him on the brief were then-*Acting Solicitor General Kneedler*, *Acting Assistant Attorney General King*, *Douglas Hallward-Driemeier*, *Steven H. Rosenbaum*, *Diana K. Flynn*, *Sarah E. Harrington*, and *T. Christian Herren, Jr.*

Debo P. Adegbile argued the cause for the intervenor-appellees. With him on the brief for intervenor-appellee Rodney Louis et al. were *John Payton*, *Jacqueline A. Berrien*, *Ryan P. Haygood*, *Kristen M. Clarke*, *Joshua Civin*, *Samuel Spital*, *Kathryn Kolbert*, *Nina Perales*, *Jose Garza*, *George Korbel*, and *Judith A. Sanders-Castro. Seth P. Waxman*, *Paul R. Q. Wolfson*, *Jonathan E. Nuechterlein*, *Ariel B. Waldman*, *Rebecca G. Deutsch*, *Micah S. Myers*, *Jon M. Greenbaum*, *Mark A. Posner*, *Laughlin McDonald*, *Steven R. Shapiro*, *Michael Kator*, *Jeremy Wright*, *Arthur B. Spitzer*, and *Angela Ciccolo* filed a brief for intervenor-appellee Texas State Conference of NAACP Branches et al. *Renea Hicks* filed a brief for appellee Travis County.*

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*Briefs of *amici curiae* urging reversal were filed for the Mountain States Legal Foundation by *J. Scott Detamore;* for the Southeastern Legal Foundation by *Shannon Lee Goessling* and *Bert W. Rein;* for Georgia Governor Sonny Perdue by *Anne W. Lewis*, Special Attorney General of Georgia; and for Dr. Abigail Thernstrom et al. by *Michael A. Carvin.*

Briefs of *amici curiae* urging affirmance were filed for the State of North Carolina et al. by *Roy Cooper*, Attorney General of North Carolina, *Christopher G. Browning, Jr.*, *Tiare B. Smiley*, *Alexander McC. Peters*, and *Susan K. Nichols*, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Edmund G. Brown, Jr.*, of California, *James D. Caldwell* of Louisiana, *Jim Hood* of Mississippi, and *Andrew Cuomo* of New York; for Alaska Native Voters et al. by *James*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The plaintiff in this case is a small utility district raising a big question—the constitutionality of § 5 of the Voting Rights Act. The district has an elected board, and is required by § 5 to seek preclearance from federal authorities in Washington, D. C., before it can change anything about those elections. This is required even though there has never been any evidence of racial discrimination in voting in the district.

Thomas Tucker; for the American Bar Association by *H. Thomas Wells, Jr.*, and *Christopher T. Handman;* for the Asian American Legal Defense and Education Fund et al. by *Theodore K. Cheng;* for the Brennan Center for Justice at New York University School of Law by *Paul M. Smith*, *Marc A. Goldman*, *Wendy Weiser*, and *Sidney S. Rosdeitcher;* for the Civil Rights Clinic at Howard University School of Law by *Aderson Bellegarde François;* for the Constitutional Accountability Center by *Clifford M. Sloan*, *Douglas T. Kendall*, and *Elizabeth B. Wydra;* for Former Republican Officeholders by *Trevor Potter*, *Tara Malloy*, and *Paul S. Ryan;* for Jurisdictions That Have Bailed Out Under the Voting Rights Act by *J. Gerald Hebert* and *George Warren Shanks;* for the Leadership Conference on Civil Rights et al. by *Matthew M. Hoffman*, *Stephen J. Pollak*, *John Townsend Rich*, and *William L. Taylor;* for Members of the Texas House of Representatives by *Lynn E. Blais*, *Michael F. Sturley*, and *David C. Frederick;* for the Navajo Nation et al. by *Marvin S. Cohen* and *Louis Denetsosie;* for Julius Chambers et al. by *William D. Kissinger;* for Congressman John Conyers, Jr., et al. by *Pamela S. Karlan*, *Jeffrey L. Fisher*, *Amy Howe*, *Kevin K. Russell*, and *Thomas C. Goldstein;* for Nicholas deB. Katzenbach et al. by *Samuel R. Bagenstos;* for Congresswoman Barbara Lee et al. by *Juan Cartagena;* and for Congressman John Lewis by *Mr. François.*

Briefs of *amici curiae* were filed for the Asian American Justice Center et al. by *Allegra R. Rich*, *David M. Burns*, *Taron K. Murakami*, *Karen K. Narasaki*, and *Vincent A. Eng;* for the Pacific Legal Foundation et al. by *Sharon L. Browne;* for the Scharf-Norton Center for Constitutional Litigation, Goldwater Institute, by *Clint Bolick* and *Nicholas C. Dranias;* for Nathaniel Persily et al. by *Mr. Persily, pro se;* and for Bob Riley, Governor of Alabama, by *Corey L. Maze*, Solicitor General of Alabama, and *Misty S. Fairbanks*, Assistant Attorney General.

The district filed suit seeking relief from these preclearance obligations under the "bailout" provision of the Voting Rights Act. That provision allows the release of a "political subdivision" from the preclearance requirements if certain rigorous conditions are met. The court below denied relief, concluding that bailout was unavailable to a political subdivision like the utility district that did not register its own voters. The district appealed, arguing that the Act imposes no such limitation on bailout, and that if it does, the preclearance requirements are unconstitutional.

That constitutional question has attracted ardent briefs from dozens of interested parties, but the importance of the question does not justify our rushing to decide it. Quite the contrary: Our usual practice is to avoid the unnecessary resolution of constitutional questions. We agree that the district is eligible under the Act to seek bailout. We therefore reverse, and do not reach the constitutionality of § 5.

I

A

The Fifteenth Amendment promises that the "right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." U. S. Const., Amdt. 15, § 1. In addition to that self-executing right, the Amendment also gives Congress the "power to enforce this article by appropriate legislation." § 2. The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure. Early enforcement Acts were inconsistently applied and repealed with the rise of Jim Crow. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 310 (1966); A. Keyssar, The Right to Vote 105–111 (2000). Another series of enforcement statutes in the 1950's and 1960's depended on individual lawsuits filed by the Department of Justice. But litigation is slow and expensive, and the States were creative in "contriving new rules" to continue violating the Fifteenth Amendment

"in the face of adverse federal court decrees." *Katzenbach*, *supra*, at 335; *Riley* v. *Kennedy*, 553 U. S. 406, 411 (2008).

Congress responded with the Voting Rights Act. Section 2 of the Act operates nationwide; as it exists today, that provision forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U. S. C. § 1973(a). Section 2 is not at issue in this case.

The remainder of the Act constitutes a "scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant." *Katzenbach*, *supra*, at 315. Rather than continuing to depend on case-by-case litigation, the Act directly pre-empted the most powerful tools of black disenfranchisement in the covered areas. All literacy tests and similar voting qualifications were abolished by § 4 of the Act. Voting Rights Act of 1965, §§ 4(a)–(d), 79 Stat. 438–439. Although such tests may have been facially neutral, they were easily manipulated to keep blacks from voting. The Act also empowered federal examiners to override state determinations about who was eligible to vote. §§ 6, 7, 9, 13, *id.*, at 439–442, 444–445.

These two remedies were bolstered by § 5, which suspended all changes in state election procedure until they were submitted to and approved by a three-judge Federal District Court in Washington, D. C., or the Attorney General. *Id.*, at 439, codified as amended at 42 U. S. C. § 1973c(a). Such preclearance is granted only if the change neither "has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." *Ibid.* We have interpreted the requirements of § 5 to apply not only to the ballot-access rights guaranteed by § 4, but to drawing district lines as well. *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 564–565 (1969).

To confine these remedies to areas of flagrant disenfranchisement, the Act applied them only to States that had used a forbidden test or device in November 1964, and had less

than 50% voter registration or turnout in the 1964 Presidential election. § 4(b), 79 Stat. 438. Congress recognized that the coverage formula it had adopted "might bring within its sweep governmental units not guilty of any unlawful discriminatory voting practices." *Briscoe* v. *Bell*, 432 U. S. 404, 411 (1977). It therefore "afforded such jurisdictions immediately available protection in the form of . . . [a] 'bailout' suit." *Ibid.*

To bail out under the current provision, a jurisdiction must seek a declaratory judgment from a three-judge District Court in Washington, D. C. 42 U. S. C. §§ 1973b(a)(1), 1973c(a). It must show that for the previous 10 years it has not used any forbidden voting test, has not been subject to any valid objection under § 5, and has not been found liable for other voting rights violations; it must also show that it has "engaged in constructive efforts to eliminate intimidation and harassment" of voters, and similar measures. §§ 1973b(a)(1)(A)–(F). The Attorney General can consent to entry of judgment in favor of bailout if the evidence warrants it, though other interested parties are allowed to intervene in the declaratory judgment action. § 1973b(a)(9). There are other restrictions: To bail out, a covered jurisdiction must show that every jurisdiction in its territory has complied with all of these requirements. § 1973b(a)(3). The District Court also retains continuing jurisdiction over a successful bailout suit for 10 years, and may reinstate coverage if any violation is found. § 1973b(a)(5).

As enacted, §§ 4 and 5 of the Voting Rights Act were temporary provisions. They were expected to be in effect for only five years. § 4(a), 79 Stat. 438. We upheld the temporary Voting Rights Act of 1965 as an appropriate exercise of congressional power in *Katzenbach*, explaining that "[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects." 383 U. S., at 308. We concluded that the problems Congress faced when it passed the Act were so dire

that "exceptional conditions [could] justify legislative measures not otherwise appropriate." *Id.*, at 334–335 (citing *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934), and *Wilson* v. *New*, 243 U. S. 332 (1917)).

Congress reauthorized the Act in 1970 (for 5 years), 1975 (for 7 years), and 1982 (for 25 years). The coverage formula remained the same, based on the use of voting-eligibility tests and the rate of registration and turnout among all voters, but the pertinent dates for assessing these criteria moved from 1964 to include 1968 and eventually 1972. 42 U. S. C. § 1973b(b). We upheld each of these reauthorizations against constitutional challenges, finding that circumstances continued to justify the provisions. *Georgia* v. *United States*, 411 U. S. 526 (1973); *City of Rome* v. *United States*, 446 U. S. 156 (1980); *Lopez* v. *Monterey County*, 525 U. S. 266 (1999). Most recently, in 2006, Congress extended § 5 for yet another 25 years. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 120 Stat. 577. The 2006 Act retained 1972 as the last baseline year for triggering coverage under § 5. It is that latest extension that is now before us.

B

Northwest Austin Municipal Utility District Number One was created in 1987 to deliver city services to residents of a portion of Travis County, Texas. It is governed by a board of five members, elected to staggered terms of four years. The district does not register voters but is responsible for its own elections; for administrative reasons, those elections are run by Travis County. Because the district is located in Texas, it is subject to the obligations of § 5, although there is no evidence that it has ever discriminated on the basis of race.

The district filed suit in the District Court for the District of Columbia, seeking relief under the statute's bailout provisions and arguing in the alternative that, if interpreted to

render the district ineligible for bailout, § 5 was unconstitutional. The three-judge District Court rejected both claims. Under the statute, only a "State or political subdivision" is permitted to seek bailout, 42 U. S. C. § 1973b(a)(1)(A), and the court concluded that the district was not a political subdivision because that term includes only "counties, parishes, and voter-registering subunits," *Northwest Austin Municipal Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221, 232 (2008). Turning to the district's constitutional challenge, the court concluded that the 25-year extension of § 5 was constitutional both because "Congress . . . rationally concluded that extending [§] 5 was necessary to protect minorities from continued racial discrimination in voting" and because "the 2006 Amendment qualifies as a congruent and proportional response to the continuing problem of racial discrimination in voting." *Id.*, at 283. We noted probable jurisdiction, 555 U. S. 1091 (2009), and now reverse.

II

The historic accomplishments of the Voting Rights Act are undeniable. When it was first passed, unconstitutional discrimination was rampant, and the "registration of voting-age whites ran roughly 50 percentage points or more ahead" of black registration in many covered States. *Katzenbach*, *supra*, at 313; H. R. Rep. No. 109–478, p. 12 (2006). Today, the registration gap between white and black voters is in single digits in the covered States; in some of those States, blacks now register and vote at higher rates than whites. *Id.*, at 12–13. Similar dramatic improvements have occurred for other racial minorities. *Id.*, at 18–20. "[M]any of the first generation barriers to minority voter registration and voter turnout that were in place prior to the [Voting Rights Act] have been eliminated." *Id.*, at 12; *Bartlett* v. *Strickland*, 556 U. S. 1, 10 (2009) (plurality opinion) ("Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities

who seek to exercise one of the most fundamental rights of our citizens: the right to vote").

At the same time, § 5, "which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial 'federalism costs.'" *Lopez*, *supra*, at 282 (quoting *Miller* v. *Johnson*, 515 U. S. 900, 926 (1995)). These federalism costs have caused Members of this Court to express serious misgivings about the constitutionality of § 5. *Katzenbach*, 383 U. S., at 358–362 (Black, J., concurring and dissenting); *Allen*, 393 U. S., at 586, n. 4 (Harlan, J., concurring in part and dissenting in part); *Georgia*, *supra*, at 545 (Powell, J., dissenting); *City of Rome*, 446 U. S., at 209–221 (Rehnquist, J., dissenting); *id.*, at 200–206 (Powell, J., dissenting); *Lopez*, 525 U. S., at 293–298 (THOMAS, J., dissenting); *id.*, at 288 (KENNEDY, J., concurring in judgment).

Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D. C. The preclearance requirement applies broadly, *NAACP* v. *Hampton County Election Comm'n*, 470 U. S. 166, 175–176 (1985), and in particular to every political subdivision in a covered State, no matter how small, *United States* v. *Sheffield Bd. of Comm'rs*, 435 U. S. 110, 117–118 (1978).

Some of the conditions that we relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved. Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels. See generally H. R. Rep. No. 109–478, at 12–18.

These improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success. Past success alone, however, is not adequate justification to retain the preclearance requirements. See

Issacharoff, Is Section 5 of the Voting Rights Act a Victim of Its Own Success? 104 Colum. L. Rev. 1710 (2004). It may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act. But the Act imposes current burdens and must be justified by current needs.

The Act also differentiates between the States, despite our historic tradition that all the States enjoy "equal sovereignty." *United States* v. *Louisiana*, 363 U. S. 1, 16 (1960) (citing *Lessee of Pollard* v. *Hagan*, 3 How. 212, 223 (1845)); see also *Texas* v. *White*, 7 Wall. 700, 725–726 (1869). Distinctions can be justified in some cases. "The doctrine of the equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared." *Katzenbach*, *supra*, at 328–329 (emphasis added). But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.

These federalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another. See *Georgia* v. *Ashcroft*, 539 U. S. 461, 491–492 (2003) (KENNEDY, J., concurring) ("Race cannot be the predominant factor in redistricting under our decision in *Miller* v. *Johnson*, 515 U. S. 900 (1995). Yet considerations of race that would doom a redistricting plan under the Fourteenth Amendment or §2 seem to be what save it under §5"). Additional constitutional concerns are raised in saying that this tension between §§2 and 5 must persist in covered jurisdictions and not elsewhere.

The evil that §5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions. For example, the racial gap in voter registration and turnout is lower in the States originally covered by §5 than it is nation-

wide. E. Blum & L. Campbell, Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act 3–6 (Am. Enterprise Inst. 2006). Congress heard warnings from supporters of extending § 5 that the evidence in the record did not address "systematic differences between the covered and the non-covered areas of the United States[,] . . . and, in fact, the evidence that is in the record suggests that there is more similarity than difference." The Continuing Need for Section 5 Pre-Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess., 10 (2006) (statement of Richard H. Pildes); see also Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L. J. 174, 208 (2007) ("The most one can say in defense of the [coverage] formula is that it is the best of the politically feasible alternatives or that changing the formula would . . . disrupt settled expectations").

The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements. The district argues that "'[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,'" Brief for Appellant 31 (quoting *City of Boerne* v. *Flores*, 521 U. S. 507, 520 (1997)); the Federal Government asserts that it is enough that the legislation be a "'rational means to effectuate the constitutional prohibition,'" Brief for Federal Appellee 6 (quoting *Katzenbach*, *supra*, at 324). That question has been extensively briefed in this case, but we need not resolve it. The Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test.

In assessing those questions, we are keenly mindful of our institutional role. We fully appreciate that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform." *Blod-*

gett v. *Holden*, 275 U. S. 142, 147–148 (1927) (Holmes, J., concurring). "The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." *Rostker* v. *Goldberg*, 453 U. S. 57, 64 (1981). The Fifteenth Amendment empowers "Congress," not the Court, to determine in the first instance what legislation is needed to enforce it. Congress amassed a sizable record in support of its decision to extend the preclearance requirements, a record the District Court determined "document[ed] contemporary racial discrimination in covered states." 573 F. Supp. 2d, at 265. The District Court also found that the record "demonstrat[ed] that section 5 prevents discriminatory voting changes" by "quietly but effectively deterring discriminatory changes." *Id.*, at 264.

We will not shrink from our duty "as the bulwar[k] of a limited constitution against legislative encroachments," The Federalist No. 78, p. 526 (J. Cooke ed. 1961) (A. Hamilton), but "[i]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case," *Escambia County* v. *McMillan*, 466 U. S. 48, 51 (1984) (*per curiam*). Here, the district also raises a statutory claim that it is eligible to bail out under §§ 4 and 5.

JUSTICE THOMAS argues that the principle of constitutional avoidance has no pertinence here. He contends that even if we resolve the district's statutory argument in its favor, we would still have to reach the constitutional question, because the district's statutory argument would not afford it all the relief it seeks. *Post*, at 212–214 (opinion concurring in judgment in part and dissenting in part).

We disagree. The district expressly describes its constitutional challenge to § 5 as being "in the alternative" to its statutory argument. See Brief for Appellant 64 ("[T]he Court should reverse the judgment of the district court and

render judgment that the district is entitled to use the bailout procedure or, in the alternative, that § 5 cannot be constitutionally applied to the district"). The district's counsel confirmed this at oral argument. See Tr. of Oral Arg. 14 ("[Question:] [D]o you acknowledge that if we find in your favor on the bailout point we need not reach the constitutional point? [Answer:] I do acknowledge that"). We therefore turn to the district's statutory argument.

III

Section 4(b) of the Voting Rights Act authorizes a bailout suit by a "State or political subdivision." 42 U. S. C. § 1973b(a)(1)(A). There is no dispute that the district is a political subdivision of the State of Texas in the ordinary sense of the term. See, *e. g.*, Black's Law Dictionary 1197 (8th ed. 2004) ("A division of a state that exists primarily to discharge some function of local government"). The district was created under Texas law with "powers of government" relating to local utilities and natural resources. Tex. Const., Art. XVI, § 59(b); Tex. Water Code Ann. § 54.011 (West 2002); see also *Bennett* v. *Brown Cty. Water Improvement Dist. No. 1*, 272 S. W. 2d 498, 500 (Tex. 1954) ("[W]ater improvement district[s] . . . are held to be political subdivisions of the State" (internal quotation marks omitted)).

The Act, however, also provides a narrower statutory definition in § 14(c)(2): "'[P]olitical subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U. S. C. § 1973*l*(c)(2). The District Court concluded that this definition applied to the bailout provision in § 4(a), and that the district did not qualify, since it is not a county or parish and does not conduct its own voter registration.

"Statutory definitions control the meaning of statutory words, of course, in the usual case. But this is an unusual

case." *Lawson* v. *Suwannee Fruit & S. S. Co.*, 336 U. S. 198, 201 (1949); see also *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U. S. 755, 764 (1949); *Philko Aviation, Inc.* v. *Shacket*, 462 U. S. 406, 412 (1983). Were the scope of § 4(a) considered in isolation from the rest of the statute and our prior cases, the District Court's approach might well be correct. But here specific precedent, the structure of the Voting Rights Act, and underlying constitutional concerns compel a broader reading of the bailout provision.

Importantly, we do not write on a blank slate. Our decisions have already established that the statutory definition in § 14(c)(2) does not apply to every use of the term "political subdivision" in the Act. We have, for example, concluded that the definition does not apply to the preclearance obligation of § 5. According to its text, § 5 applies only "[w]henever a [covered] State or political subdivision" enacts or administers a new voting practice. Yet in *Sheffield Bd. of Comm'rs*, 435 U. S. 110, we rejected the argument by an Alabama city that it was neither a State nor a political subdivision as defined in the Act, and therefore did not need to seek preclearance of a voting change. The dissent agreed with the city, pointing out that the city did not meet the statutory definition of "political subdivision" and therefore could not be covered. *Id.*, at 141–144 (opinion of STEVENS, J.). The majority, however, relying on the purpose and structure of the Act, concluded that the "definition was intended to operate only for purposes of determining which political units in nondesignated States may be separately designated for coverage under § 4(b)." *Id.*, at 128–129; see also *id.*, at 130, n. 18 ("Congress' exclusive objective in § 14(c)(2) was to limit the jurisdictions which may be separately designated for coverage under § 4(b)").

We reaffirmed this restricted scope of the statutory definition the next Term in *Dougherty County Bd. of Ed.* v. *White*, 439 U. S. 32 (1978). There, a school board argued

that because "it d[id] not meet the definition" of political subdivision in § 14(c)(2), it "d[id] not come within the purview of § 5." *Id.*, at 43, 44. We responded:

> "This contention is squarely foreclosed by our decision last Term in [*Sheffield*]. There, we expressly rejected the suggestion that the city of Sheffield was beyond the ambit of § 5 because it did not itself register voters and hence was not a political subdivision as the term is defined in § 14(c)(2) of the Act. . . . [O]nce a State has been designated for coverage, § 14(c)(2)'s definition of political subdivision has no operative significance in determining the reach of § 5." *Id.*, at 44 (internal quotation marks omitted).

According to these decisions, then, the statutory definition of "political subdivision" in § 14(c)(2) does not apply to every use of the term "political subdivision" in the Act. Even the intervenors who oppose the district's bailout concede, for example, that the definition should not apply to § 2, which bans racial discrimination in voting by "any State or political subdivision," 42 U. S. C. § 1973(a). See Brief for Intervenor-Appellee Texas State Conference of NAACP Branches et al. 17 (citing *Smith* v. *Salt River Project Agricultural Improvement and Power Dist.*, 109 F. 3d 586, 592–593 (CA9 1997)); see also *United States* v. *Uvalde Consol. Independent School Dist.*, 625 F. 2d 547, 554 (CA5 1980) ("[T]he Supreme Court has held that this definition [in § 14(c)(2)] limits the meaning of the phrase 'State or political subdivision' only when it appears in certain parts of the Act, and that it does not confine the phrase as used elsewhere in the Act"). In light of our holdings that the statutory definition does not constrict the scope of preclearance required by § 5, the district argues, it only stands to reason that the definition should not constrict the availability of bailout from those preclearance requirements either.

The Government responds that any such argument is foreclosed by our interpretation of the statute in *City of Rome*, 446 U. S. 156. There, it argues, we made clear that the discussion of political subdivisions in *Sheffield* was dictum, and "specifically held that a 'city is not a "political subdivision" for purposes of § 4(a) bailout.'" Brief for Federal Appellee 14 (quoting *City of Rome*, *supra*, at 168).

Even if that is what *City of Rome* held, the premises of its statutory holding did not survive later changes in the law. In *City of Rome* we rejected the city's attempt to bail out from coverage under § 5, concluding that "political units of a covered jurisdiction cannot independently bring a § 4(a) bailout action." 446 U. S., at 167. We concluded that the statute as then written authorized a bailout suit only by a "State" subject to the coverage formula, or a "'political subdivision with respect to which [coverage] determinations have been made as a separate unit,'" *id.*, at 164, n. 2 (quoting 42 U. S. C. § 1973b(a) (1976 ed.)); see also 446 U. S., at 163–169. Political subdivisions covered because they were part of a covered State, rather than because of separate coverage determinations, could not separately bail out. As JUSTICE STEVENS put it, "[t]he political subdivisions of a covered State" were "not entitled to bail out in a piecemeal fashion." *Id.*, at 192 (concurring opinion).

In 1982, however, Congress expressly repudiated *City of Rome* and instead embraced "piecemeal" bailout. As part of an overhaul of the bailout provision, Congress amended the Voting Rights Act to expressly provide that bailout was also available to "political subdivisions" in a covered State, "though [coverage] determinations were *not* made with respect to such subdivision as a separate unit." Voting Rights Act Amendments of 1982, § 2(b), 96 Stat. 131, codified at 42 U. S. C. § 1973b(a)(1) (emphasis added). In other words, Congress decided that a jurisdiction covered because it was within a covered State need not remain covered for as long

as the State did. If the subdivision met the bailout requirements, it could bail out, even if the State could not. In light of these amendments, our logic for denying bailout in *City of Rome* is no longer applicable to the Voting Rights Act—if anything, that logic compels the opposite conclusion.

Bailout and preclearance under § 5 are now governed by a principle of symmetry. "Given the Court's decision in *Sheffield* that all political units in a covered State are to be treated for § 5 purposes as though they were 'political subdivisions' of that State, it follows that they should also be treated as such for purposes of § 4(a)'s bailout provisions." *City of Rome*, *supra*, at 192 (STEVENS, J., concurring).

The Government contends that this reading of *Sheffield* is mistaken, and that the district is subject to § 5 under our decision in *Sheffield* not because it is a "political subdivision" but because it is a "State." That would mean it could bail out only if the whole State could bail out.

The assertion that the district is a State is at least counterintuitive. We acknowledge, however, that there has been much confusion over why *Sheffield* held the city in that case to be covered by the text of § 5. See *City of Rome*, 446 U. S., at 168–169; *id.*, at 192 (STEVENS, J., concurring); see also *Uvalde Consol. Independent School Dist.* v. *United States*, 451 U. S. 1002, 1004, n. 4 (1981) (Rehnquist, J., dissenting from denial of certiorari) ("[T]his Court has not yet settled on the proper construction of the term 'political subdivision' ").

But after the 1982 amendments, the Government's position is untenable. If the district is considered the State, and therefore necessarily subject to preclearance so long as Texas is covered, then the same must be true of all other subdivisions of the State, including counties. That would render even counties unable to seek bailout so long as their State was covered. But that is the very restriction the 1982 amendments overturned. Nobody denies that counties in a

covered State can seek bailout, as several of them have. See Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., 2599–2834 (2005) (detailing bailouts). Because such piecemeal bailout is now permitted, it cannot be true that § 5 treats every governmental unit as the State itself.

The Government's contrary interpretation has helped to render the bailout provision all but a nullity. Since 1982, only 17 jurisdictions—out of the more than 12,000 covered political subdivisions—have successfully bailed out of the Act. App. to Brief for Jurisdictions That Have Bailed Out as *Amici Curiae* 3; Dept. of Commerce, Bureau of Census, 2002 Census of Governments, Vol. 1, No. 1, pp. 1, 22–60. It is unlikely that Congress intended the provision to have such limited effect. See *United States* v. *Hayes*, 555 U. S. 415, 426–427 (2009).

We therefore hold that all political subdivisions—not only those described in § 14(c)(2)—are eligible to file a bailout suit.

* * *

More than 40 years ago, this Court concluded that "exceptional conditions" prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. *Katzenbach*, 383 U. S., at 334. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today. We conclude instead that the Voting Rights Act permits all political subdivisions, including the district in this case, to seek relief from its preclearance requirements.

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

It is so ordered.

JUSTICE THOMAS, concurring in the judgment in part and dissenting in part.

This appeal presents two questions: first, whether appellant is entitled to bail out from coverage under the Voting Rights Act of 1965 (VRA); and second, whether the preclearance requirement of § 5 of the VRA is unconstitutional. Because the Court's statutory decision does not provide appellant with full relief, I conclude that it is inappropriate to apply the constitutional avoidance doctrine in this case. I would therefore decide the constitutional issue presented and hold that § 5 exceeds Congress' power to enforce the Fifteenth Amendment.

I

The doctrine of constitutional avoidance factors heavily in the Court's conclusion that appellant is eligible for bailout as a "political subdivision" under § 4(a) of the VRA. See *ante*, at 206–207. Regardless of the Court's resolution of the statutory question, I am in full agreement that this case raises serious questions concerning the constitutionality of § 5 of the VRA. But, unlike the Court, I do not believe that the doctrine of constitutional avoidance is applicable here. The ultimate relief sought in this case is not bailout eligibility—it is bailout itself. See First Amended Complaint in No. 06–1384 (DDC), p. 8, Record, Doc. 83 ("Plaintiff requests the Court to declare that the district has met the bail-out requirements of § 4 of the [VRA] and that the preclearance requirements of § 5 . . . no longer apply to the district; or, in the alternative, that § 5 of the Act as applied to the district is an unconstitutional overextension of Congress's enforcement power to remedy past violations of the Fifteenth Amendment").

Eligibility for bailout turns on the statutory question addressed by the Court—the proper definition of "political subdivision" in the bailout clauses of § 4(a) of the VRA. Entitlement to bailout, however, requires a covered "political subdivision" to submit substantial evidence indicating that

it is not engaging in "discrimination in voting on account of race," see 42 U. S. C. § 1973b(a)(3). The Court properly declines to give appellant bailout because appellant has not yet proved its compliance with the statutory requirements for such relief. See §§ 1973b(a)(1)–(3). In fact, the record below shows that appellant's factual entitlement to bailout is a vigorously contested issue. See, *e. g.*, NAACP's Statement of Undisputed Material Facts in No. 06–1384 (DDC), pp. 490–492, Record, Doc. 100; Attorney General's Statement of Uncontested Material Facts in No. 06–1384 (DDC), ¶¶ 19, 59, Record, Doc. 98. Given its resolution of the statutory question, the Court has thus correctly remanded the case for resolution of appellant's factual entitlement to bailout. See *ante*, at 211.

But because the Court is not in a position to award appellant bailout, adjudication of the constitutionality of § 5, in my view, cannot be avoided. "Traditionally, the avoidance canon was not a doctrine under which courts read statutes to avoid mere constitutional doubts. Instead, it commanded courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading." *Clark* v. *Martinez*, 543 U. S. 371, 395 (2005) (THOMAS, J., dissenting). To the extent that constitutional avoidance is a worthwhile tool of statutory construction, it is because it allows a court to dispose of an entire case on grounds that do not require the court to pass on a statute's constitutionality. 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"); see also, *e. g.*, *Mayor of Philadelphia* v. *Educational Equality League*, 415 U. S. 605, 629 (1974). The doctrine "avoids decision of constitutional questions where possible, and it permits one lawsuit, rather than two, to resolve the entire controversy." C. Wright, The Law of Fed-

eral Courts § 19, p. 104 (4th ed. 1983). Absent a determination that appellant is not just eligible for bailout, but is entitled to it, this case will not have been entirely disposed of on a nonconstitutional ground. Cf. Tr. of Oral Arg. 14 ("[I]f the Court were to give us bailout . . . the Court might choose on its own not to reach the constitutional issues because we would receive relief"). Invocation of the doctrine of constitutional avoidance is therefore inappropriate in this case.

The doctrine of constitutional avoidance is also unavailable here because an interpretation of § 4(a) that merely makes more political subdivisions *eligible* for bailout does not render § 5 constitutional, and the Court notably does not suggest otherwise. See *Clark*, *supra*, at 396 (THOMAS, J., dissenting). Bailout eligibility is a distant prospect for most covered jurisdictions. To obtain bailout a covered jurisdiction must satisfy numerous objective criteria. It must show that during the previous 10 years: (A) no "test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color"; (B) "no final judgment of any court of the United States . . . has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of" the covered jurisdiction; (C) "no Federal examiners or observers . . . have been assigned to" the covered jurisdiction; (D) the covered jurisdiction has fully complied with § 5; and (E) "the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under [§ 5]." §§ 1973b(a)(1)(A)–(E). The jurisdiction also has the burden of presenting "evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation." § 1973b(a)(2).

These extensive requirements may be difficult to satisfy, see Brief for Georgia Governor Sonny Perdue as *Amicus Curiae* 20–26, but at least they are objective. The covered jurisdiction seeking bailout must also meet subjective criteria: It must "(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected [under the Act]; and (iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process." §§ 1973b(a)(1)(F)(i)–(iii).

As a result, a covered jurisdiction meeting each of the objective conditions could nonetheless be denied bailout because it has not, in the subjective view of the United States District Court for the District of Columbia, engaged in sufficiently "constructive efforts" to expand voting opportunities, § 1973b(a)(1)(F)(iii). Congress, of course, has complete authority to set the terms of bailout. But its promise of a bailout opportunity has, in the great majority of cases, turned out to be no more than a mirage. As the Court notes, only a handful "of the more than 12,000 covered political subdivisions . . . have successfully bailed out of the Act." *Ante*, at 211;[1] see Williamson, The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions, 62 Wash. U. L. Q. 1, 42 (1984) (explaining that

[1] All 17 covered jurisdictions that have been awarded bailout are from Virginia, see App. to Brief for Jurisdictions That Have Bailed Out as *Amici Curiae* 3, and all 17 were represented by the same attorney—a former lawyer in the Voting Rights Section of the Department of Justice, see Hebert, An Assessment of the Bailout Provisions of the Voting Rights Act, in Voting Rights Act Reauthorization of 2006, p. 257, n. 1 (A. Henderson ed. 2007). Whatever the reason for this anomaly, it only underscores how little relationship there is between the existence of bailout and the constitutionality of § 5.

"the conditions for termination of coverage have been made so restrictive that bailout will continue to be impossible for most jurisdictions"). Accordingly, bailout eligibility does not eliminate the issue of § 5's constitutionality.

II

The Court quite properly alerts Congress that § 5 tests the outer boundaries of its Fifteenth Amendment enforcement authority and may not be constitutional. See *ante*, at 202–204. And, although I respect the Court's careful approach to this weighty issue, I nevertheless believe it is necessary to definitively resolve that important question. For the reasons set forth below, I conclude that the lack of current evidence of intentional discrimination with respect to voting renders § 5 unconstitutional. The provision can no longer be justified as an appropriate mechanism for enforcement of the Fifteenth Amendment.

A

"The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people." *United States* v. *Cruikshank*, 92 U. S. 542, 551 (1876); see also *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 848 (1995) (THOMAS, J., dissenting). In the specific area of voting rights, this Court has consistently recognized that the Constitution gives the States primary authority over the structuring of electoral systems. See, *e. g.*, *White* v. *Weiser*, 412 U. S. 783, 795 (1973); *Burns* v. *Richardson*, 384 U. S. 73, 84–85 (1966). "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices." *Oregon* v. *Mitchell*, 400 U. S. 112, 125 (1970) (opinion of Black, J.).

State autonomy with respect to the machinery of self-government defines the States as sovereign entities rather than mere provincial outposts subject to every dictate of a central governing authority. See U. S. Const., Amdt. 10 ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"); see also *Alden* v. *Maine*, 527 U. S. 706, 713 (1999). In the main, the "Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Gregory* v. *Ashcroft*, 501 U. S. 452, 461–462 (1991) (internal quotation marks omitted).

To be sure, state authority over local elections is not absolute under the Constitution. The Fifteenth Amendment guarantees that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," §1, and it grants Congress the authority to "enforce" these rights "by appropriate legislation," §2. The Fifteenth Amendment thus renders unconstitutional any federal or state law that would limit a citizen's access to the ballot on one of the three bases enumerated in the Amendment. See *Mobile* v. *Bolden*, 446 U. S. 55, 65 (1980) (plurality opinion) (the Fifteenth Amendment guards against "purposefully discriminatory denial or abridgment by government of the freedom to vote"). Nonetheless, because States still retain sovereign authority over their election systems, any measure enacted in furtherance of the Fifteenth Amendment must be closely examined to ensure that its encroachment on state authority in this area is limited to the appropriate enforcement of this ban on discrimination.

There is certainly no question that the VRA initially "was passed pursuant to Congress' authority under the Fifteenth Amendment." *Lopez* v. *Monterey County*, 525 U. S. 266, 282 (1999). For example, §§2 and 4(a) seek to implement the Fifteenth Amendment's substantive command by creating a

private cause of action to enforce § 1 of the Fifteenth Amendment, see § 1973(a), and by banning discriminatory tests and devices in covered jurisdictions, see § 1973b(a); see also *City of Lockhart* v. *United States*, 460 U. S. 125, 139 (1983) (Marshall, J., concurring in part and dissenting in part) (explaining that § 2 reflects Congress' determination "that voting discrimination was a nationwide problem" that called for a "general prohibition of discriminatory practices"). Other provisions of the VRA also directly enforce the Fifteenth Amendment. See § 1973h (elimination of poll taxes that effectively deny certain racial groups the right to vote); § 1973i(a) ("No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote . . . or willfully fail or refuse to tabulate, count, and report such person's vote").

Section 5, however, was enacted for a different purpose: to prevent covered jurisdictions from circumventing the direct prohibitions imposed by provisions such as §§ 2 and 4(a). See *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471, 477 (1997) (explaining that §§ 2 and 5 "combat different evils" and "impose very different duties upon the States"). Section 5 "was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory." *Beer* v. *United States*, 425 U. S. 130, 140 (1976) (internal quotation marks omitted).

The rebellion against the enfranchisement of blacks in the wake of ratification of the Fifteenth Amendment illustrated the need for increased federal intervention to protect the right to vote. Almost immediately following Reconstruction, blacks attempting to vote were met with coordinated

intimidation and violence. See, *e. g.*, L. McDonald, A Voting Rights Odyssey: Black Enfranchisement in Georgia 34 (2003) ("By 1872, the legislative and executive branches of state government . . . were once again firmly in the control of white Democrats, who resorted to a variety of tactics, including fraud, intimidation, and violence, to take away the vote from blacks, despite ratification of the Fifteenth Amendment in 1870 . . . ").[2] A soon-to-be victorious mayoral candidate in Wilmington, North Carolina, for example, urged white voters in an 1898 election-eve speech: "'Go to the polls tomorrow and if you find the negro out voting, tell him to leave the polls, and if he refuses kill him; shoot him down in his tracks.'" S. Tolnay & E. Beck, A Festival of Violence: An Analysis of Southern Lynchings, 1882–1930, p. 67 (1995).

This campaign of violence eventually was supplemented, and in part replaced, by more subtle methods engineered to deny blacks the right to vote. See *South Carolina* v. *Katzenbach*, 383 U. S. 301, 310–312 (1966). Literacy tests were particularly effective: "[A]s of 1890 in . . . States [with literacy tests], more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write," *id.*, at 311, because "[p]rior to the Civil War, most of the slave States made it a crime to

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[2] See also S. Rep. No. 41, 42d Cong., 2d Sess., pt. 7, p. 610 (1872) (quoting a Ku Klux Klan letter warning a black man from Georgia to "'stay at home if you value your life, and not vote at all, and advise all of your race to do the same thing. You are marked and closely watched by K. K. K. . . . '"); see also Jackson Daily Mississippian, Dec. 29, 1887, reprinted in S. Misc. Doc. No. 166, 50th Cong., 1st Sess., 14 (1888) ("[W]e hereby warn the negroes that if any one of their race attempts to run for office in the approaching municipal election he does so at his supremest peril, and we further warn any and all negroes of this city against attempting, at their utmost hazard, by vote or influence, to foist on us again this black and damnable machine miscalled a government of our city" (publishing resolutions passed by the Young White Men's League of Jackson)).

teach Negroes how to read or write," see also *ibid.*, n. 10.[3] Compounding the tests' discriminatory impact on blacks, alternative voter qualification laws such as "grandfather clauses, property qualifications, [and] 'good character' tests" were enacted to protect those whites who were unable to pass the literacy tests. *Id.*, at 311; see also *Lopez*, 525 U. S., at 297 (THOMAS, J., dissenting) ("Literacy tests were unfairly administered; whites were given easy questions, and blacks were given more difficult questions, such as the number of bubbles in a soap bar, the news contained in a copy of the *Peking Daily*, the meaning of obscure passages in state constitutions, and the definition of terms such as *habeas corpus*" (internal quotation marks omitted)).

The Court had declared many of these "tests and devices" unconstitutional, see *Katzenbach*, 383 U. S., at 311–312, but case-by-case eradication was woefully inadequate to ensure that the franchise extended to all citizens regardless of race, see *id.*, at 328. As a result, enforcement efforts before the enactment of § 5 had rendered the right to vote illusory for blacks in the Jim Crow South. Despite the Civil War's bloody purchase of the Fifteenth Amendment, "the reality remained far from the promise." *Rice* v. *Cayetano*, 528 U. S. 495, 512–513 (2000); see also R. Wardlaw, Negro Suffrage in Georgia, 1867–1930, p. 34 (Phelps-Stokes Fellowship Stud-

[3] Although tests had become the main tool for disenfranchising blacks, state governments engaged in violence into 1965. See Daniel, Tear Gas, Clubs Halt 600 in Selma March, Washington Times Herald, Mar. 8, 1965, pp. A1, A3 ("State troopers and mounted deputies bombarded 600 praying Negroes with tear gas today and then waded into them with clubs, whips and ropes, injuring scores. . . . The Negroes started out today to walk the 50 miles to Montgomery to protest to [Governor] Wallace the denial of Negro voting rights in Alabama"); Banner, Aid for Selma Negroes, N. Y. Times, Mar. 14, 1965, p. E11 ("We should remember March 7, 1965 as 'Bloody Sunday in Selma.' It is now clear that the public officials and the police of Alabama are at war with those citizens who are Negroes and who are determined to exercise their rights under the Constitution of the United States").

ies, No. 11, Sept. 1932) ("Southern States were setting out to accomplish an effectual nullification of the war measures of Congress").

Thus, by 1965, Congress had every reason to conclude that States with a history of disenfranchising voters based on race would continue to do all they could to evade the constitutional ban on voting discrimination. By that time, race-based voting discrimination had "infected the electoral process in parts of our country for nearly a century." *Katzenbach*, 383 U. S., at 308. Moreover, the massive scale of disenfranchisement efforts made case-by-case enforcement of the Fifteenth Amendment impossible, if not Sisyphean. See *id.*, at 309 ("Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment"); *Rice*, *supra*, at 513 ("Progress was slow, particularly when litigation had to proceed case by case, district by district, sometimes voter by voter"); Thernstrom, Section 5 of the Voting Rights Act: By Now, a Murky Mess, 5 Geo. J. L. & Pub. Pol'y 41, 44 (2007) ("In 1965, it was perfectly reasonable to believe that *any* move affecting black enfranchisement in the Deep South was deeply suspect. And only such a punitive measure [as § 5] had any hope of forcing the South to let blacks vote" (emphasis in original)).

It was against this backdrop of "historical experience" that § 5 was first enacted and upheld against a constitutional challenge. See *Katzenbach*, *supra*, at 308. As the *Katzenbach* Court explained, § 5, which applied to those States and political subdivisions that had employed discriminatory tests and devices in the previous Presidential election, see 42 U. S. C. § 1973b(b), directly targeted the "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." 383 U. S., at 309; see also *id.*, at 329 ("Congress began work with reliable evidence of actual vot-

ing discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act"). According to the Court, it was appropriate to radically interfere with control over local elections only in those jurisdictions with a history of discriminatory disenfranchisement as those were "the geographic areas where immediate action seemed necessary." *Id.*, at 328. The Court believed it was thus "permissible to impose the new remedies" on the jurisdictions covered under § 4(b) "at least in the absence of proof that they ha[d] been free of substantial voting discrimination in recent years." *Id.*, at 330.

In upholding § 5 in *Katzenbach*, the Court nonetheless noted that the provision was an "uncommon exercise of congressional power" that would not have been "appropriate" absent the "exceptional conditions" and "unique circumstances" present in the targeted jurisdictions at that particular time. *Id.*, at 334–335. In reaching its decision, the Court thus refused to simply accept Congress' representation that the extreme measure was necessary to enforce the Fifteenth Amendment; rather, it closely reviewed the record compiled by Congress to ensure that § 5 was "'appropriate'" antievasion legislation. See *id.*, at 308. In so doing, the Court highlighted evidence showing that black voter registration rates ran approximately 50 percentage points lower than white voter registration in several States. See *id.*, at 313. It also noted that the registration rate for blacks in Alabama "rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964." *Ibid.* The Court further observed that voter turnout levels in covered jurisdictions had been at least 12% below the national average in the 1964 Presidential election. See *id.*, at 329–330.

The statistical evidence confirmed Congress' judgment that "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting

discrimination in the face of adverse federal court decrees" was working and could not be defeated through case-by-case enforcement of the Fifteenth Amendment. *Id.*, at 335. This record also clearly supported Congress' predictive judgment that such "States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *Ibid.* These stark statistics—in conjunction with the unrelenting use of discriminatory tests and practices that denied blacks the right to vote—constituted sufficient proof of "actual voting discrimination" to uphold the preclearance requirement imposed by § 5 on the covered jurisdictions as an appropriate exercise of congressional power under the Fifteenth Amendment. *Id.*, at 330. It was only "[u]nder the compulsion of these unique circumstances [that] Congress responded in a permissibly decisive manner." *Id.*, at 335.

B

Several important principles emerge from *Katzenbach* and the decisions that followed it. First, § 5 prohibits more state voting practices than those necessarily encompassed by the explicit prohibition on intentional discrimination found in the text of the Fifteenth Amendment. The explicit command of the Fifteenth Amendment is a prohibition on state practices that in fact deny individuals the right to vote "on account of" race, color, or previous servitude. In contrast, § 5 is the quintessential prophylaxis; it "goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D. C." *Ante*, at 202. The Court has freely acknowledged that such legislation is preventative, upholding it based on the view that the Reconstruction Amendments give Congress the power "both to remedy and to *deter* violation of rights guaranteed thereunder by prohibiting a *somewhat broader* swath of conduct, including that which is not itself forbidden by the

Amendment's text." *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 81 (2000) (emphasis added).

Second, because it sweeps more broadly than the substantive command of the Fifteenth Amendment, § 5 pushes the outer boundaries of Congress' Fifteenth Amendment enforcement authority. See *Miller* v. *Johnson*, 515 U. S. 900, 926 (1995) (detailing the "federalism costs exacted by § 5"); *Presley* v. *Etowah County Comm'n*, 502 U. S. 491, 500–501 (1992) (describing § 5 as "an extraordinary departure from the traditional course of relations between the States and the Federal Government"); *City of Rome* v. *United States*, 446 U. S. 156, 200 (1980) (Powell, J., dissenting) ("The preclearance requirement both intrudes on the prerogatives of state and local governments and abridges the voting rights of all citizens in States covered under the Act"); *Lopez*, 525 U. S., at 293 (THOMAS, J., dissenting) ("Section 5 is a unique requirement that exacts significant federalism costs"); *ante*, at 202 ("[Section] 5, which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial federalism costs" (internal quotation marks omitted)).

Indeed, § 5's preclearance requirement is "one of the most extraordinary remedial provisions in an Act noted for its broad remedies. Even the Department of Justice has described it as a 'substantial departure . . . from ordinary concepts of our federal system'; its encroachment on state sovereignty is significant and undeniable." *United States* v. *Sheffield Bd. of Comm'rs*, 435 U. S. 110, 141 (1978) (STEVENS, J., dissenting) (footnote omitted). This "encroachment is especially troubling because it destroys local control of the means of self-government, one of the central values of our polity." *City of Rome*, *supra*, at 201 (Powell, J., dissenting). More than 40 years after its enactment, this intrusion has become increasingly difficult to justify.

Third, to accommodate the tension between the constitutional imperatives of the Fifteenth and Tenth Amendments—a balance between allowing the Federal Govern-

ment to patrol state voting practices for discrimination and preserving the States' significant interest in self-determination—the constitutionality of §5 has always depended on the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible. See *Katzenbach*, 383 U. S., at 308 ("Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting"); *Katzenbach* v. *Morgan*, 384 U. S. 641, 667 (1966) (Harlan, J., dissenting) ("Congress made a detailed investigation of various state practices that had been used to deprive Negroes of the franchise"). "There can be no remedy without a wrong. Essential to our holdings in [*South Carolina* v.] *Katzenbach* and *City of Rome* was our conclusion that Congress was remedying the effects of prior *intentional* racial discrimination. In both cases, we required Congress to have some evidence that the jurisdiction burdened with preclearance obligations had actually engaged in such intentional discrimination." *Lopez*, *supra*, at 294–295 (THOMAS, J., dissenting) (emphasis in original).

The Court has never deviated from this understanding. We have explained that prophylactic legislation designed to enforce the Reconstruction Amendments must "identify conduct transgressing the . . . substantive provisions" it seeks to enforce and be tailored "to remedying or preventing such conduct." *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627, 639 (1999). Congress must establish a "history and pattern" of constitutional violations to establish the need for §5 by justifying a remedy that pushes the limits of its constitutional authority. *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 368 (2001). As a result, for §5 to withstand renewed constitutional scrutiny, there must be a demonstrated connection between the "remedial measures" chosen and the "evil presented" in the record made by Congress when it renewed the VRA. *City of Boerne* v. *Flores*, 521 U. S. 507, 530 (1997).

"Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Ibid.*

C

The extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists. Covered jurisdictions are not now engaged in a systematic campaign to deny black citizens access to the ballot through intimidation and violence. And the days of "grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matter," *Katzenbach*, 383 U. S., at 311, are gone. There is thus currently no concerted effort in these jurisdictions to engage in the "unremitting and ingenious defiance of the Constitution," *id.*, at 309, that served as the constitutional basis for upholding the "uncommon exercise of congressional power" embodied in § 5, *id.*, at 334.

The lack of sufficient evidence that the covered jurisdictions currently engage in the type of discrimination that underlay the enactment of § 5 undermines any basis for retaining it. Punishment for long past sins is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose. Those supporting § 5's reenactment argue that without it these jurisdictions would return to the racially discriminatory practices of 30 and 40 years ago. But there is no evidence that public officials stand ready, if given the chance, to again engage in concerted acts of violence, terror, and subterfuge in order to keep minorities from voting. Without such evidence, the charge can only be premised on outdated assumptions about racial attitudes in the covered jurisdictions. Admitting that a prophylactic law as broad as § 5 is no longer constitutionally justified based on current evidence of discrimination is not a sign of defeat. It is an acknowledgment of victory.

The current statistical evidence confirms that the emergency that prompted the enactment of § 5 has long since passed. By 2006, the voter registration rates for blacks in Alabama, Louisiana, and Mississippi had jumped to 71.8%, 66.9%, and 72.2%, respectively. See App. to Brief for Southeastern Legal Foundation as *Amicus Curiae* 6a–7a (hereinafter SLF Brief). Therefore, in contrast to the *Katzenbach* Court's finding that the "registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration" in these States in 1964, see 383 U. S., at 313, since that time this disparity has nearly vanished. In 2006, the disparity was only 3 percentage points in Alabama, 8 percentage points in Louisiana, and in Mississippi, black voter registration actually exceeded white voter registration by 1.5 percentage points. See App. to SLF Brief 6a–7a. In addition, blacks in these three covered States also have higher registration numbers than the registration rate for whites in noncovered states. See E. Blum & L. Campbell, Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act 3–6 (Am. Enterprise Inst. 2006); see also S. Rep. No. 109–295, p. 11 (2006) (noting that "presently in seven of the covered States, African-Americans are registered at a rate higher than the national average"; in two more, black registration in the 2004 election was "identical to the national average"; and in "California, Georgia, Mississippi, North Carolina, and Texas, black registration and turnout in the 2004 election . . . was higher than that for whites").

Indeed, when reenacting § 5 in 2006, Congress evidently understood that the emergency conditions which prompted § 5's original enactment no longer exist. See H. R. Rep. No. 109–478, p. 12 (2006) ("The record reveals that many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated"). Instead of relying on the kind of evi-

dence that the *Katzenbach* Court had found so persuasive, Congress based reenactment on evidence of what it termed "second generation barriers constructed to prevent minority voters from fully participating in the electoral process." § 2(b)(2), 120 Stat. 577. But such evidence is not probative of the type of purposeful discrimination that prompted Congress to enact § 5 in 1965. For example, Congress relied upon evidence of racially polarized voting within the covered jurisdictions. But racially polarized voting is not evidence of unconstitutional discrimination, see *Bolden*, 446 U. S. 55, is not state action, see *James* v. *Bowman*, 190 U. S. 127, 136 (1903), and is not a problem unique to the South, see Katz, Aisenbrey, Baldwin, Cheuse, & Weisbrodt, Documenting Discrimination in Voting: Judicial Findings Under Section 2 of The Voting Rights Act Since 1982, 39 U. Mich. J. L. Reform 643, 665 (2006). The other evidence relied on by Congress, such as § 5 enforcement actions, §§ 2 and 4 lawsuits, and federal examiner and observer coverage, also bears no resemblance to the record initially supporting § 5, and is plainly insufficient to sustain such an extraordinary remedy. See SLF Brief 18–35. In sum, evidence of "second generation barriers" cannot compare to the prevalent and pervasive voting discrimination of the 1960's.

This is not to say that voter discrimination is extinct. Indeed, the District Court singled out a handful of examples of allegedly discriminatory voting practices from the record made by Congress. See, *e. g.*, *Northwest Austin Municipal Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221, 252–254, 256–262 (DC 2008). But the existence of discrete and isolated incidents of interference with the right to vote has never been sufficient justification for the imposition of § 5's extraordinary requirements. From its inception, the statute was promoted as a measure needed to neutralize a coordinated and unrelenting campaign to deny an entire race access to the ballot. See *City of Boerne*, 521 U. S., at 526 (concluding that *Katzenbach* confronted a "widespread and

persisting deprivation of constitutional rights resulting from this country's history of racial discrimination"). Perfect compliance with the Fifteenth Amendment's substantive command is not now—nor has it ever been—the yardstick for determining whether Congress has the power to employ broad prophylactic legislation to enforce that Amendment. The burden remains with Congress to prove that the extreme circumstances warranting § 5's enactment persist today. A record of scattered infringement of the right to vote is not a constitutionally acceptable substitute.

* * *

In 1870, the Fifteenth Amendment was ratified in order to guarantee that no citizen would be denied the right to vote based on race, color, or previous condition of servitude. Congress passed § 5 of the VRA in 1965 because that promise had remained unfulfilled for far too long. But now—more than 40 years later—the violence, intimidation, and subterfuge that led Congress to pass § 5 and this Court to uphold it no longer remains. An acknowledgment of § 5's unconstitutionality represents a fulfillment of the Fifteenth Amendment's promise of full enfranchisement and honors the success achieved by the VRA.

Syllabus

FOREST GROVE SCHOOL DISTRICT *v.* T. A.

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

No. 08–305. Argued April 28, 2009—Decided June 22, 2009

After a private specialist diagnosed respondent with learning disabilities, his parents unilaterally removed him from petitioner public school district (School District), enrolled him in a private academy, and requested an administrative hearing on his eligibility for special-education services under the Individuals with Disabilities Education Act (IDEA), 20 U. S. C. § 1400 *et seq.* The School District found respondent ineligible for such services and declined to offer him an individualized education program (IEP). Concluding that the School District had failed to provide respondent a "free appropriate public education" (FAPE) as required by IDEA, § 1412(a)(1)(A), and that respondent's private-school placement was appropriate, the hearing officer ordered the School District to reimburse his parents for his private-school tuition. The District Court set aside the award, holding that the IDEA Amendments of 1997 (Amendments) categorically bar reimbursement unless a child has "previously received special education or related services under the [school's] authority." § 1412(a)(10)(C)(ii). Reversing, the Ninth Circuit concluded that the Amendments did not diminish the authority of courts to grant reimbursement as "appropriate" relief pursuant to § 1415(i)(2)(C)(iii). See *School Comm. of Burlington* v. *Department of Ed. of Mass.*, 471 U. S. 359, 370.

Held: IDEA authorizes reimbursement for private special-education services when a public school fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special-education services through the public school. Pp. 237–248.

(a) This Court held in *Burlington* and *Florence County School Dist. Four* v. *Carter*, 510 U. S. 7, that § 1415(i)(2)(C)(iii) authorizes courts to reimburse parents for the cost of private-school tuition when a school district fails to provide a child a FAPE and the private-school placement is appropriate. That *Burlington* and *Carter* involved the deficiency of a proposed IEP does not distinguish this case, nor does the fact that the children in *Burlington* and *Carter* had previously received special-education services; the Court's decision in those cases depended on IDEA's language and purpose rather than the particular facts involved. Thus, the reasoning of *Burlington* and *Carter* applies unless the 1997 Amendments require a different result. Pp. 237–239.

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(b) The 1997 Amendments do not impose a categorical bar to reimbursement. The Amendments made no change to the central purpose of IDEA or the text of § 1415(i)(2)(C)(iii). Because Congress is presumed to be aware of, and to adopt, a judicial interpretation of a statute when it reenacts that law without change, *Lorillard* v. *Pons*, 434 U. S. 575, 580, this Court will continue to read § 1415(i)(2)(C)(iii) to authorize reimbursement absent a clear indication that Congress intended to repeal the provision or abrogate *Burlington* and *Carter*. The School District's argument that § 1412(a)(10)(C)(ii) limits reimbursement to children who have previously received public special-education services is unpersuasive for several reasons: It is not supported by IDEA's text, as the 1997 Amendments do not expressly prohibit reimbursement in this case, and the School District offers no evidence that Congress intended to supersede *Burlington* and *Carter;* it is at odds with IDEA's remedial purpose of "ensur[ing] that all children with disabilities have available to them a [FAPE] that emphasizes special education . . . designed to meet their unique needs," § 1400(d)(1)(A); and it would produce a rule bordering on the irrational by providing a remedy when a school offers a child inadequate special-education services but leaving parents remediless when the school unreasonably denies access to such services altogether. Pp. 239–245.

(c) The School District's argument that any conditions on accepting IDEA funds must be stated unambiguously is clearly satisfied here, as States have been on notice at least since *Burlington* that IDEA authorizes courts to order reimbursement. The School District's claims that respondent's reading will impose a heavy financial burden on public schools and encourage parents to enroll their children in private school without first trying to cooperate with public-school authorities are also unpersuasive in light of the restrictions on reimbursement awards identified in *Burlington* and the fact that parents unilaterally change their child's placement at their own financial risk. See, *e. g.*, *Carter*, 510 U. S., at 15. Pp. 246–247.

523 F. 3d 1078, affirmed and remanded.

STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and ALITO, JJ., joined. SOUTER, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 249.

Gary Feinerman argued the cause for petitioner. With him on the briefs were *Richard Cohn-Lee*, *Andrea L. Hungerford*, and *Eamon P. Joyce*.

David B. Salmons argued the cause for respondent. With him on the brief were *Jason R. Scherr*, *Goutam Patnaik*, and *Mary E. Broadhurst.*

Eric D. Miller argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Kagan*, *Acting Assistant Attorney General King*, *Deputy Solicitor General Katyal*, *Mark L. Gross*, *Karl N. Gellert*, and *Philip H. Rosenfelt.**

JUSTICE STEVENS delivered the opinion of the Court.

The Individuals with Disabilities Education Act (IDEA or Act), 84 Stat. 175, as amended, 20 U. S. C. § 1400 *et seq.*, requires States receiving federal funding to make a "free appropriate public education" (FAPE) available to all children with disabilities residing in the State, § 1412(a)(1)(A). We have previously held that when a public school fails to provide a FAPE and a child's parents place the child in an appropriate private school without the school district's consent, a court may require the district to reimburse the parents for the cost of the private education. See *School Comm. of Burlington* v. *Department of Ed. of Mass.*, 471 U. S. 359, 370

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*Briefs of *amici curiae* urging reversal were filed for the City of New York by *Michael A. Cardozo*, *Leonard J. Koerner*, *Michael Best*, *Edward F. X. Hart*, and *Drake A. Colley;* for the Council of the Great City Schools by *Julie Wright Halbert*, *Pamela A. Harris*, and *Shannon M. Pazur;* for the National Education Association by *John M. West*, *Robert H. Chanin*, and *Michael D. Simpson;* for the National School Boards Association et al. by *Maree F. Sneed*, *John W. Borkowski*, *Audrey J. Anderson*, *Francisco M. Negrón, Jr.*, and *Naomi Gittins;* for the New York State School Boards Association by *Jay Worona* and *Pilar Sokol;* and for the U. S. Conference of Mayors et al. by *Richard Ruda* and *Donald B. Ayer.*

Briefs of *amici curiae* urging affirmance were filed for Autism Speaks by *Robert H. Pees* and *Gary S. Mayerson;* for the Council of Parent Attorneys and Advocates by *Ankur J. Goel* and *Tamu K. Floyd;* for the Disability Rights Legal Center et al. by *Terri D. Keville* and *Deborah A. Dorfman;* and for the National Disability Rights Network et al. by *Brian R. Matsui*, *Seth M. Galanter*, and *Linda A. Arnsbarger.*

(1985). The question presented in this case is whether the IDEA Amendments of 1997 (Amendments), 111 Stat. 37, categorically prohibit reimbursement for private-education costs if a child has not "previously received special education and related services under the authority of a public agency." § 1412(a)(10)(C)(ii). We hold that the Amendments impose no such categorical bar.

I

Respondent T. A. attended public schools in the Forest Grove School District (School District or District) from the time he was in kindergarten through the winter of his junior year of high school. From kindergarten through eighth grade, respondent's teachers observed that he had trouble paying attention in class and completing his assignments. When respondent entered high school, his difficulties increased.

In December 2000, during respondent's freshman year, his mother contacted the school counselor to discuss respondent's problems with his schoolwork. At the end of the school year, respondent was evaluated by a school psychologist. After interviewing him, examining his school records, and administering cognitive ability tests, the psychologist concluded that respondent did not need further testing for any learning disabilities or other health impairments, including attention deficit hyperactivity disorder (ADHD). The psychologist and two other school officials discussed the evaluation results with respondent's mother in June 2001, and all agreed that respondent did not qualify for special-education services. Respondent's parents did not seek review of that decision, although the hearing examiner later found that the School District's evaluation was legally inadequate because it failed to address all areas of suspected disability, including ADHD.

With extensive help from his family, respondent completed his sophomore year at Forest Grove High School, but his problems worsened during his junior year. In February

2003, respondent's parents discussed with the School District the possibility of respondent completing high school through a partnership program with the local community college. They also sought private professional advice, and in March 2003 respondent was diagnosed with ADHD and a number of disabilities related to learning and memory. Advised by the private specialist that respondent would do best in a structured, residential learning environment, respondent's parents enrolled him at a private academy that focuses on educating children with special needs.

Four days after enrolling him in private school, respondent's parents hired a lawyer to ascertain their rights and to give the School District written notice of respondent's private placement. A few weeks later, in April 2003, respondent's parents requested an administrative due process hearing regarding respondent's eligibility for special-education services. In June 2003, the District engaged a school psychologist to assist in determining whether respondent had a disability that significantly interfered with his educational performance. Respondent's parents cooperated with the District during the evaluation process. In July 2003, a multidisciplinary team met to discuss whether respondent satisfied IDEA's disability criteria and concluded that he did not because his ADHD did not have a sufficiently significant adverse impact on his educational performance. Because the School District maintained that respondent was not eligible for special-education services and therefore declined to provide an individualized education program (IEP),[1] respondent's parents left him enrolled at the private academy for his senior year.

The administrative review process resumed in September 2003. After considering the parties' evidence, including the

[1] An IEP is an education plan tailored to a child's unique needs that is designed by the school district in consultation with the child's parents after the child is identified as eligible for special-education services. See 20 U. S. C. §§ 1412(a)(4), 1414(d).

testimony of numerous experts, the hearing officer issued a decision in January 2004 finding that respondent's ADHD adversely affected his educational performance and that the School District failed to meet its obligations under IDEA in not identifying respondent as a student eligible for special-education services. Because the District did not offer respondent a FAPE and his private-school placement was appropriate under IDEA, the hearing officer ordered the District to reimburse respondent's parents for the cost of the private-school tuition.[2]

The School District sought judicial review pursuant to § 1415(i)(2), arguing that the hearing officer erred in granting reimbursement. The District Court accepted the hearing officer's findings of fact but set aside the reimbursement award after finding that the 1997 Amendments categorically bar reimbursement of private-school tuition for students who have not "previously received special education and related services under the authority of a public agency." § 612(a)(10)(C)(ii), 111 Stat. 63, 20 U. S. C. § 1412(a)(10)(C)(ii). The District Court further held that, "[e]ven assuming that tuition reimbursement may be ordered in an extreme case for a student not receiving special education services, under general principles of equity where the need for special education was obvious to school authorities," the facts of this case do not support equitable relief. App. to Pet. for Cert. 53a.

The Court of Appeals for the Ninth Circuit reversed and remanded for further proceedings. The court first noted that, prior to the 1997 Amendments, "IDEA was silent on the subject of private school reimbursement, but courts had granted such reimbursement as 'appropriate' relief under principles of equity pursuant to 20 U. S. C. § 1415(i)(2)(C)." 523 F. 3d 1078, 1085 (2008) (citing *Burlington*, 471 U. S., at

[2] Although it was respondent's parents who initially sought reimbursement, when respondent reached the age of majority in 2003 his parents' rights under IDEA transferred to him pursuant to Ore. Admin. Rule 581–015–2325(1) (2008).

370). It then held that the Amendments do not impose a categorical bar to reimbursement when a parent unilaterally places in private school a child who has not previously received special-education services through the public school. Rather, such students "are eligible for reimbursement, to the same extent as before the 1997 amendments, as 'appropriate' relief pursuant to § 1415(i)(2)(C)." 523 F. 3d, at 1087–1088.

The Court of Appeals also rejected the District Court's analysis of the equities as resting on two legal errors. First, because it found that § 1412(a)(10)(C)(ii) generally bars relief in these circumstances, the District Court wrongly stated that relief was appropriate only if the equities were sufficient to "'override'" that statutory limitation. The District Court also erred in asserting that reimbursement is limited to "'extreme'" cases. *Id.*, at 1088 (emphasis deleted). The Court of Appeals therefore remanded with instructions to reexamine the equities, including the failure of respondent's parents to notify the School District before removing respondent from public school. In dissent, Judge Rymer stated her view that reimbursement is not available as an equitable remedy in this case because respondent's parents did not request an IEP before removing him from public school, and respondent's right to a FAPE was therefore not at issue.

Because the Courts of Appeals that have considered this question have reached inconsistent results,[3] we granted certiorari to determine whether § 1412(a)(10)(C) establishes a categorical bar to tuition reimbursement for students who have not previously received special-education services

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[3] Compare *Frank G.* v. *Board of Ed. of Hyde Park*, 459 F. 3d 356, 376 (CA2 2006) (holding that § 1412(a)(10)(C)(ii) does not bar reimbursement for students who have not previously received public special-education services), and *M. M.* v. *School Bd. of Miami-Dade Cty., Fla.*, 437 F. 3d 1085, 1099 (CA11 2006) *(per curiam)* (same), with *Greenland School Dist.* v. *Amy N.*, 358 F. 3d 150, 159–160 (CA1 2004) (finding reimbursement barred in those circumstances).

under the authority of a public education agency. 555 U. S. 1130 (2009).[4]

II

Justice Rehnquist's opinion for a unanimous Court in *Burlington* provides the pertinent background for our analysis of the question presented. In that case, respondent challenged the appropriateness of the IEP developed for his child by public-school officials. The child had previously received special-education services through the public school. While administrative review was pending, private specialists advised respondent that the child would do best in a specialized private educational setting, and respondent enrolled the child in private school without the school district's consent. The hearing officer concluded that the IEP was not adequate to meet the child's educational needs and that the school district therefore failed to provide the child a FAPE. Finding also that the private-school placement was appropriate under IDEA, the hearing officer ordered the school district to reimburse respondent for the cost of the private-school tuition.

We granted certiorari in *Burlington* to determine whether IDEA authorizes reimbursement for the cost of private education when a parent or guardian unilaterally enrolls a child in private school because the public school has proposed an inadequate IEP and thus failed to provide a FAPE. The Act at that time made no express reference to the possibility of reimbursement, but it authorized a court to "grant such relief as the court determines is appropriate." § 1415(i)(2)(C)(iii).[5] In determining the scope of the relief

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[4] We previously granted certiorari to address this question in *Board of Ed. of City School Dist. of New York* v. *Tom F.*, 552 U. S. 1 (2007), in which we affirmed without opinion the judgment of the Court of Appeals for the Second Circuit by an equally divided vote.

[5] At the time we decided *Burlington*, that provision was codified at § 1415(e)(2). The 1997 Amendments renumbered the provision but did not alter its text. For ease of reference, we refer to the provision by its current section number, § 1415(i)(2)(C)(iii).

authorized, we noted that "the ordinary meaning of these words confers broad discretion on the court" and that, absent any indication to the contrary, what relief is "appropriate" must be determined in light of the Act's broad purpose of providing children with disabilities a FAPE, including through publicly funded private-school placements when necessary. 471 U. S., at 369. Accordingly, we held that the provision's grant of authority includes "the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." *Ibid.*

Our decision rested in part on the fact that administrative and judicial review of a parent's complaint often takes years. We concluded that, having mandated that participating States provide a FAPE for every student, Congress could not have intended to require parents to either accept an inadequate public-school education pending adjudication of their claim or bear the cost of a private education if the court ultimately determined that the private placement was proper under the Act. *Id.*, at 370. Eight years later, we unanimously reaffirmed the availability of reimbursement in *Florence County School Dist. Four* v. *Carter*, 510 U. S. 7 (1993) (holding that reimbursement may be appropriate even when a child is placed in a private school that has not been approved by the State).

The dispute giving rise to the present litigation differs from those in *Burlington* and *Carter* in that it concerns not the adequacy of a proposed IEP but the School District's failure to provide an IEP at all. And, unlike respondent, the children in those cases had previously received public special-education services. These differences are insignificant, however, because our analysis in the earlier cases depended on the language and purpose of the Act and not the particular facts involved. Moreover, when a child requires special-education services, a school district's failure to pro-

pose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP. It is thus clear that the reasoning of *Burlington* and *Carter* applies equally to this case. The only question is whether the 1997 Amendments require a different result.

III

Congress enacted IDEA in 1970[6] to ensure that all children with disabilities are provided "'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of [such] children and their parents or guardians are protected.'" *Burlington*, 471 U. S., at 367 (quoting 20 U. S. C. § 1400(c) (1982 ed.), now codified as amended at §§ 1400(d)(1)(A), (B)). After examining the States' progress under IDEA, Congress found in 1997 that substantial gains had been made in the area of special education but that more needed to be done to guarantee children with disabilities adequate access to appropriate services. See S. Rep. No. 105–17, p. 5 (1997). The 1997 Amendments were intended "to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Id.*, at 3.

Consistent with that goal, the Amendments preserved the Act's purpose of providing a FAPE to all children with disabilities. And they did not change the text of the provision we considered in *Burlington*, § 1415(i)(2)(C)(iii), which gives courts broad authority to grant "appropriate" relief, including reimbursement for the cost of private special education when a school district fails to provide a FAPE. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation

[6] The legislation was enacted as the Education of the Handicapped Act, Title VI of Pub. L. 91–230, 84 Stat. 175, and was renamed the Individuals with Disabilities Education Act in 1990, see § 901(a)(3), Pub. L. 101–476, 104 Stat. 1142.

when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978). Accordingly, absent a clear expression elsewhere in the Amendments of Congress' intent to repeal some portion of that provision or to abrogate our decisions in *Burlington* and *Carter*, we will continue to read § 1415(i)(2)(C)(iii) to authorize the relief respondent seeks.

The School District and the dissent argue that one of the provisions enacted by the Amendments, § 1412(a)(10)(C), effects such a repeal. Section 1412(a)(10)(C) is entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency," and it sets forth a number of principles applicable to public reimbursement for the costs of unilateral private-school placements. Section 1412(a)(10)(C)(i) states that IDEA "does not require a local educational agency to pay for the cost of education . . . of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child" and his parents nevertheless elected to place him in a private school. Section 1412(a)(10)(C)(ii) then provides that a "court or hearing officer may require [a public] agency to reimburse the parents for the cost of [private-school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available" and the child has "previously received special education and related services under the authority of [the] agency." Finally, § 1412(a)(10)(C)(iii) discusses circumstances under which the "cost of reimbursement described in clause (ii) may be reduced or denied," as when a parent fails to give 10 days' notice before removing a child from public school or refuses to make a child available for evaluation, and § 1412(a)(10)(C)(iv) lists circumstances in which a parent's failure to give notice may or must be excused.[7]

[7] The full text of § 1412(a)(10)(C) is set forth in the Appendix, *infra*, at 248.

Looking primarily to clauses (i) and (ii), the School District argues that Congress intended § 1412(a)(10)(C) to provide the exclusive source of authority for courts to order reimbursement when parents unilaterally enroll a child in private school. According to the District, clause (i) provides a safe harbor for school districts that provide a FAPE by foreclosing reimbursement in those circumstances. Clause (ii) then sets forth the circumstance in which reimbursement is appropriate—namely, when a school district fails to provide a FAPE to a child who has previously received special-education services through the public school. The District contends that because § 1412(a)(10)(C) only discusses reimbursement for children who have previously received special-education services through the public school, IDEA only authorizes reimbursement in that circumstance. The dissent agrees.

For several reasons, we find this argument unpersuasive. First, the School District's reading of the Act is not supported by its text and context, as the 1997 Amendments do not expressly prohibit reimbursement under the circumstances of this case, and the District offers no evidence that Congress intended to supersede our decisions in *Burlington* and *Carter*. Clause (i)'s safe harbor explicitly bars reimbursement only when a school district makes a FAPE available by correctly identifying a child as having a disability and proposing an IEP adequate to meet the child's needs. The clause says nothing about the availability of reimbursement when a school district fails to provide a FAPE. Indeed, its statement that reimbursement *is not* authorized when a school district provides a FAPE could be read to indicate that reimbursement *is* authorized when a school district does not fulfill that obligation.

Clause (ii) likewise does not support the District's position. Because that clause is phrased permissively, stating only that courts "may require" reimbursement in those circumstances, it does not foreclose reimbursement awards in other circum-

stances. Together with clauses (iii) and (iv), clause (ii) is best read as elaborating on the general rule that courts may order reimbursement when a school district fails to provide a FAPE by listing factors that may affect a reimbursement award in the common situation in which a school district has provided a child with some special-education services and the child's parents believe those services are inadequate. Referring as they do to students who have previously received special-education services through a public school, clauses (ii) through (iv) are premised on a history of cooperation and together encourage school districts and parents to continue to cooperate in developing and implementing an appropriate IEP before resorting to a unilateral private placement.[8] The clauses of § 1412(a)(10)(C) are thus best read as elucidative rather than exhaustive. Cf. *United States* v. *Atlantic Research Corp.*, 551 U. S. 128, 137 (2007) (noting that statutory language may "perfor[m] a significant function simply by clarifying" a provision's meaning).[9]

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[8] The dissent asserts that, under this reading of the Act, "Congress has called for reducing reimbursement only for the most deserving . . . but provided no mechanism to reduce reimbursement to the least deserving." *Post*, at 254 (opinion of SOUTER, J.). In addition to making unsubstantiated generalizations about the desert of parents whose children have been denied public special-education services, the dissent grossly mischaracterizes our view of § 1412(a)(10)(C). The fact that clause (iii) *permits* a court to reduce a reimbursement award when a parent whose child has previously received special-education services fails to give the school adequate notice of an intended private placement does not mean that it *prohibits* courts from similarly reducing the amount of reimbursement when a parent whose child has not previously received services fails to give such notice. Like clause (ii), clause (iii) provides guidance regarding the appropriateness of relief in a common factual scenario, and its instructions should not be understood to preclude courts and hearing officers from considering similar factors in other scenarios.

[9] In arguing that § 1412(a)(10)(C) is the exclusive source of authority for granting reimbursement awards to parents who unilaterally place a child

This reading of § 1412(a)(10)(C) is necessary to avoid the conclusion that Congress abrogated *sub silentio* our decisions in *Burlington* and *Carter*. In those cases, we construed § 1415(i)(2)(C)(iii) to authorize reimbursement when a school district fails to provide a FAPE and a child's private-school placement is appropriate, without regard to the child's prior receipt of services.[10] It would take more than Congress' failure to comment on the category of cases in which a child has not previously received special-education services for us to conclude that the Amendments substantially superseded our decisions and in large part repealed § 1415(i)(2)(C)(iii). See *Branch* v. *Smith*, 538 U. S. 254, 273 (2003) (plurality opinion) ("[A]bsent a clearly expressed congressional intention, repeals by implication are not favored" (internal quotation marks and citation omit-

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in private school, the dissent neglects to explain that provision's failure to limit the type of private-school placements for which parents may be reimbursed. *School Comm. of Burlington* v. *Department of Ed. of Mass.*, 471 U. S. 359 (1985), held that courts may grant reimbursement under § 1415(i)(2)(C)(iii) only when a school district fails to provide a FAPE *and* the private-school placement is appropriate. See *id.*, at 369; see *Florence County School Dist. Four* v. *Carter*, 510 U. S. 7, 12–13 (1993). The latter requirement is essential to ensuring that reimbursement awards are granted only when such relief furthers the purposes of the Act. See *Burlington*, 471 U. S., at 369. That § 1412(a)(10)(C) did not codify that requirement further indicates that Congress did not intend that provision to supplant § 1415(i)(2)(C)(iii) as the sole authority on reimbursement awards but rather meant to augment the latter provision and our decisions construing it.

[10] As discussed above, although the children in *Burlington* and *Carter* had previously received special-education services in public school, our decisions in no way depended on their prior receipt of services. Those holdings rested instead on the breadth of the authority conferred by § 1415(i)(2)(C)(iii), the interest in providing relief consistent with the Act's purpose, and the injustice that a contrary reading would produce, see *Burlington*, 471 U. S., at 369–370; see also *Carter*, 510 U. S., at 12–14—considerations that were not altered by the 1997 Amendments.

ted)).[11] We accordingly adopt the reading of § 1412(a)(10)(C) that is consistent with those decisions.[12]

The School District's reading of § 1412(a)(10)(C) is also at odds with the general remedial purpose underlying IDEA and the 1997 Amendments. The express purpose of the Act is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs," § 1400(d)(1)(A)—a factor we took into account in construing the scope of § 1415(i)(2)(C)(iii), see *Burlington*, 471 U. S., at 369. Without the remedy respondent seeks, a "child's right to a *free* appropriate education . . . would be

[11] For the same reason, we reject the District's argument that because § 1412(a)(10)(C)(ii) authorizes "a court or a hearing officer" to award reimbursement for private-school tuition, whereas § 1415(i)(2)(C)(iii) only provides a general grant of remedial authority to "court[s]," the latter section cannot be read to authorize hearing officers to award reimbursement. That argument ignores our decision in *Burlington*, 471 U. S., at 363, 370, which interpreted § 1415(i)(2)(C)(iii) to authorize hearing officers as well as courts to award reimbursement notwithstanding the provision's silence with regard to hearing officers. When Congress amended IDEA without altering the text of § 1415(i)(2)(C)(iii), it implicitly adopted that construction of the statute. See *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978).

[12] Looking to the Amendments' legislative history for support, the School District cites two House and Senate Reports that essentially restate the text of § 1412(a)(10)(C)(ii), H. R. Rep. No. 105–95, pp. 92–93 (1997); S. Rep. No. 105–17, p. 13 (1997), and a floor statement by Representative Mike Castle, 143 Cong. Rec. 8013 (1997) (stating that the "bill makes it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense, lowering costs to local school districts"). Those ambiguous references do not undermine the meaning that we discern from the statute's language and context.

Notably, the agency charged with implementing IDEA has adopted respondent's reading of the statute. In commentary to regulations implementing the 1997 Amendments, the Department of Education stated that "hearing officers and courts retain their authority, recognized in *Burlington* . . . to award 'appropriate' relief if a public agency has failed to provide FAPE, including reimbursement . . . in instances in which the child has not yet received special education and related services." 64 Fed. Reg. 12602 (1999); see 71 Fed. Reg. 46599 (2006).

less than complete." *Id.*, at 370. The District's position similarly conflicts with IDEA's "child find" requirement, pursuant to which States are obligated to "identif[y], locat[e], and evaluat[e]" "[a]ll children with disabilities residing in the State" to ensure that they receive needed special-education services. § 1412(a)(3)(A); see § 1412(a)(10)(A)(ii). A reading of the Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services.

Indeed, by immunizing a school district's refusal to find a child eligible for special-education services no matter how compelling the child's need, the School District's interpretation of § 1412(a)(10)(C) would produce a rule bordering on the irrational. It would be particularly strange for the Act to provide a remedy, as all agree it does, when a school district offers a child inadequate special-education services but to leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether. That IDEA affords parents substantial procedural safeguards, including the right to challenge a school district's eligibility determination and obtain prospective relief, see *post*, at 258–259, is no answer. We roundly rejected that argument in *Burlington*, observing that the "review process is ponderous" and therefore inadequate to ensure that a school's failure to provide a FAPE is remedied with the speed necessary to avoid detriment to the child's education. 471 U. S., at 370. Like *Burlington*, see *ibid.*, this case vividly demonstrates the problem of delay, as respondent's parents first sought a due process hearing in April 2003, and the District Court issued its decision in May 2005—almost a year after respondent graduated from high school. The dissent all but ignores these shortcomings of IDEA's procedural safeguards.

IV

The School District advances two additional arguments for reading the Act to foreclose reimbursement in this case. First, the District contends that because IDEA was an exercise of Congress' authority under the Spending Clause, U. S. Const., Art. I, § 8, cl. 1, any conditions attached to a State's acceptance of funds must be stated unambiguously. See *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981). Applying that principle, we held in *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 304 (2006), that IDEA's fee-shifting provision, § 1415(i)(3)(B), does not authorize courts to award expert-services fees to prevailing parents in IDEA actions because the Act does not put States on notice of the possibility of such awards. But *Arlington* is readily distinguishable from this case. In accepting IDEA funding, States expressly agree to provide a FAPE to all children with disabilities. See § 1412(a)(1)(A). An order awarding reimbursement of private-education costs when a school district fails to provide a FAPE merely requires the district "to belatedly pay expenses that it should have paid all along." *Burlington*, 471 U. S., at 370–371. And States have in any event been on notice at least since our decision in *Burlington* that IDEA authorizes courts to order reimbursement of the costs of private special-education services in appropriate circumstances. *Pennhurst*'s notice requirement is thus clearly satisfied.

Finally, the District urges that respondent's reading of the Act will impose a substantial financial burden on public-school districts and encourage parents to immediately enroll their children in private school without first endeavoring to cooperate with the school district. The dissent echoes this concern. See *post*, at 258. For several reasons, those fears are unfounded. Parents "are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and the private school placement was proper under the Act." *Carter*, 510 U. S., at 15. And even

then courts retain discretion to reduce the amount of a reimbursement award if the equities so warrant—for instance, if the parents failed to give the school district adequate notice of their intent to enroll the child in private school. In considering the equities, courts should generally presume that public-school officials are properly performing their obligations under IDEA. See *Schaffer* v. *Weast*, 546 U. S. 49, 62–63 (2005) (STEVENS, J., concurring). As a result of these criteria and the fact that parents who "'unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk,'" *Carter*, 510 U. S., at 15 (quoting *Burlington*, 471 U. S., at 373–374), the incidence of private-school placement at public expense is quite small, see Brief for National Disability Rights Network et al. as *Amici Curiae* 13–14.

V

The IDEA Amendments of 1997 did not modify the text of § 1415(i)(2)(C)(iii), and we do not read § 1412(a)(10)(C) to alter that provision's meaning. Consistent with our decisions in *Burlington* and *Carter*, we conclude that IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school.

When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted. As the Court of Appeals noted, the District Court did not properly consider the equities in this case and will need to undertake that analysis on remand. Accordingly, the judgment of the Court of Ap-

peals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX

Title 20 U. S. C. § 1412(a)(10)(C) provides:

"(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

"(i) In general

"Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

"(ii) Reimbursement for private school placement

"If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

"(iii) Limitation on reimbursement

"The cost of reimbursement described in clause (ii) may be reduced or denied—

"(I) if—

"(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appro-

priate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

"(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

"(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

"(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents."

JUSTICE SOUTER, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

I respectfully dissent.

School Comm. of Burlington v. *Department of Ed. of Mass.*, 471 U. S. 359 (1985), held that the Education of the Handicapped Act, 84 Stat. 175, now known as the Individuals with Disabilities Education Act (IDEA or Act), 20 U. S. C. § 1400 *et seq.*, authorized a district court to order reimbursement of private school tuition and expenses to parents who took their disabled child from public school because the school's special education services did not meet the child's needs. We said that, for want of any specific limitation, this remedy was within the general authorization for courts to award "such relief as [they] determin[e] is appropriate." § 1415(e)(2) (1982 ed.) (now codified at § 1415(i)(2)(C)(iii) (2006 ed.)). In 1997, however, Congress amended the IDEA with a number of provisions explicitly addressing the issue of

"[p]ayment for education of children enrolled in private schools without consent of or referral by the public agency." § 1412(a)(10)(C). These amendments generally prohibit reimbursement if the school district made a "free appropriate public education" (FAPE) available, § 1412(a)(10)(C)(i), and if they are to have any effect, there is no exception except by agreement, § 1412(a)(10)(B), or for a student who previously received special education services that were inadequate, § 1412(a)(10)(C)(ii).

The majority says otherwise and holds that § 1412(a)(10)(C)(ii) places no limit on reimbursements for private tuition. The Court does not find the provision clear enough to affect the rule in *Burlington*, and it does not believe Congress meant to limit public reimbursement for unilaterally incurred private school tuition. But there is no authority for a heightened standard before Congress can alter a prior judicial interpretation of a statute, and the assessment of congressional policy aims falls short of trumping what seems to me to be the clear limitation imposed by § 1412(a)(10)(C)(ii).

I

In *Burlington*, parents of a child with a learning disability tried for over eight years to work out a satisfactory individualized education plan (IEP) for their son. 471 U. S., at 361–362. They eventually gave up and sent the boy to a private school for disabled children, *id.*, at 362, and we took the ensuing case to decide whether the Education of the Handicapped Act authorized courts to order reimbursement for private special education "if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act," *id.*, at 369. After noting various sections that "emphasiz[e] the participation of the parents in developing the child's [public] educational program," *id.*, at 368, we inferred that the Act authorized reimbursement by providing that a district court shall "'grant such relief as [it] determines is appropriate,'" *id.*, at 369 (quoting what is now

§ 1415(i)(2)(C)(iii); alteration in original). We emphasized that the Act did not speak specifically to the issue of reimbursement, and held that "[a]bsent other reference," reimbursement for private tuition and expenses would be an "'appropriate'" remedy in light of the purposes of the Act. *Id.*, at 369–370. In short, we read the general provision for ordering equitable remedies in § 1415(i)(2)(C)(iii) as authorizing a reimbursement order, in large part because Congress had not spoken more specifically to the issue.

But Congress did speak explicitly when it amended the IDEA in 1997. It first said that whenever the State or a local educational agency refers a student to private special education, the bill is a public expense. See 20 U. S. C. § 1412(a)(10)(B). It then included several clauses addressing "[p]ayment for education of children enrolled in private schools without consent of or referral by the public agency." § 1412(a)(10)(C). The first contrasts with the provision covering an agency referral:

> "(i) In general
>
> " . . . this subchapter does not require a local educational agency to pay for the cost of education . . . of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." § 1412(a)(10)(C).

The second clause covers the case in which the school authority failed to make a FAPE available in its schools. It does not, however, provide simply that the authority must pay in this case, no matter what. Instead it provides this:

> "(ii) Reimbursement for private school placement
>
> "If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency,

> a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." *Ibid.*

Two additional clauses spell out in some detail various facts upon which the reimbursement described in clause (ii) may be "reduced or denied." See §§ 1412(a)(10)(C)(iii) and (iv).

As a purely semantic matter, these provisions are ambiguous in their silence about the case with no previous special education services and no FAPE available. As the majority suggests, *ante*, at 241–242, clause (i) could theoretically be understood to imply that reimbursement may be ordered whenever a school district fails to provide a FAPE, and clause (ii) could be read as merely taking care to mention one of a variety of circumstances in which such reimbursement is permitted. But this is overstretching. When permissive language covers a special case, the natural sense of it is taken to prohibit what it fails to authorize. When a mother tells a boy that he may go out and play after his homework is done, he knows what she means.

So does anyone who reads the authorization of a reimbursement order in the case of "a child with a disability, who previously received special education and related services under the authority of a public agency." § 1412(a)(10)(C)(ii).[1] If the mother did not mean that the homework had to be done, why did she mention it at all, and if Congress did not

[1] Likewise, no one is unsure whether this Court's Rule 18.6, which states, "Within 30 days after the case is placed on this Court's docket, the appellee may file a motion to dismiss, . . . " allows for a motion to dismiss after 30 days. See also *Carlisle* v. *United States*, 517 U. S. 416, 431–432 (1996) (listing numerous examples of permissive statements, such as then Federal Rule of Criminal Procedure 17(d)'s statement that a subpoena "may be served" by a person "who is not less than 18 years of age," that plainly carry a restrictive meaning).

mean to restrict reimbursement authority by reference to previous receipt of services, why did it even raise the subject? "[O]ne of the most basic interpretive canons [is] that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." *Corley* v. *United States*, 556 U. S. 303, 314 (2009) (internal quotation marks omitted). But not on the Court's reading, under which clause (ii) does nothing but describe a particular subset of cases subject to remedial authority already given to courts by § 1415(i)(2)(C)(iii) and recognized in *Burlington:* a court may order reimbursement for a child who previously received special education related services, but it may do this for any other child, too.[2] But this is just not plausible, the notion that Congress added a new provision to the IDEA entitled "Reimbursement for private school placement" that had no effect whatsoever on reimbursement for private school placement. I would read clause (i) as written on the assumption that the school authorities can be expected to honor their obligations and as stating the general rule that unilateral placement cannot be reimbursed. See § 1412(a)(10)(C)(i) ("In general . . . "). And I would read clause (ii) as imposing a receipt of prior services limit on any exceptions to that general rule when school officials fall short of providing a

[2] The majority says that "clause (ii) is best read as elaborating on the general rule that courts may order reimbursement when a school district fails to provide a FAPE by listing factors that may affect a reimbursement award in the common situation in which a school district has provided a child with some special-education services and the child's parents believe those services are inadequate." *Ante*, at 242. But this is just another way of reading the provision off the books. On the majority's reading, clause (ii) states only that a court may award reimbursement when (1) there is a previous receipt of special education services and (2) a failure to provide a FAPE. Such a description of the most common subset of a category already described may be called elaboration, but it still has no effect on the statutory scheme.

FAPE. See § 1412(a)(10)(C)(ii) ("Reimbursement for private school placement . . . ").

This reading can claim the virtue of avoiding a further anomaly. Section 1412(a)(10)(C)(iii), which limits otherwise available reimbursement, is expressly directed to "[t]he cost of reimbursement described in clause (ii)." This makes perfect sense under my reading. Since clause (ii) is now the exclusive source of authority to order reimbursement, it is natural to refer to it in the clause setting out the conditions for reducing or even denying reimbursement otherwise authorized. Yet, as T. A. and the Government concede, Brief for Respondent 22; Brief for United States as *Amicus Curiae* 4, 17, under the majority's reading, Congress has called for reducing reimbursement only for the most deserving (parents described in clause (ii) who consult with the school district and give public special education services a try before demanding payment for private education), but provided no mechanism to reduce reimbursement to the least deserving (parents who have not given public placement a chance).

The Court responds to this point by doubling down. According to the majority, the criteria listed in clause (iii) can justify a reduction not only of "reimbursement described in clause (ii)," § 1412(a)(10)(C)(iii), but can also do so for a reimbursement order authorized elsewhere as well, *ante*, at 242, n. 8. That is, the majority avoids ascribing perverse motives to Congress by concluding that in both clause (ii) and clause (iii), Congress meant to add nothing to the statutory scheme. This simply leads back to the question of why Congress in § 1412(a)(10)(C) would have been so concerned with cases in which children had not previously received special education services when, on the majority's reading, the prior receipt of services has no relevance whatsoever to the subject of that provision.

Because any other interpretation would render clause (ii) pointless and clause (iii) either pointless or perverse, § 1412(a)(10)(C)(ii) must be read to allow reimbursement only

for "parents of a child with a disability, who previously received special education and related services under the authority of a public agency."

II

Neither the majority's clear statement rule nor its policy considerations prevail over the better view of the 1997 amendments.

A

The majority says that, because of our previous interpretation of the Act as authorizing reimbursement for unilateral private placement, Congress was obliged to speak with added clarity to alter the statute as so understood. *Ante*, at 239–244. The majority refers to two distinct principles for support: first, statutes are to be read with a presumption against implied repeals, *e. g.*, *ante*, at 243–244 (citing *Branch* v. *Smith*, 538 U. S. 254, 273 (2003) (plurality opinion)), and second, congressional reenactment of statutory text without change is deemed to ratify a prior judicial interpretation of it, *e. g.*, *ante*, at 239–240 (citing *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978)). I think neither principle is up to the task.

Section 1412(a)(10)(C) in no way repealed the provision we considered in *Burlington*.[3] The relief that "is appropriate" under § 1415(i)(2)(C)(iii) depends on the substantive provisions of the IDEA as surely as if the provision authorized equitable relief "consistent with the provisions of this statute."[4] When we applied § 1415(i)(2)(C)(iii) in *Burlington*,

[3] The presumption against implied repeals would not justify reading the later provision as useless even if it applied since, when two provisions are irreconcilable, the presumption against implied repeals gives way to the later enactment. See *Branch* v. *Smith*, 538 U. S. 254, 273 (2003) (plurality opinion).

[4] No one, for example, would suggest that a court could grant reimbursement under § 1415(i)(2)(C)(iii) to parents of a nondisabled child, but this is obvious only because we assume § 1415(i)(2)(C)(iii) is to be read in light of the substantive provisions of the statute.

we expressly referred to those provisions and concluded that, in the absence of a specific rule, "appropriate" relief included the reimbursement sought. By introducing new restrictions on reimbursement, the 1997 amendments produce a different conclusion about what relief is "appropriate." But § 1415(i)(2)(C)(iii) remains in effect, just as it would remain in effect if Congress had explicitly amended the IDEA to prohibit reimbursement absent prior receipt of services.

As for the rule that reenactment incorporates prior interpretation, the Court's reliance on it to preserve *Burlington*'s reading of § 1415(i)(2)(C)(iii) faces two hurdles. First, so far as I can tell, this maxim has never been used to impose a clear statement rule. If Congress does not suggest otherwise, reenacted statutory language retains its old meaning; but when a new enactment includes language undermining the prior reading, there is no presumption favoring the old, and the only course open is simply to read the revised statute as a whole. This is so because there is no reason to distinguish between amendments that occur in a single clause (as if Congress had placed all the changes in § 1415(i)(2)(C)(iii)), and those that take the form of a separate section (here, § 1412(a)(10)(C)). If Congress had added a caveat within § 1415(i)(2)(C)(iii), or in an immediately neighboring provision, I assume the majority would not approach it with skepticism on the ground that it purported to modify a prior judicial interpretation.

Second, nothing in my reading of § 1412(a)(10)(C)(ii) is inconsistent with the holdings of *Burlington* and the other prior decision on the subject, *Florence County School Dist. Four* v. *Carter*, 510 U. S. 7 (1993). Our opinion in *Burlington* was expressly premised on there being no "other reference" that would govern reimbursement for private tuition, 471 U. S., at 369, and this all but invited Congress to provide one. Congress's provision of such a reference in 1997 is, to

say the very least, no reason for skepticism that Congress wished to alter the law on reimbursement. The 1997 legislation, read my way, would not, however, alter the result in either *Burlington* or *Carter*. In each case, the school district had agreed that the child was disabled, the parents had cooperated with the district and tried out an IEP, and the only question was whether parents who later resorted to a private school could be reimbursed " 'if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.' " *Carter*, *supra*, at 12 (quoting *Burlington*, *supra*, at 369). In ordering reimbursement, the Court in both *Burlington* and *Carter* emphasized that the parents took part in devising an IEP, 471 U. S., at 368; 510 U. S., at 12, and expressed concern for parents who had sought an IEP before placing their child in private school, but received one that was inadequate, 471 U. S., at 370; 510 U. S., at 12. The result in each case would have been the same under my reading of the amended Act, both sets of parents being "parents of a child with a disability, who previously received special education and related services under the authority of a public agency." § 1412(a)(10)(C)(ii). It is therefore too much to suggest that my reading of § 1412(a)(10)(C)(ii) would "abrogat[e] *sub silentio* our decisions in *Burlington* and *Carter*," *ante*, at 243.

The majority argues that the policy concerns vindicated in *Burlington* and *Carter* justify reading those cases to authorize a reimbursement authority going beyond their facts, *ante*, at 238–239, and would hold reimbursement possible even for parents who, like those here, unilaterally resort to a private school without first establishing at the administrative or appellate level that the child is disabled, or engaging in a collaborative process with the school officials. But how broadly one should read *Burlington* and *Carter* is beside the point, Congress having explicitly addressed the subject with statutory language that precludes the Court's result today.

B

The Court also rejects the natural sense of § 1412(a)(10)(C) as an interpretation that would be "at odds with the general remedial purpose underlying IDEA and the 1997 Amendments." *Ante,* at 244. The majority thinks my reading would place the school authorities in total control of parents' eligibility for reimbursement: just refuse any request for special education or services in the public school, and the prior service condition for eligibility under clause (ii) can never be satisfied. Thus, as the majority puts it, it would "borde[r] on the irrational" to "immuniz[e] a school district's refusal to find a child eligible for special-education services no matter how compelling the child's need." *Ante,* at 245. I agree that any such scheme would be pretty absurd, but there is no absurdity here. The majority's suggestion overlooks the terms of the IDEA process, the substantial procedures protecting a child's substantive rights under the IDEA, and the significant costs of its rule.

To start with the costs, special education can be immensely expensive, amounting to tens of billions of dollars annually and as much as 20% of public schools' general operating budgets. See Brief for Council of the Great City Schools as *Amicus Curiae* 22–23. The more private placement there is, the higher the special education bill, a fact that lends urgency to the IDEA's mandate of a collaborative process in which an IEP is "developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and, where appropriate, the child." *Burlington, supra,* at 368.

The Act's repeated emphasis on the need for cooperative joint action by school and parent does not, however, leave the school in control if officials should wish to block effective (and expensive) action for the child's benefit, for if the collaborative approach breaks down, the IDEA provides for quick review in a "due process hearing" of the parents' claim that more services are needed to provide a FAPE than the school

is willing to give. See § 1415(c)(2) (district must respond to due process hearing complaint within 10 days and hearing officer must assess facial validity of complaint within 5 days); § 1415(e) (mediation is available, provided it does not delay due process hearing); § 1415(f)(1)(B) (district must convene a meeting with parents within 15 days to attempt to resolve complaint); 34 CFR §§ 300.510(b)(1)–(2) (2008) (if complaint is not resolved, a hearing must be held within 30 days of complaint and a decision must be issued within 75 days of complaint). Parents who remain dissatisfied after these first two levels of process may have a right of appeal to the state educational agency and in any case may bring a court action in federal district court. See 20 U. S. C. § 1415(i)(2). This scheme of administrative and judicial review is the answer to the Court's claim that reading the prior services condition as restrictive, not illustrative, immunizes a school district's intransigence, giving it an effective veto on reimbursement for private placement.[5]

That said, the Court of course has a fair point that the prior services condition qualifies the remedial objective of the statute, and pursuing appeals to get a satisfactory IEP with special services worth accepting could be discouraging. The child who needs help does not stop needing it, or stop growing, while schools and parents argue back and forth.

[5] The majority argues that we already rejected this process as inadequate in *School Comm. of Burlington* v. *Department of Ed. of Mass.*, 471 U. S. 359 (1985). *Ante*, at 245. That was before the enactment of § 1412(a)(10)(C)(ii). The question in *Burlington* was whether the reimbursement there was an "appropriate" remedy under § 1415(i)(2)(C)(iii). See 471 U. S., at 370. With no statement to the contrary from Congress, the Court expressed concern over the possible length of the IDEA review process and surmised that Congress would have intended for reimbursement to be authorized. *Ibid.* But Congress provided a statement to the contrary in 1997; the only reading that gives effect to § 1412(a)(10)(C)(ii) is that reimbursement is not permitted absent prior placement, and the only question for the Court now is whether Congress could have meant what it said.

But we have to decide this case on the premise that most such arguments will be carried on in good faith, and even on the assumption that disagreements about the adequacy of IEPs will impose some burdens on the Act's intended beneficiaries, there is still a persuasive reason for Congress to have written the statute to mandate just what my interpretation requires. Given the burden of private school placement, it makes good sense to require parents to try to devise a satisfactory alternative within the public schools, by taking part in the collaborative process of developing an IEP that is the "*modus operandi*" of the IDEA. *Burlington*, 471 U. S., at 368. And if some time, and some educational opportunity, is lost in consequence, this only shows what we have realized before, that no policy is ever pursued to the ultimate, single-minded limit, and that "[t]he IDEA obviously does not seek to promote [its] goals at the expense of all considerations, including fiscal considerations," *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 303 (2006).[6]

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[6] See 143 Cong. Rec. 8013 (1997) (statement of Rep. Castle) ("This law . . . has had unintended and costly consequences. . . . It has resulted in school districts unnecessarily paying expensive private school tuition for children. It has resulted in cases where lawyers have gamed the system to the detriment of schools and children." "This bill makes it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense, lowering costs to local school districts").

Syllabus

COEUR ALASKA, INC. *v.* SOUTHEAST ALASKA CONSERVATION COUNCIL ET AL.

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

No. 07–984. Argued January 12, 2009—Decided June 22, 2009*

In reviving a closed Alaska gold mine using a "froth flotation" technique, petitioner Coeur Alaska, Inc., plans to dispose of the resulting waste material, a rock and water mixture called "slurry," by pumping it into a nearby lake and then discharging purified lake water into a downstream creek. The Clean Water Act (CWA), *inter alia*, classifies crushed rock as a "pollutant," § 352(6); forbids its discharge "[e]xcept as in compliance" with the CWA, § 301(a); empowers the Army Corps of Engineers (Corps) to "issue permits . . . for the discharge of . . . fill material," § 404(a); and authorizes the Environmental Protection Agency (EPA) to "issue a permit for the discharge of any pollutant," "[e]xcept as provided in [§ 404]," § 402(a). The Corps and the EPA together define "fill material" as any "material [that] has the effect of . . . [c]hanging the bottom elevation" of water, including "slurry . . . or similar mining-related materials." 40 CFR § 232.2. Coeur Alaska obtained a § 404 permit for the slurry discharge from the Corps and a § 402 permit for the lakewater discharge from the EPA.

Respondent environmental groups (collectively, SEACC) sued the Corps and several of its officials under the Administrative Procedure Act, arguing that the CWA § 404 permit was not "in accordance with law," 5 U. S. C. § 706(2)(A), because (1) Coeur Alaska should have sought a CWA § 402 permit from the EPA instead, just as it did for the lakewater discharge; and (2) the slurry discharge would violate the "new source performance standard" the EPA had promulgated under CWA § 306(b), forbidding froth-flotation gold mines to discharge "process wastewater," which includes solid wastes, 40 CFR § 440.104(b)(1). Coeur Alaska and petitioner Alaska intervened as defendants. The District Court granted the defendants summary judgment, but the Ninth Circuit reversed, holding that the proposed slurry discharge would violate the EPA's performance standard and § 306(e).

Held:

1. The Corps, not the EPA, has authority to permit the slurry discharge. Pp. 273–277.

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*Together with No. 07–990, *Alaska* v. *Southeast Alaska Conservation Council et al.*, also on certiorari to the same court.

Syllabus

(a) By specifying that, "[e]xcept as provided in . . . [§ 404,]" the EPA "may . . . issue . . . permit[s] for the discharge of any pollutant," § 402(a) forbids the EPA to issue permits for fill materials falling under the Corps' § 404 authority. Even if there were ambiguity on this point, it would be resolved by the EPA's own regulation providing that "[d]ischarges of . . . fill material . . . which are regulated under section 404" "do not require [EPA § 402] permits." 40 CFR § 122.3. The agencies have interpreted this regulation to essentially restate § 402's text, *ibid.*, and the EPA has confirmed that reading before this Court. Because it is not "plainly erroneous or inconsistent with the regulation," the Court accepts the EPA's interpretation as correct. *Auer* v. *Robbins*, 519 U. S. 452, 461. Thus, the question whether the EPA is the proper agency to regulate the slurry discharge depends on whether the Corps has authority to do so. If so, the EPA may not regulate. Pp. 273–275.

(b) Because § 404(a) empowers the Corps to "issue permits . . . for the discharge of . . . fill material," and the agencies' joint regulation defines "fill material" to include "slurry . . . or similar mining-related materials" having the "effect of . . . [c]hanging the bottom elevation" of water, 40 CFR § 232.2, the slurry Coeur Alaska wishes to discharge into the lake falls well within the Corps' § 404 permitting authority, rather than the EPA's § 402 authority. The CWA gives no indication that Congress intended to burden industry with the confusing division of permitting authority that SEACC's contrary reading would create. Pp. 275–277.

2. The Corps acted in accordance with law in issuing the slurry discharge permit to Coeur Alaska. Pp. 277–291.

(a) The CWA alone does not resolve these cases. Pp. 278–282.

(i) SEACC contends that because the EPA's performance standard forbids even minute solid waste discharges, 40 CFR § 440.104(b)(1), it also forbids Coeur Alaska's slurry discharge, 30 percent of which is solid waste, into the lake. Thus, says SEACC, the slurry discharge is "unlawful" under CWA § 306(e), which prohibits "any owner . . . of any new source to operate such source in violation of any standard of performance applicable to such source." Pp. 278–280.

(ii) Petitioners and the federal agencies counter that CWA § 404 grants the Corps authority to determine whether to issue a permit allowing the slurry discharge without regard to the EPA's new source performance standard or § 306(e)'s prohibition. Pp. 280–281.

(iii) The CWA is ambiguous on the question whether § 306 applies to discharges of fill material regulated under § 404. On the one hand, § 306 provides that a discharge that violates an EPA new source performance standard is "unlawful"—without an exception for fill material. On the other hand, § 404 grants the Corps blanket authority to permit the discharge of fill material—without mentioning § 306. This tension

indicates that Congress has not "directly spoken" to the "precise question" at issue. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842. Pp. 281–282.

(b) Although the agencies' regulations construing the CWA are entitled to deference if they resolve the statutory ambiguity in a reasonable manner, see *Chevron*, *supra*, at 842, the regulations bearing on §§ 306 and 404, like the CWA itself, do not do so. For example, each of the two principal regulations seems to stand on its own without reference to the other. The EPA's performance standard contains no exception for fill material, and it forbids any discharge of "process wastewater," including solid wastes. 40 CFR § 440.104(b)(1). The agencies' joint regulation defining fill material includes "slurry or . . . similar mining-related materials," § 232.2, but contains no exception for slurry regulated by an EPA performance standard. Additional regulations noted by the parties offer no basis for reconciliation. Pp. 282–283.

(c) In light of the ambiguities in the CWA and the pertinent regulations, the Court turns to the agencies' subsequent interpretation of those regulations. *Auer*, *supra*, at 461. The question at issue is addressed and resolved in a reasonable and coherent way by the two agencies' practice and policy, as recited in the EPA's internal "Regas Memorandum" (Memorandum), which explains that the performance standard applies only to the discharge of water from the lake into the downstream creek, and not to the initial discharge of slurry into the lake. Though the Memorandum is not subject to sufficiently formal procedures to merit full *Chevron* deference, the Court defers to it because it is not "plainly erroneous or inconsistent with the regulation[s]," *Auer*, *supra*, at 461. Five factors inform that conclusion: The Memorandum (1) confines its own scope to closed bodies of water like the lake here, thereby preserving a role for the performance standards; (2) guards against the possibility of evasion of those standards; (3) employs the Corps' expertise in evaluating the effects of fill material on the aquatic environment; (4) does not allow toxic compounds to be discharged into navigable waters; and (5) reconciles §§ 306, 402, and 404, and the regulations implementing them, better than any of the parties' alternatives. The Court agrees with the parties that a two-permit regime is contrary to the statute and regulations. Pp. 283–286.

(d) The Court rejects SEACC's contention that the Memorandum is not entitled to deference because it contradicts the agencies' published statements and prior practice. Though SEACC cites three such statements, its arguments are not convincing. Pp. 286–291.

(i) Although a 1986 memorandum of agreement (MOA) between the EPA and the Corps seeking to reconcile their then-differing "fill material" definitions suggests, as SEACC asserts, that § 402 will "nor-

mally" apply to discharges of "suspended"—*i. e.*, solid—pollutants, that statement is not contrary to the Memorandum, which acknowledges that the EPA retains authority under § 402 to regulate the discharge of suspended solids from the lake into downstream waters. The MOA does not address the question presented by these cases, and answered by the Memorandum, and is, in fact, consistent with the agencies' determination that the Corps regulates all discharges of fill material and that § 306 does not apply to these discharges. Pp. 286–288.

(ii) Despite SEACC's assertion that the fill regulation's preamble demonstrates that the fill rule was not intended to displace the preexisting froth-flotation gold mine performance standard, the preamble is consistent with the Memorandum when it explicitly notes that the EPA has "never sought to regulate fill material under effluent guidelines," 67 Fed. Reg. 31135. If a discharge does not qualify as fill, the EPA's new source performance standard applies. If the discharge qualifies as fill, the performance standard does not apply; and there was no earlier agency practice or policy to the contrary. Pp. 288–289.

(iii) Remarks made by the two agencies in promulgating the fill regulation, which pledge that the EPA's "previou[s] determination[s]" with regard to the application of performance standards "remai[n] valid," are not conclusive of the question at issue. The Memorandum has followed this policy by applying the performance standard to the discharge of water from the lake into the creek. The remarks do not state that the EPA will apply such standards to discharges of fill material. Pp. 289–290.

(iv) While SEACC cites no instance in which the EPA has applied a performance standard to a discharge of fill material, Coeur Alaska cites two instances in which the Corps issued a § 404 permit authorizing a mine to discharge solid waste as fill material. These permits illustrate that the agencies did not have a prior practice of applying EPA performance standards to discharges of mining wastes that qualify as fill material. Pp. 290–291.

486 F. 3d 638, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, BREYER, and ALITO, JJ., joined, and in which SCALIA, J., joined in part. BREYER, J., filed a concurring opinion, *post*, p. 291. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 295. GINSBURG, J., filed a dissenting opinion, in which STEVENS and SOUTER, JJ., joined, *post*, p. 296.

Theodore B. Olson argued the cause for petitioners in both cases. With him on the briefs for petitioner Coeur Alaska,

Inc., were *Matthew D. McGill*, *Aaron D. Lindstrom*, and *Robert A. Maynard*. *Talis J. Colberg*, Attorney General of Alaska, *Cameron M. Leonard*, Assistant Attorney General, *Jonathan S. Franklin*, and *Tillman J. Breckenridge* filed briefs for petitioner State of Alaska.

Former *Solicitor General Garre* argued the cause for the federal respondents urging reversal in both cases. With him on the briefs were *Assistant Attorney General Tenpas*, *Deputy Solicitor General Stewart*, *Pratik A. Shah*, *Lane McFadden*, *Earl H. Stockdale*, and *Marc L. Kesselman*. *David C. Crosby* filed briefs for respondent Goldbelt, Inc., under this Court's Rule 12.6 urging reversal in both cases.

Thomas S. Waldo argued the cause for respondent Southeast Alaska Conservation Council et al. With him on the brief was *Scott L. Nelson*.†

JUSTICE KENNEDY delivered the opinion of the Court.

These cases require us to address two questions under the Clean Water Act (CWA or Act). The first is whether the Act gives authority to the United States Army Corps of Engineers, or instead to the Environmental Protection Agency (EPA or Agency), to issue a permit for the discharge of min-

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†Briefs of *amici curiae* urging reversal in both cases were filed for the Council of Alaska Producers by *Paul Lawrence* and *Wilson L. Condon;* for the Mountain States Legal Foundation by *William Perry Pendley;* for the National Association of Home Builders by *Duane J. Desiderio*, *Thomas J. Ward*, and *Amy C. Chai;* for the National Mining Association et al. by *Christopher T. Handman* and *Harold P. Quinn, Jr.;* for the Pacific Legal Foundation et al. by *James S. Burling;* and for the Resource Development Council for Alaska, Inc., by *Michael Jungreis*.

Briefs of *amici curiae* urging affirmance in both cases were filed for American Rivers et al. by *Deborah A. Sivas* and *Leah J. Russin;* for the Nondalton Tribal Council et al. by *Seth P. Waxman*, *Paul R. Q. Wolfson*, *Ethan G. Shenkman*, *Brian Litmans*, and *Victoria Clark;* for Members of Congress by *David C. Vladeck;* and for the Honorable G. Tracy Mehan III by *Amy J. Wildermuth*.

Jeffrey C. Parsons and *Roger Flynn* filed a brief for David M. Chambers et al. as *amici curiae* in both cases.

ing waste, called slurry. The Corps of Engineers (or Corps) has issued a permit to petitioner Coeur Alaska, Inc. (Coeur Alaska), for a discharge of slurry into a lake in southeast Alaska. The second question is whether, when the Corps issued that permit, the agency acted in accordance with law. We conclude that the Corps was the appropriate agency to issue the permit and that the permit is lawful.

With regard to the first question, § 404(a) of the CWA grants the Corps the power to "issue permits . . . for the discharge of . . . fill material." 86 Stat. 884, 33 U. S. C. § 1344(a). But the EPA also has authority to issue permits for the discharge of pollutants. Section 402 of the Act grants the EPA authority to "issue a permit for the discharge of any pollutant," "[e]xcept as provided in" § 404. 33 U. S. C. § 1342(a). We conclude that because the slurry Coeur Alaska wishes to discharge is defined by regulation as "fill material," 40 CFR § 232.2 (2008), Coeur Alaska properly obtained its permit from the Corps of Engineers, under § 404, rather than from the EPA, under § 402.

The second question is whether the Corps permit is lawful. Three environmental groups, respondents here, sued the Corps under the Administrative Procedure Act, arguing that the issuance of the permit by the Corps was "not in accordance with law." 5 U. S. C. § 706(2)(A). The environmental groups are Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation (collectively, SEACC). The State of Alaska and Coeur Alaska are petitioners here.

SEACC argues that the permit from the Corps is unlawful because the discharge of slurry would violate an EPA regulation promulgated under § 306(b) of the CWA, 33 U. S. C. § 1316(b). The EPA regulation, which is called a "new source performance standard," forbids mines like Coeur Alaska's from discharging "process wastewater" into the navigable waters. 40 CFR § 440.104(b)(1). Coeur Alaska, the State of Alaska, and the federal agencies maintain that the Corps permit is lawful nonetheless because the EPA's

performance standard does not apply to discharges of fill material.

Reversing the judgment of the District Court, the Court of Appeals held that the EPA's performance standard applies to this discharge so that the permit from the Corps is unlawful.

I

A

Petitioner Coeur Alaska plans to reopen the Kensington Gold Mine, located some 45 miles north of Juneau, Alaska. The mine has been closed since 1928, but Coeur Alaska seeks to make it profitable once more by using a technique known as "froth flotation." Coeur Alaska will churn the mine's crushed rock in tanks of frothing water. Chemicals in the water will cause gold-bearing minerals to float to the surface, where they will be skimmed off.

At issue is Coeur Alaska's plan to dispose of the mixture of crushed rock and water left behind in the tanks. This mixture is called slurry. Some 30 percent of the slurry's volume is crushed rock, resembling wet sand, which is called tailings. The rest is water.

The standard way to dispose of slurry is to pump it into a tailings pond. The slurry separates in the pond. Solid tailings sink to the bottom, and water on the surface returns to the mine to be used again.

Rather than build a tailings pond, Coeur Alaska proposes to use Lower Slate Lake, located some three miles from the mine in the Tongass National Forest. This lake is small—800 feet at its widest crossing, 2,000 feet at its longest, and 23 acres in area. See App. 138a, 212a. Though small, the lake is 51 feet deep at its maximum. The parties agree the lake is a navigable water of the United States and so is subject to the CWA. They also agree there can be no discharge into the lake except as the CWA and any lawful permit allow.

Over the life of the mine, Coeur Alaska intends to put 4.5 million tons of tailings in the lake. This will raise the lake-

bed 50 feet—to what is now the lake's surface—and will increase the lake's area from 23 to about 60 acres. *Id.*, at 361a (62 acres), 212a (56 acres). To contain this wider, shallower body of water, Coeur Alaska will dam the lake's downstream shore. The transformed lake will be isolated from other surface water. Creeks and stormwater runoff will detour around it. *Id.*, at 298a. Ultimately, lakewater will be cleaned by purification systems and will flow from the lake to a stream and thence onward. *Id.*, at 309a–312a.

B

Numerous state and federal agencies reviewed and approved Coeur Alaska's plans. At issue here are actions by two of those agencies: the Corps of Engineers and the EPA.

1

The CWA classifies crushed rock as a "pollutant." 33 U. S. C. § 1362(6). On the one hand, the Act forbids Coeur Alaska's discharge of crushed rock "[e]xcept as in compliance" with the Act. CWA § 301(a), 33 U. S. C. § 1311(a). Section 404(a) of the CWA, on the other hand, empowers the Corps to authorize the discharge of "dredged or fill material." 33 U. S. C. § 1344(a). The Corps and the EPA have together defined "fill material" to mean any "material [that] has the effect of . . . [c]hanging the bottom elevation" of water. 40 CFR § 232.2. The agencies have further defined the "discharge of fill material" to include "placement of . . . slurry, or tailings or similar mining-related materials." *Ibid.*

In these cases the Corps and the EPA agree that the slurry meets their regulatory definition of "fill material." On that premise the Corps evaluated the mine's plan for a § 404 permit. After considering the environmental factors required by § 404(b), the Corps issued Coeur Alaska a permit to pump the slurry into Lower Slate Lake. App. 340a–378a.

In granting the permit the Corps followed the steps set forth by § 404. Section 404(b) requires the Corps to consider the environmental consequences of every discharge it allows. 33 U. S. C. § 1344(b). The Corps must apply guidelines written by the EPA pursuant to § 404(b). See *ibid.;* 40 CFR pt. 230 (EPA guidelines). Applying those guidelines here, the Corps determined that Coeur Alaska's plan to use Lower Slate Lake as a tailings pond was the "least environmentally damaging practicable" way to dispose of the tailings. App. 366a. To conduct that analysis, the Corps compared the plan to the proposed alternatives.

The Corps determined that the environmental damage caused by placing slurry in the lake will be temporary. And during that temporary disruption, Coeur Alaska will divert waters around the lake through pipelines built for this purpose. *Id.*, at 298a. Coeur Alaska will also treat water flowing from the lake into downstream waters, pursuant to strict EPA criteria. *Ibid.;* see Part I–B–2, *infra.* Though the slurry will at first destroy the lake's small population of common fish, that population may later be replaced. After mining operations are completed, Coeur Alaska will help "recla[im]" the lake by "[c]apping" the tailings with about four inches of "native material." App. 361a; *id.*, at 309a. The Corps concluded that

> "[t]he reclamation of the lake will result in more emergent wetlands/vegetated shallows with moderate values for fish habitat, nutrient recycling, carbon/detrital export and sediment/toxicant retention, and high values for wildlife habitat." *Id.*, at 361a.

If the tailings did not go into the lake, they would be placed on nearby wetlands. The resulting pile would rise twice as high as the Pentagon and cover three times as many acres. Reply Brief for Petitioner Coeur Alaska 27. If it were chosen, that alternative would destroy dozens of acres of wetlands—a permanent loss. App. 365a–366a. On the

premise that when the mining ends the lake will be at least as environmentally hospitable, if not more so, than now, the Corps concluded that placing the tailings in the lake will cause less damage to the environment than storing them above ground: The reclaimed lake will be "more valuable to the aquatic ecosystem than a permanently filled wetland . . . that has lost all aquatic functions and values." *Id.*, at 361a; see also *id.*, at 366a.

2

The EPA had the statutory authority to veto the Corps permit, and prohibit the discharge, if it found the plan to have "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas." CWA §404(c), 33 U. S. C. §1344(c). After considering the Corps' findings, the EPA did not veto the Corps permit, even though, in its view, placing the tailings in the lake was not the "environmentally preferable" means of disposing of them. App. 300a. By declining to exercise its veto, the EPA in effect deferred to the judgment of the Corps on this point.

The EPA's involvement extended beyond the Agency's veto consideration. The EPA also issued a permit of its own—not for the discharge from the mine into the lake but for the discharge from the lake into a downstream creek. *Id.*, at 287a–331a. Section 402 grants the EPA authority to "issue a permit for the discharge of any pollutant," "[e]xcept as provided in [CWA §404]." 33 U. S. C. §1342(a). The EPA's §402 permit authorizes Coeur Alaska to discharge water from Lower Slate Lake into the downstream creek, subject to strict water-quality limits that Coeur Alaska must regularly monitor. App. 303a–304a, 309a.

The EPA's authority to regulate this discharge comes from a regulation, termed a "new source performance standard," that it has promulgated under authority granted to it by §306(b) of the CWA. Section 306(b) gives the EPA authority to regulate the amount of pollutants that certain catego-

ries of new sources may discharge into the navigable waters of the United States. 33 U. S. C. § 1316(b). Pursuant to this authority, the EPA in 1982 promulgated a new source performance standard restricting discharges from new froth-flotation gold mines like Coeur Alaska's. The standard is stringent: It allows "no discharge of process wastewater" from these mines. 40 CFR § 440.104(b)(1).

Applying that standard to the discharge of water from Lower Slate Lake into the downstream creek, the EPA's § 402 permit sets strict limits on the amount of pollutants the water may contain. The permit requires Coeur Alaska to treat the water using "reverse osmosis" to remove aluminum, suspended solids, and other pollutants. App. 298a; *id.*, at 304a. Coeur Alaska must monitor the water flowing from the lake to be sure that the pollutants are kept to low, specified minimums. *Id.*, at 326a–330a.

C

SEACC brought suit against the Corps of Engineers and various of its officials in the United States District Court for the District of Alaska. The Corps permit was not in accordance with law, SEACC argued, for two reasons. First, in SEACC's view, the permit was issued by the wrong agency—Coeur Alaska ought to have sought a § 402 permit from the EPA, just as the company did for the discharge of water from the lake into the downstream creek. See Part I–B–2, *supra.* Second, SEACC contended that regardless of which agency issued the permit, the discharge itself is unlawful because it will violate the EPA new source performance standard for froth-flotation gold mines. (This is the same performance standard described above, which the EPA has already applied to the discharge of water from the lake into the downstream creek. See *ibid.*) SEACC argued that this performance standard also applies to the discharge of slurry into the lake. It contended further that the performance standard is a binding implementation of § 306.

Section 306(e) of the CWA makes it "unlawful" for Coeur Alaska to "operate" the mine "in violation of" the EPA's performance standard. 33 U. S. C. § 1316(e).

Coeur Alaska and the State of Alaska intervened as defendants. Both sides moved for summary judgment. The District Court granted summary judgment in favor of the defendants.

The Court of Appeals for the Ninth Circuit reversed and ordered the District Court to vacate the Corps of Engineers' permit. *Southeast Alaska Conservation Council* v. *United States Army Corps of Engs.*, 486 F. 3d 638, 654–655 (2007). The court acknowledged that Coeur Alaska's slurry "facially meets the Corps' current regulatory definition of 'fill material,'" *id.*, at 644, because it would have the effect of raising the lake's bottom elevation. But the court also noted that the EPA's new source performance standard "prohibits discharges from froth-flotation mills." *Ibid.* The Court of Appeals concluded that "[b]oth of the regulations appear to apply in this case, yet they are at odds." *Ibid.* To resolve the conflict, the court turned to what it viewed as "the plain language of the Clean Water Act." *Ibid.* The court held that the EPA's new source performance standard "applies to discharges from the froth-flotation mill at Coeur Alaska's Kensington Gold Mine into Lower Slate Lake." *Ibid.*

In addition to the text of the CWA, the Court of Appeals also relied on the agencies' statements made when promulgating their current and prior definitions of "fill material." These statements, in the Court of Appeals' view, demonstrated the agencies' intent that the EPA's new source performance standard govern discharges like Coeur Alaska's. *Id.*, at 648–654.

The Court of Appeals concluded that Coeur Alaska required a § 402 permit for its slurry discharge, that the Corps lacked authority to issue such a permit under § 404, and that the proposed discharge was unlawful because it would violate the EPA new source performance standard and § 306(e).

The decision of the Court of Appeals in effect reallocated the division of responsibility that the Corps and the EPA had been following. The Court granted certiorari. 554 U. S. 931 (2008). We now hold that the decision of the Court of Appeals was incorrect.

II

The question of which agency has authority to consider whether to permit the slurry discharge is our beginning inquiry. We consider first the authority of the EPA and second the authority of the Corps. Our conclusion is that under the CWA the Corps had authority to determine whether Coeur Alaska was entitled to the permit governing this discharge.

A

Section 402 gives the EPA authority to issue "permit[s] for the discharge of any pollutant," with one important exception: The EPA may not issue permits for fill material that fall under the Corps' § 404 permitting authority. Section 402(a) states:

> "*Except as provided in . . . [CWA § 404, 33 U. S. C. § 1344]*, the Administrator may . . . issue a permit for the discharge of any pollutant, . . . notwithstanding [CWA § 301(a), 33 U. S. C. § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under [CWA § 301, 33 U. S. C. § 1311; CWA § 302, 33 U. S. C. § 1312; CWA § 306, 33 U. S. C. § 1316; CWA § 307, 33 U. S. C. § 1317; CWA § 308, 33 U. S. C. § 1318; CWA § 403, 33 U. S. C. § 1343], or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter." 33 U. S. C. § 1342(a)(1) (emphasis added).

Section 402 thus prohibits the EPA from exercising permitting authority that is "provided [to the Corps] in" § 404.

This is not to say the EPA has no role with respect to the environmental consequences of fill. The EPA's function is different, in regulating fill, from its function in regulating other pollutants, but the Agency does exercise some authority. Section 404 assigns the EPA two tasks in regard to fill material. First, the EPA must write guidelines for the Corps to follow in determining whether to permit a discharge of fill material. CWA § 404(b); 33 U. S. C. § 1344(b). Second, the Act gives the EPA authority to "prohibit" any decision by the Corps to issue a permit for a particular disposal site. CWA § 404(c); 33 U. S. C. § 1344(c). We, and the parties, refer to this as the EPA's power to veto a permit.

The Act is best understood to provide that if the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402.

Even if there were ambiguity on this point, the EPA's own regulations would resolve it. Those regulations provide that "[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA" "do not require [§ 402] permits" from the EPA. 40 CFR § 122.3.

In SEACC's view, this regulation implies that some "fill material" discharges are not regulated under § 404—else, SEACC asks, why would the regulation lack a comma before the word "which," and thereby imply that only a subset of "[d]ischarges of . . . fill material" are "regulated under section 404." *Ibid.*

The agencies, however, have interpreted this regulation otherwise. In the agencies' view the regulation essentially restates the text of § 402, and prohibits the EPA from issuing permits for discharges that "are regulated under section 404." 40 CFR § 122.3(b); cf. CWA § 402(a) ("[e]xcept as provided in . . . [§ 404], the Administrator may . . . issue a permit"). Before us, the EPA confirms this reading of the regulation. Brief for Federal Respondents 27. The Agency's interpretation is not "plainly erroneous or inconsistent with

the regulation"; and so we accept it as correct. *Auer* v. *Robbins*, 519 U. S. 452, 461 (1997) (internal quotation marks omitted).

The question whether the EPA is the proper agency to regulate the slurry discharge thus depends on whether the Corps of Engineers has authority to do so. If the Corps has authority to issue a permit, then the EPA may not do so. We turn to the Corps' authority under § 404.

B

Section 404(a) gives the Corps power to "issue permits . . . for the discharge of dredged or fill material." 33 U. S. C. § 1344(a). As all parties concede, the slurry meets the definition of fill material agreed upon by the agencies in a joint regulation promulgated in 2002. That regulation defines "fill material" to mean any "material [that] has the effect of . . . [c]hanging the bottom elevation" of water—a definition that includes "slurry, or tailings or similar mining-related materials." 40 CFR § 232.2.

SEACC concedes that the slurry to be discharged meets the regulation's definition of fill material. Brief for Respondent SEACC et al. 20. Its concession on this point is appropriate because slurry falls well within the central understanding of the term "fill," as shown by the examples given by the regulation. See 40 CFR § 232.2 ("Examples of such fill material include, but are not limited to: rock, sand, soil, clay . . . "). The regulation further excludes "trash or garbage" from its definition. *Ibid.* SEACC expresses a concern that Coeur Alaska's interpretation of the statute will lead to § 404 permits authorizing the discharges of other solids that are now restricted by EPA standards. Brief for Respondent SEACC et al. 44–45 (listing, for example, "feces and uneaten feed," "litter," and waste produced in "battery manufacturing"). But these extreme instances are not presented by the cases now before us. If, in a future case, a discharger of one of these solids were to seek a § 404 permit,

the dispositive question for the agencies would be whether the solid at issue—for instance, "feces and uneaten feed"—came within the regulation's definition of "fill." SEACC cites no instance in which the agencies have so interpreted their fill regulation. If that instance did arise, and the agencies were to interpret the fill regulation as SEACC fears, then SEACC could challenge that decision as an unlawful interpretation of the fill regulation; or SEACC could claim that the fill regulation as interpreted is an unreasonable interpretation of § 404. The difficulties are not presented here, however, because the slurry meets the regulation's definition of fill.

Rather than challenge the agencies' decision to define the slurry as fill, SEACC instead contends that § 404 contains an implicit exception. According to SEACC, § 404 does not authorize the Corps to permit a discharge of fill material if that material is subject to an EPA new source performance standard.

But § 404's text does not limit its grant of power in this way. Instead, § 404 refers to all "fill material" without qualification. Nor do the EPA regulations support SEACC's reading of § 404. The EPA has enacted guidelines, pursuant to § 404(b), to guide the Corps' permitting decision. 40 CFR pt. 230. Those guidelines do not strip the Corps of power to issue permits for fill in cases where the fill is also subject to an EPA new source performance standard.

SEACC's reading of § 404 would create numerous difficulties for the regulated industry. As the regulatory regime stands now, a discharger must ask a simple question—is the substance to be discharged fill material or not? The fill regulation, 40 CFR § 232.2, offers a clear answer to that question; and under the agencies' view, that answer decides the matter—if the discharge is fill, the discharger must seek a § 404 permit from the Corps; if not, only then must the discharger consider whether any EPA performance standard

applies, so that the discharger requires a § 402 permit from the EPA.

Under SEACC's interpretation, however, the discharger would face a more difficult problem. The discharger would have to ask—is the fill material also subject to one of the many hundreds of EPA performance standards, so that the permit must come from the EPA, not the Corps? The statute gives no indication that Congress intended to burden industry with that confusing division of permit authority.

The regulatory scheme discloses a defined, and workable, line for determining whether the Corps or the EPA has the permit authority. Under this framework, the Corps of Engineers, and not the EPA, has authority to permit Coeur Alaska's discharge of the slurry.

III

A second question remains: In issuing the permit did the Corps act in violation of a statutory mandate so that the issuance was "not in accordance with law"? 5 U. S. C. § 706(2)(A). SEACC contends that the slurry discharge will violate the EPA's new source performance standard and that the Corps' permit is made "unlawful" by CWA § 306(e). Petitioners and the agencies argue that the permit is lawful because the EPA performance standard and § 306(e) do not apply to fill material regulated by the Corps. In order to determine whether the Corps' permit is lawful we must answer the question: Do EPA performance standards, and § 306(e), apply to discharges of fill material?

We address in turn the statutory text of the CWA, the agencies' regulations construing it, and the EPA's subsequent interpretation of those regulations. Because Congress has not "directly spoken" to the "precise question" of whether an EPA performance standard applies to discharges of fill material, the statute alone does not resolve the case. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984). We look first to the agency

regulations, which are entitled to deference if they resolve the ambiguity in a reasonable manner. *Ibid.;* see *United States* v. *Mead Corp.*, 533 U. S. 218, 226–227 (2001). But the regulations, too, are ambiguous, so we next turn to the agencies' subsequent interpretation of those regulations. *Id.*, at 234–238; *Auer*, 519 U. S., at 461. In an internal memorandum the EPA explained that its performance standards do not apply to discharges of fill material. That interpretation is not "plainly erroneous or inconsistent with the regulation[s]," and so we accept it as correct. *Ibid.* (internal quotation marks omitted). Though SEACC contends that the agencies' interpretation is not entitled to deference because it contradicts the agencies' published statements and prior practice, we disagree with SEACC's reading of those statements and of the regulatory record.

A

As for the statutory argument, SEACC claims the CWA § 404 permit is unlawful because § 306(e) forbids the slurry discharge. Petitioners and the federal agencies, in contrast, contend that § 306(e) does not apply to the slurry discharge.

1

To address SEACC's statutory argument, it is necessary to review the EPA's responsibilities under the CWA. As noted, § 306 empowers the EPA to regulate the froth-flotation gold mining industry. See 33 U. S. C. § 1316(b). Pursuant to this authority, EPA promulgated the new source performance standard relied upon by SEACC. The standard is stringent. If it were to apply here, it would allow "no discharge of process wastewater" from the mine. 40 CFR § 440.104(b)(1).

The term "process wastewater" includes solid waste. So the regulation forbids not only pollutants that dissolve in water but also solid pollutants suspended in water—what the Agency terms "total suspended solids," or TSS. See

§ 440.104(a) (limiting the amount of TSS from other kinds of mines); see also EPA Development Document for Effluent Limitations Guidelines and Standards for the Ore Mining and Dressing Point Source Category 157–158 (Nov. 1982) (the amount of TSS in "wastewater" from froth-flotation mines is "generally high"); *id.*, at 175 (Table VI–6) (measuring the amounts of TSS in samples of froth-flotation mines' discharges); *id.*, at 194 (stating an intent to "regulat[e]" TSS); *id.*, at 402 (evaluating the costs of constructing a "settling pond"); *id.*, at 535 (concluding that even in mountainous regions, a froth-flotation mine will be able to construct a "tailings impoundment" to "provide a disposal area for mill tailings").

Were there any doubt about whether the EPA's new source performance standard forbade solids as well as soluble pollutants, the Agency's action in these cases would resolve it. Here, the EPA's § 402 permit authorizes Coeur Alaska to discharge water from Lower Slate Lake into a downstream creek, provided the water meets the quality requirements set by the performance standard. This demonstrates that the performance standard regulates solid waste. The EPA's permit not only restricts the amount of total suspended solids, App. 327a (Table 3), but also prohibits the mine from allowing any "floating solids" to flow from the lake. *Id.*, at 328a. No party disputes the EPA's authority to regulate these discharges of solid mining waste; and no party questions the validity of the EPA's new source performance standard when it is applicable.

When the performance standard applies to a point source, § 306(e) makes it "unlawful" for that point source to violate it: "[I]t shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." CWA § 306(e), 33 U. S. C. § 1316(e).

SEACC argues that this provision, § 306(e), prohibits the mine from discharging slurry into Lower Slate Lake.

SEACC contends the new source performance standard is, in the words of § 306(e), "applicable to" the mine. Both the text of the performance standard and the EPA's application of it to the discharge of mining waste from Lower Slate Lake demonstrate that the performance standard is "applicable to" Coeur Alaska's mine in some circumstances. And so, SEACC reasons, it follows that because the new source performance standard forbids even minute discharges of solid waste, it also forbids the slurry discharge, 30 percent of which is solid waste.

2

For their part, the State of Alaska and the federal agencies claim that the Act is unambiguous in the opposite direction. They rely on § 404 of the Act. As explained above, that section authorizes the Corps of Engineers to determine whether to issue a permit allowing the discharge of the slurry. Petitioners and the agencies argue that § 404 grants the Corps authority to do so without regard to the EPA's new source performance standard or the § 306(e) prohibition discussed above.

Petitioners and the agencies make two statutory arguments based on § 404's silence in regard to § 306. First, they note that nothing in § 404 requires the Corps to consider the EPA's new source performance standard or the § 306(e) prohibition. That silence advances the argument that § 404's grant of authority to "issue permits" contradicts § 306(e)'s declaration that discharges in violation of new source performance standards are "unlawful."

Second, petitioners and the agencies point to § 404(p), which protects § 404 permitees from enforcement actions by the EPA or private citizens:

> "Compliance with a permit issued pursuant to this section . . . shall be deemed compliance, for purposes of sections 1319 [CWA § 309] and 1365 [CWA § 505] of this title, with sections 1311 [CWA § 301], 1317 [CWA

> § 307], and 1343 [CWA § 403] of this title." 33 U. S. C. § 1344(p).

Here again, their argument is that silence is significant. Section 404(p) protects the permittee from lawsuits alleging violations of CWA § 301 (which bars the discharge of "any pollutant" "[e]xcept as in compliance" with the Act); § 307 (which bars the discharge of "toxic pollutants"); and § 403 (which bars discharges into the sea). But § 404(p) does not in express terms protect the permittee from a lawsuit alleging a violation of § 306(e) or of the EPA's new source performance standards. Section 404(p)'s silence regarding § 306 is made even more significant because a parallel provision in § 402 does protect a § 402 permittee from an enforcement action alleging a violation of § 306. CWA § 402(k), 33 U. S. C. § 1342(k).

In our view, Congress' omission of § 306 from § 404, and its inclusion of § 306 in § 402(k), is evidence that Congress did not intend § 306(e) to apply to Corps § 404 permits or to discharges of fill material. If § 306 did apply, then the Corps would be required to evaluate each permit application for compliance with § 306, and issue a permit only if it found the discharge would comply with § 306. But even if that finding were made, it is not clear that the § 404 permittee would be protected from a suit seeking a judicial determination that the discharge violates § 306.

3

The CWA is ambiguous on the question whether § 306 applies to discharges of fill material regulated under § 404. On the one hand, § 306 provides that a discharge that violates an EPA new source performance standard is "unlawful"—without any exception for fill material. On the other hand, § 404 grants the Corps blanket authority to permit the discharge of fill material—without any mention of § 306. This tension indicates that Congress has not "directly spoken" to

the "precise question" whether § 306 applies to discharges of fill material. *Chevron*, 467 U. S., at 842.

B

Before turning to how the agencies have resolved that question, we consider the formal regulations that bear on §§ 306 and 404. See *Mead*, 533 U. S., at 234–238. The regulations, like the statutes, do not address the question whether § 306, and the EPA new source performance standards promulgated under it, applies to § 404 permits and the discharges they authorize. There is no regulation, for example, interpreting § 306(e)'s text—"standard of performance applicable to such source"—to mean that a performance standard ceases to be "applicable" the moment the discharge qualifies as fill material, which would resolve the cases in petitioners' favor. Nor is there a regulation providing that the Corps, in deciding whether to grant a permit under § 404, must deny that permit if the discharge would violate § 306(e), which would decide the cases for SEACC.

Rather than address the tension between §§ 306 and 404, the regulations instead implement the statutory framework without elaboration on this point. Each of the two principal regulations, which have been mentioned above, seems to stand on its own without reference to the other. The EPA's new source performance standard contains no exception for fill material; and it forbids any discharge of "process wastewater," a term that includes solid wastes. 40 CFR § 440.104(b)(1); see Part III–A–1, *supra*. The agencies' joint regulation defining fill material is also unqualified. It includes "slurry, or tailings or similar mining-related materials" in its definition of a "discharge of fill material," 40 CFR § 232.2; and it contains no exception for slurry that is regulated by an EPA performance standard.

The parties point to additional regulations, but these provisions do not offer a clear basis of reconciliation. An EPA regulation, mentioned above, provides that "[d]ischarges of

dredged or fill material into waters of the United States which are regulated under section 404 of CWA" "do not require [§ 402] permits" from the EPA. § 122.3. As we have explained, however, this merely states that a permit for this discharge cannot be issued by the EPA. See Part II, *supra*. The regulation does not answer the question whether the EPA's new source performance standard and § 306(e) apply to a discharge regulated by the Corps under § 404.

The agencies also direct us to the § 404(b) guidelines written by the EPA to guide the Corps permitting decision. See 40 CFR pt. 230. The agencies note that these guidelines do not expressly require the Corps, in issuing a permit, to consider whether the discharge would violate EPA's performance standards. Here we think failure to mention § 306 or the EPA new source performance standards does offer some indication that these are not relevant to the § 404 permit, though the argument falls short of being conclusive. The Corps' own regulations require the agency to evaluate permit applications "for compliance with applicable [EPA] effluent limitations." 33 CFR § 320.4(d) (2008). The regulations do not answer whether the new source performance standard is "applicable" to a discharge of fill material.

C

The regulations do not give a definitive answer to the question whether § 306 applies to discharges regulated by the Corps under § 404, but we do find that agency interpretation and agency application of the regulations are instructive and to the point. *Auer*, 519 U. S., at 461. The question is addressed and resolved in a reasonable and coherent way by the practice and policy of the two agencies, all as recited in a memorandum written in May 2004 by Diane Regas, then the Director of the EPA's Office of Wetlands, Oceans and Watersheds, to Randy Smith, the Director of the EPA's regional Office of Water with responsibility over the mine. App. 141a–149a (Regas Memorandum). The Memorandum,

though not subject to sufficiently formal procedures to merit *Chevron* deference, see *Mead*, *supra*, at 234–238, is entitled to a measure of deference because it interprets the agencies' own regulatory scheme. See *Auer*, *supra*, at 461.

The Regas Memorandum explains:

> "As a result [of the fact that the discharge is regulated under § 404], the regulatory regime applicable to discharges under section 402, including effluent limitations guidelines and standards, such as those applicable to gold ore mining . . . do not apply to the placement of tailings into the proposed impoundment [of Lower Slate Lake]. See 40 CFR § 122.3(b)." App. 144a–145a.

The regulation that the Memorandum cites—40 CFR § 122.3—is one we considered above and found ambiguous. That regulation provides: "Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA" "do not require [§ 402] permits." The Regas Memorandum takes an instructive interpretive step when it explains that because the discharge "do[es] not require" an EPA permit, *ibid.*, the EPA's performance standard "do[es] not apply" to the discharge. App. 145a. The Memorandum presents a reasonable interpretation of the regulatory regime. We defer to the interpretation because it is not "plainly erroneous or inconsistent with the regulation[s]." *Auer*, *supra*, at 461 (internal quotation marks omitted). Five factors inform that conclusion.

First, the Memorandum preserves a role for the EPA's performance standard. It confines the Memorandum's scope to closed bodies of water, like the lake here. App. 142a–143a, n. 1. When slurry is discharged into a closed body of water, the Memorandum explains, the EPA's performance standard retains an important role in regulating the discharge into surrounding waters. The Memorandum does not purport to invalidate the EPA's performance standard.

Second, the Memorandum acknowledges that this is not an instance in which the discharger attempts to evade the requirements of the EPA's performance standard. The Kensington Mine is not, for example, a project that smuggles a discharge of EPA-regulated pollutants into a separate discharge of Corps-regulated fill material. The instant cases do not present a process or plan designed to manipulate the outer boundaries of the definition of "fill material" by labeling minute quantities of EPA-regulated solids as fill. The Memorandum states that when a discharge has only an "incidental filling effect," the EPA's performance standard continues to govern that discharge. *Id.*, at 145a.

Third, the Memorandum's interpretation preserves the Corps' authority to determine whether a discharge is in the public interest. See 33 CFR §320.4(a)(1); 40 CFR §230.10. The Corps has significant expertise in making this determination. Applying it, the Corps determined that placing slurry in the lake will improve that body of water by making it wider, shallower, and so more capable of sustaining aquatic life. The Corps determined, furthermore, that the alternative—a heap of tailings larger than the Pentagon placed upon wetlands—would cause more harm to the environment. Because the Memorandum preserves an important role for the Corps' expertise, its conclusion that the EPA's performance standard does not apply is a reasonable one.

Fourth, the Regas Memorandum's interpretation does not allow toxic pollutants (as distinguished from other, less dangerous pollutants, such as slurry) to enter the navigable waters. The EPA has regulated toxic pollutants under a separate provision, §307 of the CWA, and the EPA's §404(b) guidelines require the Corps to deny a §404 permit for any discharge that would violate the EPA's §307 toxic-effluent limitations. 40 CFR §230.10(b)(2).

Fifth, as a final reason to defer to the Regas Memorandum, we find it a sensible and rational construction that reconciles §§306, 402, and 404, and the regulations implementing them,

which the alternatives put forward by the parties do not. SEACC's argument, that § 402 applies to this discharge and not § 404, is not consistent with the statute and regulations, as already noted. See Part II, *supra.*

The Court requested the parties to submit supplemental briefs addressing whether the CWA contemplated that both agencies would issue a permit for a discharge. 556 U. S. 1219 (2009). A two-permit regime would allow the EPA to apply its performance standard, while the Corps could apply its § 404(b) criteria. The parties agree, however, that a two-permit regime is contrary to the statute and the regulations. We conclude that this is correct. A two-permit regime would cause confusion, delay, expense, and uncertainty in the permitting process. In agreement with all of the parties, we conclude that, when a permit is required to discharge fill material, either a § 402 or a § 404 permit is necessary. Here, we now hold, § 404 applies, not § 402. See Part II, *supra.*

The Regas Memorandum's interpretation of the agencies' regulations is consistent with the regulatory scheme as a whole. The Memorandum preserves a role for the EPA's performance standards; it guards against the possibility of evasion of those standards; it employs the Corps' expertise in evaluating the effects of fill material on the aquatic environment; it does not allow toxic pollutants to be discharged; and we have been offered no better way to harmonize the regulations. We defer to the EPA's conclusion that its performance standard does not apply to the initial discharge of slurry into the lake but applies only to the later discharge of water from the lake into the downstream creek.

D

SEACC argues against deference to the Regas Memorandum. In its view the Regas Memorandum is contrary to published agency statements and earlier agency practice. SEACC cites three agency statements: A 1986 "memorandum of understanding" between the EPA and the Corps re-

garding the definition of fill material; the preamble to the agencies' current 2002 fill regulation; and comments made by the agencies in promulgating the 2002 fill regulation. These arguments are not convincing.

1

In 1986, to reconcile their then-differing definitions of "fill material," the EPA and the Corps issued a "memorandum of agreement." 51 Fed. Reg. 8871 (MOA). The memorandum was not made subject to notice-and-comment procedures, but it was published in the Federal Register. It defined the statutory term "fill material" until the current definition took effect in 2002. Brief for Federal Respondents 30–31, n. 8.

SEACC points to paragraph B(5) of the MOA, which reads:

> "[A] pollutant (other than dredged material) will normally be considered by EPA and the Corps to be subject to section 402 if it is a discharge in liquid, semi-liquid, or suspended form or if it is a discharge of solid material of a homogeneous nature normally associated with single industry wastes . . . . These materials include placer mining wastes, phosphate mining wastes, titanium mining wastes, sand and gravel wastes, fly ash, and drilling muds. As appropriate, EPA and the Corps will identify additional such materials." 51 Fed. Reg. 8872.

It is true, as SEACC notes, that this passage suggests that § 402 will "normally" apply to discharges of "suspended"—*i. e.*, solid—pollutants. But that statement is not contrary to the Regas Memorandum, which acknowledges that the EPA retains authority under § 402 to regulate the discharge of suspended solids from Lower Slate Lake into downstream waters. This passage does not address the question presented by these cases, and answered by the Regas Memorandum, as to whether the EPA's performance standard applies when the discharge qualifies as fill material. In fact, the MOA's preamble suggests that when a discharge qualifies as

"fill material," the Corps retains authority to regulate it under § 404:

> "Discharges listed in the Corps definition of 'discharge of fill material,' . . . remain subject to section 404 even if they occur in association with discharges of wastes meeting the criteria in the agreement for section 402 discharges." *Id.*, at 8871.

The MOA is quite consistent with the agencies' determination that the Corps regulates all discharges of fill material and that § 306 does not apply to these discharges.

2

SEACC draws our attention to the preamble of the current fill material regulation. 67 Fed. Reg. 31129 (2002) (final rule). It cites the opening passages of the preamble, which state:

> "[T]oday's rule is generally consistent with current agency practice and so it does not expand the types of discharges that will be covered under section 404." *Id.*, at 31133.

In SEACC's view, this passage demonstrates that the fill rule was not intended to displace the pre-existing froth-flotation gold mine performance standard, which has been on the books since 1982.

The preamble goes on to say, in a section entitled "Effluent Guideline Limitations and 402 Permits":

> "[W]e emphasize that today's rule generally is intended to maintain our existing approach to regulating pollutants under either section 402 or 404 of the CWA. Effluent limitation guidelines and new source performance standards ('effluent guidelines') promulgated under section 304 and 306 of the CWA establish limitations and standards for specified wastestreams from industrial categories, and those limitations and standards are in-

> corporated into permits issued under section 402 of the Act. EPA has never sought to regulate fill material under effluent guidelines. Rather, effluent guidelines restrict discharges of pollutants from identified waste-streams based upon the pollutant reduction capabilities of available treatment technologies. Recognizing that some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to settling of water-borne pollutants, we do not consider such pollutants to be 'fill material,' and nothing in today's rule changes that view. Nor does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA. Similarly, this rule does not alter the manner in which water quality standards currently apply under the section 402 or the section 404 programs." *Id.*, at 31135.

Although the preamble asserts it does not change agency policy with regard to EPA performance standards and § 402 permitting decisions, it is explicit in noting that the EPA has "never sought to regulate fill material under effluent guidelines." *Ibid.* The preamble, then, is consistent with the Regas Memorandum. If a discharge does not qualify as fill material, the EPA's new source performance standard applies. If the discharge qualifies as fill, the performance standard does not apply; and there was no earlier agency practice or policy to the contrary.

3

SEACC also cites remarks made by the agencies in response to public comments on the proposed fill material regulation. App. 22a–127a. These remarks were incorporated by reference into the administrative record. 67 Fed. Reg. 31131.

Responding to a question about whether "mine tailings" would be "subject to section 404 regulation as opposed to section 402" under the 2002 fill regulation, the agencies stated:

> "Today's final rule clarifies that any material that has the effect of fill is regulated under section 404 and further that the placement of 'overburden, slurry, or tailings or similar mining-related materials' is considered a discharge of fill material. Nevertheless, if EPA has previously determined that certain materials are subject to an [effluent limitation guideline] under specific circumstances, then that determination remains valid. Moreover, . . . permits issued pursuant to section 402 are intended to regulate process water and provide effluent limits that are protective of receiving water quality. This distinction provides the framework for today's rule." App. 48a.

This statement is not conclusive of the issue. SEACC notes that this response, like the regulation's preamble, pledges that EPA's "previou[s] determination[s]" with regard to the application of performance standards "remai[n] valid." But, as noted above, the Regas Memorandum has followed this policy by applying the EPA's performance standard to the discharge of water from the lake into the downstream creek. The response does not state that the EPA will apply its performance standards to discharges of fill material.

4

The agencies' published statements indicate adherence to the EPA's previous application and interpretation of its performance standards. SEACC cannot show that the agencies have changed their interpretation or application of their regulations.

SEACC cites no instance in which the EPA has applied one of its performance standards to a discharge of fill mate-

rial. By contrast, Coeur Alaska cites two instances in which the Corps issued a § 404 permit authorizing a mine to discharge solid waste (tailings) as fill material. See Brief for Petitioner Coeur Alaska 40–42. SEACC objects that those two § 404 permits authorized discharges that used the tailings to construct useful structures—a dam in one case, a tailings pond in another. Here, by contrast, SEACC contends that the primary purpose of the discharge is to use a navigable water to dispose of waste. *Ibid.* But that objection misses the point. The two § 404 permits cited by Coeur Alaska illustrate that the agencies did not have a prior practice of applying EPA performance standards to discharges of mining wastes that qualify as fill material.

SEACC has not demonstrated that the agencies have changed their policy, and it cannot show that the Regas Memorandum is contrary to the agencies' published statements.

* * *

We accord deference to the agencies' reasonable decision to continue their prior practice.

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

It is so ordered.

JUSTICE BREYER, concurring.

As I understand the Court's opinion, it recognizes a legal zone within which the regulating agencies might reasonably classify material either as "dredged or fill material" subject to § 404 of the Clean Water Act, 33 U. S. C. § 1344(a), or as a "pollutant," subject to §§ 402 and 306, 33 U. S. C. §§ 1342(a), 1316(a). Within this zone, the law authorizes the environmental agencies to classify material as the one or the other, so long as they act within the bounds of relevant regulations, and provided that the classification, considered in terms of

the purposes of the statutes and relevant regulations, is reasonable.

This approach reflects the difficulty of applying §§ 402 and 306 literally to *every* new-source-related discharge of a "pollutant." The Environmental Protection Agency (EPA) applies § 306 new source "performance standards" to a wide variety of discharges, ranging, for example, from those involved in the processing of apples into apple juice or apple cider, 40 CFR § 407.10 (2008); to the manufacturing of cement, § 411.10; to the production of fresh meat cuts by a meatcutter, § 432.60; and to the manufacture of pharmaceutical products by fermentation, § 439.10. See generally 40 CFR pts. 405–471 (containing more than 800 pages of "new source performance" and effluent limitation regulations). At the same time the regulations for any one point source often regulate numerous chemicals, minerals, and other substances produced by that point source; in the case of fermentation products, for example, the regulations provide performance standards for roughly 30 different chemicals. § 439.15. These "standards of performance" "reflect the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology . . . including, where practicable, a standard permitting no discharge of pollutants." 33 U. S. C. § 1316(a)(1).

To literally apply these performance standards so as to forbid the use of any of these substances as "fill," even when, say, they constitute no more than trace elements in dirt, crushed rock, or sand that is clearly being used as "fill" to build a levee or to replace dirt removed from a lake bottom may prove unnecessarily strict, cf. § 1362(6) (defining "pollutant" to include "rock"), to the point that such application would undermine the objective of § 404, which foresees the use of "dredged or fill material" in certain circumstances and with approval of the relevant agencies, § 1344. At minimum, the EPA might reasonably read the statute and the applica-

ble regulations as allowing the use of such material, say, crushed rock, as "fill" in some of these situations. Cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–844 (1984); *Auer* v. *Robbins*, 519 U. S. 452, 461 (1997).

At the same time, I recognize the danger that JUSTICE GINSBURG warns against, namely, that "[w]hole categories of regulated industries" might "gain immunity from a variety of pollution-control standards," if, say, a § 404-permit applicant simply adds "sufficient solid matter" to a pollutant "to raise the bottom of a water body," thereby turning a "pollutant" governed by § 306 into "fill" governed by § 404. *Post*, at 302 (dissenting opinion).

Yet there are safeguards against that occurring. For one thing, as the Court recognizes, see *ante*, at 275, it is not the case that *any* material that has the " 'effect of . . . [c]hanging the bottom elevation' " of the body of water is automatically subject to § 404, not § 402. The EPA has never suggested that it would interpret the regulations so as to turn § 404 into a loophole, permitting evasion of a "performance standard" simply because a polluter discharges enough pollutant to raise the bottom elevation of the body of water. For another thing, even where a matter is determined reasonably to be "fill" and consequently falls within § 404, the EPA can retain an important role in the permitting process. That is because the EPA may veto any § 404 plan that it finds has an "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas." § 1344(c). Finally, the EPA's decision not to apply § 306, but to allow permitting to proceed under § 404, must be a reasonable decision; and court review will help ensure that is so. 5 U. S. C. § 706.

In these cases, it seems to me that the EPA's interpretation of the statute as permitting the EPA/Corps of Engineers "fill" definition to apply to the cases at hand is reasonable, hence lawful. Lower Slate Lake, located roughly three

miles from the Kensington Gold Mine, is 51 feet deep, 800 feet wide, and 2,000 feet long; downstream from the lake is Slate Creek. Faced with a difficult choice between creating a huge pile of slurry on nearby wetlands or using part of the lake as a storage facility for mine tailings, see App. 294a–298a; see also *ante,* at 268–270, the EPA arrived at a compromise. On the one hand, it would treat mine tailings placed directly into the lake as "fill" under the § 404 permitting program. App. 144a. The tailings, the EPA recognized, would have the "immediate effect of filling the areas of water into which they are discharged." *Ibid.* But it would also treat any spillover of the tailings, or chemicals from the tailings, into any nearby waterway, most particularly Slate Creek (running out of Slate Lake) as requiring a § 402 permit. The EPA's § 306 "performance standard" would apply and that standard insists upon *no discharge of process wastewater at all. Id.,* at 145a; see also 40 CFR § 440.104(b). The EPA reached this result because it recognized that, even though pollutants discharged into the creek might come "in the form of suspended and settleable solids," such solids would "have, at most, an incidental filling effect." App. 145a. The EPA thereby sought to apply the distinction it had previously recognized between discharges that have the immediate effect of raising the bottom elevation of water, and those that only have the "associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants." See 67 Fed. Reg. 31135 (2002) (concluding that § 402 applies to the latter); see also Brief for G. Tracy Mehan III as *Amicus Curiae* 22–23.

I cannot say whether the EPA's compromise represents the best overall environmental result; but I do believe it amounts to the kind of detailed decision that the statutes delegate authority to the EPA, not the courts, to make (subject to the bounds of reasonableness). I believe the Court's views are consistent with those I here express. And with that understanding, I join its opinion.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join the opinion of the Court, except for its protestation, *ante*, at 283–284, that it is not according *Chevron* deference to the reasonable interpretation set forth in the memorandum sent by the Director of the Environmental Protection Agency's (EPA) Office of Wetlands, Oceans and Watersheds, to the Director of the EPA's regional Office of Water with responsibility over the Coeur Alaska mine—an interpretation consistently followed by both the EPA and the Corps of Engineers, and adopted by both agencies in the proceedings before this Court. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). The opinion purports to give this agency interpretation "a measure of deference" because it involves an interpretation of "the agencies' own regulatory scheme" and "'the regulatory regime,'" *ante*, at 284 (citing *Auer* v. *Robbins*, 519 U. S. 452, 461 (1997)). *Auer*, however, stands only for the principle that we defer to an agency's interpretation *of its own ambiguous regulation.* But it becomes obvious from the ensuing discussion that the referenced "regulatory scheme," and "regulatory regime" for which the Court accepts the agency interpretation, includes not just the agencies' own regulations but also (and indeed primarily) the conformity of those regulations with the ambiguous governing statute, which is the primary dispute here.

Surely the Court is not adding to our already inscrutable opinion in *United States* v. *Mead Corp.*, 533 U. S. 218 (2001), the irrational fillip that an agency position which otherwise does not qualify for *Chevron* deference *does* receive *Chevron* deference if it clarifies not just an ambiguous statute but *also* an ambiguous regulation. One must conclude, then, that if today's opinion is *not* according the agencies' reasonable and authoritative interpretation of the Clean Water Act *Chevron* deference, it is according some *new* type of deference—perhaps to be called in the future *Coeur Alaska* deference—which is identical to *Chevron* deference except for the name.

The Court's deference to the EPA and the Corps of Engineers in today's cases is eminently reasonable. It is quite impossible to achieve predictable (and relatively litigation-free) administration of the vast body of complex laws committed to the charge of executive agencies without the assurance that reviewing courts will accept reasonable and authoritative agency interpretation of ambiguous provisions. If we must not call that practice *Chevron* deference, then we have to rechristen the rose. Of course the only reason a new name is required is our misguided opinion in *Mead*, whose incomprehensible criteria for *Chevron* deference have produced so much confusion in the lower courts* that there has now appeared the phenomenon of *Chevron* avoidance—the practice of declining to opine whether *Chevron* applies or not. See Bressman, How *Mead* Has Muddled Judicial Review of Agency Action, 58 Vand. L. Rev. 1443, 1464 (2005).

I favor overruling *Mead.* Failing that, I am pleased to join an opinion that effectively ignores it.

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

Petitioner Coeur Alaska, Inc., proposes to discharge 210,000 gallons per day of mining waste into Lower Slate

*Compare, *e. g.*, *Kruse* v. *Wells Fargo Home Mortgage, Inc.*, 383 F. 3d 49, 61 (CA2 2004) (according *Chevron* deference to policy statements issued by Department of Housing and Urban Development), and *Schuetz* v. *Banc One Mortgage Corp.*, 292 F. 3d 1004, 1012 (CA9 2002) (same), with *Krzalic* v. *Republic Title Co.*, 314 F. 3d 875, 881 (CA7 2002) (denying *Chevron* deference to same policy statements). Compare *American Federation of Govt. Employees, AFL–CIO, Local 446* v. *Nicholson*, 475 F. 3d 341, 353–354 (CADC 2007) (according *Chevron* deference to informal adjudication by Department of Veterans Affairs), with *American Federation of Govt. Employees, AFL–CIO, Local 2152* v. *Principi*, 464 F. 3d 1049, 1057 (CA9 2006) (denying *Chevron* deference to similar action). It is not even clear that notice-and-comment rulemaking will assure *Chevron* deference to agency interpretation of an ambiguous statute. See *Rubie's Costume Co.* v. *United States*, 337 F. 3d 1350, 1355 (CA Fed. 2003) (customs classification).

Lake, a 23-acre subalpine lake in Tongass National Forest. The "tailings slurry" would contain concentrations of aluminum, copper, lead, and mercury. Over the life of the mine, roughly 4.5 million tons of solid tailings would enter the lake, raising the bottom elevation by 50 feet. It is undisputed that the discharge would kill all of the lake's fish and nearly all of its other aquatic life.[1]

Coeur Alaska's proposal is prohibited by the Environmental Protection Agency (EPA) performance standard forbidding any discharge of process wastewater from new "froth-flotation" mills into waters of the United States. See 40 CFR § 440.104(b)(1) (2008). Section 306 of the Clean Water Act directs EPA to promulgate such performance standards, 33 U. S. C. § 1316(a), and declares it unlawful for any discharger to violate them, § 1316(e). Ordinarily, that would be the end of the inquiry.

Coeur Alaska contends, however, that its discharge is not subject to EPA's regulatory regime, but is governed, instead, by the mutually exclusive permitting authority of the Army Corps of Engineers (Corps). The Corps has authority, under § 404 of the Act, 3 U. S. C. § 1344(a), to issue permits for discharges of "dredged or fill material." By regulation, a discharge that has the effect of raising a water body's bottom elevation qualifies as "fill material." See 33 CFR § 323.2(e) (2008). Discharges properly within the Corps' permitting authority, it is undisputed, are not subject to EPA performance standards. See *ante*, at 284; Brief for Petitioner Coeur Alaska 26; Brief for Respondent Southeast Alaska Conservation Council et al. 37.

The litigation before the Court thus presents a single question: Is a pollutant discharge prohibited under § 306 of the Act eligible for a § 404 permit as a discharge of fill ma-

[1] Whether aquatic life will eventually be able to inhabit the lake again is uncertain. Compare *ante*, at 269, with App. 201a–202a and *Southeast Alaska Conservation Council* v. *United States Army Corps of Engineers*, 486 F. 3d 638, 642 (CA9 2007).

terial? In agreement with the Court of Appeals, I would answer no. The statute's text, structure, and purpose all mandate adherence to EPA pollution-control requirements. A discharge covered by a performance standard must be authorized, if at all, by EPA.

I

A

Congress enacted the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity" of the waters of the United States. 33 U. S. C. § 1251(a). "The use of any river, lake, stream or ocean as a waste treatment system," the Act's drafters stated, "is unacceptable." S. Rep. No. 92–414, p. 7 (1971). Congress announced in the Act itself an ambitious objective: to eliminate, by 1985, the discharge of all pollutants into the Nation's navigable waters. 33 U. S. C. § 1251(a).

In service of its goals, Congress issued a core command: "[T]he discharge of any pollutant by any person shall be unlawful," except in compliance with the Act's terms. § 1311(a). The Act's substantive requirements—housed primarily in Subchapter III, "Standards and Enforcement"—establish "a comprehensive regulatory program supervised by an expert administrative agency," EPA. *Milwaukee* v. *Illinois*, 451 U. S. 304, 317 (1981). See also 33 U. S. C. § 1251(d) ("Except as otherwise expressly provided . . . , the Administrator of [EPA] shall administer this [Act].").

The Act instructs EPA to establish various technology-based, increasingly stringent effluent limitations for categories of point sources. *E. g.*, §§ 1311, 1314. These limitations, formulated as restrictions "on quantities, rates, and concentrations of chemical, physical, biological, and other constituents," § 1362(11), were imposed to achieve national uniformity among categories of sources. See, *e. g.*, *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112, 129–130

(1977). The limitations for a given discharge depend on the type of pollutant and source at issue.[2]

Of key importance, new sources must meet stringent "standards of performance" adopted by EPA under § 306(e). That section makes it "unlawful for *any* . . . new source to operate . . . in violation of" an applicable performance standard. 33 U. S. C. § 1316(e) (emphasis added). In line with Congress' aim "to insure . . . 'maximum feasible control of new sources,'" *du Pont*, 430 U. S., at 138, the preferred standard for a new source is one "'permitting *no* discharge of pollutants,'" *id.*, at 137–138 (quoting 33 U. S. C. § 1316(a)(1); emphasis added). Moreover, new sources, unlike existing sources, are not eligible for EPA-granted variances from applicable limitations. 430 U. S., at 138.[3]

In 1982, EPA promulgated new source performance standards for facilities engaged in mining, including those using a froth-flotation milling process. See Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 54598. Existing mills, EPA found, were already achieving zero discharge; it was therefore practicable, EPA concluded, for new mills to do as well. *Id.*, at 54602. Accordingly, under 40 CFR § 440.104(b)(1), new mines using the froth-flotation method, as Coeur Alaska proposes to do, may not discharge wastewater directly into waters of the United States.

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[2] In addition, the Act requires States to institute comprehensive water quality standards for intrastate waters, subject to EPA approval. See § 1313. This program supplements the technology-based standards, serving to "prevent water quality from falling below acceptable levels" even when point sources comply with effluent limitations. *EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U. S. 200, 205, n. 12 (1976).

[3] Even the provision allowing the President to exempt federal installations from compliance with the Act's requirements—"if he determines it to be in the paramount interest of the United States to do so"—does not extend to new source standards: "[N]o exemption may be granted from the requirements of section [306] or [307] of this [Act]." 33 U. S. C. § 1323(a).

B

The nationwide pollution-control requirements just described are implemented through the National Pollution Discharge Elimination System (NPDES), a permitting scheme set forth in § 402 and administered by EPA and the States. The NPDES is the linchpin of the Act, for it transforms generally applicable effluent limitations into the individual obligations of each discharger. *EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U. S. 200, 205 (1976). The discharge of a pollutant is generally prohibited unless the source has obtained an NPDES permit. *E. g., EPA* v. *National Crushed Stone Assn.*, 449 U. S. 64, 71 (1980) ("Section 402 authorizes the establishment of the [NPDES], under which every discharger of pollutants is required to obtain a permit.").

The Act also establishes a separate permitting scheme, administered by the Corps, for discharges of "dredged or fill material." 33 U. S. C. § 1344(a). Section 404 hews to the Corps' established expertise in matters of navigability and construction. The § 404 program does not implement the uniform, technology-based pollution-control standards set out, *inter alia*, in § 306. Instead, § 404 permits are subject to regulatory guidelines based generally on the impact of a discharge on the receiving environment. See § 1344(b); *ante*, at 269.

As the above-described statutory background indicates, Coeur Alaska's claim to a § 404 permit carries weighty implications. If eligible for that permit, Coeur Alaska can evade the exacting performance standard prescribed by EPA for froth-flotation mills. It may, instead, use Lower Slate Lake "as the settling pond and disposal site for the tailings." App. 360a (Corps' Record of Decision).

II

Is a pollutant discharge prohibited under § 306(e) eligible to receive a § 404 permit as a discharge of fill material? All

agree on preliminary matters. Only one agency, the Corps or EPA, can issue a permit for the discharge. See *ante*, at 274, 286. Only EPA, through the NPDES program, issues permits that implement § 306. See *supra*, at 297–298. Further, § 306(e) and EPA's froth-flotation performance standard, unless inapplicable here, bar Coeur Alaska's proposed discharge. See *ante*, at 278–279.

No part of the statutory scheme, in my view, calls into question the governance of EPA's performance standard. The text of § 306(e) states a clear proscription: "[I]t shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U. S. C. § 1316(e). Under the standard of performance relevant here, "there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process" for mining gold. 40 CFR § 440.104(b)(1). The Act imposes these requirements without qualification.

Section 404, stating that the Corps "may issue permits" for the discharge of "dredged or fill material," does not create an exception to § 306(e)'s plain command. 33 U. S. C. § 1344(a). Cf. *ante*, at 276. Section 404 neither mentions § 306 nor states a contrary requirement. The Act can be home to both provisions, with no words added or omitted, so long as the category of "dredged or fill material" eligible for a § 404 permit is read in harmony with § 306. Doing so yields a simple rule: Discharges governed by EPA performance standards are subject to EPA's administration and receive permits under the NPDES, not § 404.

This reading accords with the Act's structure and objectives. It retains, through the NPDES, uniform application of the Act's core pollution-control requirements, and it respects Congress' special concern for new sources. Leaving pollution-related decisions to EPA, moreover, is consistent with Congress' delegation to that Agency of primary responsibility to administer the Act. Most fundamental, adhering

to § 306(e)'s instruction honors the overriding statutory goal of eliminating water pollution, and Congress' particular rejection of the use of navigable waters as waste disposal sites. See *supra*, at 298–301. See also 33 U. S. C. § 1324 (creating "clean lakes" program requiring States to identify and restore polluted lakes).[4]

The Court's reading, in contrast, strains credulity. A discharge of a pollutant, otherwise prohibited by firm statutory command, becomes lawful if it contains sufficient solid matter to raise the bottom of a water body, transformed into a waste disposal facility. Whole categories of regulated industries can thereby gain immunity from a variety of pollution-control standards. The loophole would swallow not only standards governing mining activities, see 40 CFR pt. 440 (effluent limitations and new source performance standards for ore mining and dressing); *id.*, pt. 434 (coal mining); *id.*,

[4] The Court asserts that "numerous difficulties" will ensue if a discharge governed by a new source performance standard is ineligible for a § 404 permit. *Ante*, at 276. Namely, the Court notes, the discharger will have to determine whether a performance standard applies to it. *Ante*, at 277. That is not only the usual inquiry under the Clean Water Act; it is one Coeur Alaska answered, without apparent difficulty, when it sought and obtained an EPA permit for the proposed discharge from the lake into a downstream creek. See *ante*, at 270.

JUSTICE BREYER fears that "litera[l] appl[ication]" of performance standards would interfere with efforts "to build a levee or to replace dirt removed from a lake bottom," and thus "may prove unnecessarily strict." *Ante*, at 292 (concurring opinion). His concerns are imaginative, but it is questionable whether they are real. Apple juice processors, meatcutters, cement manufacturers, and pharmaceutical producers do not ordinarily build levees—and it is almost inconceivable that they would do so using the waste generated by their highly specific industrial processes. See, *e. g.*, 40 CFR § 411.10 (performance standard for particular cement manufacturing process). Levee construction generally is undertaken by developers or government, entities not subject to performance standards for such a project. This litigation, furthermore, does not illustrate the "difficulty" JUSTICE BREYER perceives. See *ante*, at 292. Coeur Alaska does not seek to build a levee or return dirt to a lake; it simply wants to use Lower Slate Lake as a waste disposal site.

pt. 436 (mineral mining), but also standards for dozens of other categories of regulated point sources, see, *e. g.*, *id.*, pt. 411 (cement manufacturing); *id.*, pt. 425 (leather tanning and finishing); *id.*, pt. 432 (meat and poultry products processing). See also Brief for American Rivers et al. as *Amici Curiae* 26–27 (observing that discharges in these categories "typically contain high volumes of solids"). Providing an escape hatch for polluters whose discharges contain solid matter, it bears noting, is particularly perverse; the Act specifically focuses on solids as harmful pollutants. See 33 U. S. C. § 1314(a)(4) (requiring EPA to publish information regarding "conventional pollutants," including "suspended solids"); Brief for American Rivers, *supra*, at 28–29, and n. 18 (identifying over 50 effluent limitations that restrict total suspended solids).[5]

Congress, we have recognized, does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 467–468 (2001). Yet an alteration of that kind is just what today's decision imagines. Congress, as the Court reads the Act, silently upended, in an ancillary permitting provision, its painstaking pollution-control scheme. See *ante*, at 281. Congress did so, the Court holds, notwithstanding the lawmakers' stated effort "to restore and maintain the chemical, physical, and biological integrity" of

[5] The "safeguards" JUSTICE BREYER identifies are hardly reassuring. See *ante*, at 293 (concurring opinion). Given today's decision, it is optimistic to expect that EPA or the courts will act vigorously to prevent evasion of performance standards. Nor is EPA's veto power under § 404(c) of the Clean Water Act an adequate substitute for adherence to § 306. That power—exercised only a dozen times over 36 years encompassing more than 1 million permit applications, see Brief for American Rivers 14—hinges on a finding of "unacceptable adverse effect," 33 U. S. C. § 1344(c). Destruction of nearly all aquatic life in a pristine lake apparently does not qualify as "unacceptable." Reliance on ad hoc vetoes, moreover, undermines Congress' aim to install uniform water-pollution regulation.

the waters of the United States, 33 U. S. C. § 1251(a); their assignment to EPA of the Herculean task of setting strict effluent limitations for many categories of industrial sources; and their insistence that new sources meet even more ambitious standards, not subject to exception or variance. Would a rational legislature order exacting pollution limits, yet call all bets off if the pollutant, discharged into a lake, will raise the water body's elevation? To say the least, I am persuaded, that is not how Congress intended the Clean Water Act to operate.

In sum, it is neither necessary nor proper to read the statute as allowing mines to bypass EPA's zero-discharge standard by classifying slurry as "fill material." The use of waters of the United States as "settling ponds" for harmful mining waste, the Court of Appeals correctly held, is antithetical to the text, structure, and purpose of the Clean Water Act.

* * *

For the reasons stated, I would affirm the judgment of the Ninth Circuit.

Syllabus

MELENDEZ-DIAZ *v.* MASSACHUSETTS

CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS

No. 07–591. Argued November 10, 2008—Decided June 25, 2009

At petitioner's state-court drug trial, the prosecution introduced certificates of state laboratory analysts stating that material seized by police and connected to petitioner was cocaine of a certain quantity. As required by Massachusetts law, the certificates were sworn to before a notary public and were submitted as prima facie evidence of what they asserted. Petitioner objected, asserting that *Crawford* v. *Washington*, 541 U. S. 36, required the analysts to testify in person. The trial court disagreed, the certificates were admitted, and petitioner was convicted. The Massachusetts Appeals Court affirmed, rejecting petitioner's claim that the certificates' admission violated the Sixth Amendment.

Held: The admission of the certificates violated petitioner's Sixth Amendment right to confront the witnesses against him. Pp. 309–329.

(a) Under *Crawford*, a witness's testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. 541 U. S., at 54. The certificates here are affidavits, which fall within the "core class of testimonial statements" covered by the Confrontation Clause, *id.*, at 51. They asserted that the substance found in petitioner's possession was, as the prosecution claimed, cocaine of a certain weight—the precise testimony the analysts would be expected to provide if called at trial. Not only were the certificates made, as *Crawford* required for testimonial statements, "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," *id.*, at 52, but under the relevant Massachusetts law their *sole purpose* was to provide prima facie evidence of the substance's composition, quality, and net weight. Petitioner was entitled to "be confronted with" the persons giving this testimony at trial. *Id.*, at 54. Pp. 309–311.

(b) The arguments advanced to avoid this rather straightforward application of *Crawford* are rejected. Respondent's claim that the analysts are not subject to confrontation because they are not "accusatory" witnesses finds no support in the Sixth Amendment's text or in this Court's case law. The affiants' testimonial statements were not "nearly contemporaneous" with their observations, nor, if they had been, would that fact alter the statements' testimonial character. There is no support for the proposition that witnesses who testify regarding facts other

Syllabus

than those observed at the crime scene are exempt from confrontation. The absence of interrogation is irrelevant; a witness who volunteers his testimony is no less a witness for Sixth Amendment purposes. The affidavits do not qualify as traditional official or business records. The argument that the analysts should not be subject to confrontation because their statements result from neutral scientific testing is little more than an invitation to return to the since-overruled decision in *Ohio* v. *Roberts*, 448 U. S. 56, 66, which held that evidence with "particularized guarantees of trustworthiness" was admissible without confrontation. Petitioner's power to subpoena the analysts is no substitute for the right of confrontation. Finally, the requirements of the Confrontation Clause may not be relaxed because they make the prosecution's task burdensome. In any event, the practice in many States already accords with today's decision, and the serious disruption predicted by respondent and the dissent has not materialized. Pp. 312–328.

69 Mass. App. 1114, 870 N. E. 2d 676, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which STEVENS, SOUTER, THOMAS, and GINSBURG, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 329. KENNEDY, J., filed a dissenting opinion, in which ROBERTS, C. J., and BREYER and ALITO, JJ., joined, *post*, p. 330.

Jeffrey L. Fisher argued the cause for petitioner. With him on the briefs were *Pamela S. Karlan*, *Amy Howe*, *Kevin K. Russell*, *Mary T. Rogers*, and *Thomas C. Goldstein*.

Martha Coakley, Attorney General of Massachusetts, argued the cause for respondent. With her on the brief were *James J. Arguin* and *David S. Friedman*, Assistant Attorneys General.

Lisa H. Schertler argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were former *Solicitor General Garre*, *Acting Assistant Attorney General Friedrich*, and *Deputy Solicitor General Dreeben*.*

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*Briefs of *amici curiae* urging reversal were filed for Law Professors by *Donald B. Ayer*, *Christopher S. Perry*, *Samuel Estreicher*, *Meir Feder*, and *Paul C. Giannelli*, *Edward J. Imwinkelried*, and *Robert P. Mosteller*, all *pro se;* for the National Association of Criminal Defense Lawyers et al. by *Jeffrey T. Green*, *Leonard R. Stamm*, *Frances H. Pratt*, *Donna F. Coltharp*, and *Judith H. Mizner;* for the National Innocence Network by *Tim-*

JUSTICE SCALIA delivered the opinion of the Court.

The Massachusetts courts in this case admitted into evidence affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine. The question presented is whether those affidavits are "testimonial," rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment.

I

In 2001, Boston police officers received a tip that a Kmart employee, Thomas Wright, was engaging in suspicious activ-

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othy P. O'Toole and *Andrew T. Wise;* and for Richard D. Friedman by *Mr. Friedman, pro se.*

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Troy King,* Attorney General of Alabama, *Corey L. Maze,* Solicitor General, and *Margaret L. Fleming,* Assistant Attorney General, by *Kevin T. Kane,* Chief State's Attorney of Connecticut, by *Peter J. Nickles,* 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, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *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, *Steve Six* of Kansas, *Jack Conway* of Kentucky, *Douglas F. Gansler* of Maryland, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Jon C. Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Kelly Ayotte* of New Hampshire, *Anne Milgram* of New Jersey, *Gary K. King* of New Mexico, *Roy Cooper* of North Carolina, *Nancy H. Rogers* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Patrick C. Lynch* of Rhode Island, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Robert E. Cooper, Jr.,* of Tennessee, *Mark L. Shurtleff* of Utah, *Robert F. McDonnell* of Virginia, *Robert M. McKenna* of Washington, and *Bruce A. Salzburg* of Wyoming; and for the National District Attorneys Association et al. by *Mathias H. Heck, Jr., Daniel F. Conley, John P. Zanini, Macy Lee, Helle Sachse, William D. Mason, Lisa Reitz Williamson, Lynne M. Abraham, Hugh J. Burns, Jr., Andrew P. Thomas, Kym L. Worthy, Timothy A. Baughman, David Roger,* and *Steven S. Owens.*

ity. The informant reported that Wright repeatedly received phone calls at work, after each of which he would be picked up in front of the store by a blue sedan, and would return to the store a short time later. The police set up surveillance in the Kmart parking lot and witnessed this precise sequence of events. When Wright got out of the car upon his return, one of the officers detained and searched him, finding four clear white plastic bags containing a substance resembling cocaine. The officer then signaled other officers on the scene to arrest the two men in the car—one of whom was petitioner Luis Melendez-Diaz. The officers placed all three men in a police cruiser.

During the short drive to the police station, the officers observed their passengers fidgeting and making furtive movements in the back of the car. After depositing the men at the station, they searched the police cruiser and found a plastic bag containing 19 smaller plastic bags hidden in the partition between the front and back seats. They submitted the seized evidence to a state laboratory required by law to conduct chemical analysis upon police request. Mass. Gen. Laws, ch. 111, § 12 (West 2006).

Melendez-Diaz was charged with distributing cocaine and with trafficking in cocaine in an amount between 14 and 28 grams. Ch. 94C, §§ 32A, 32E(b)(1). At trial, the prosecution placed into evidence the bags seized from Wright and from the police cruiser. It also submitted three "certificates of analysis" showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags and stated that the bags "[h]a[ve] been examined with the following results: The substance was found to contain: Cocaine." App. to Pet. for Cert. 24a, 26a, 28a. The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law. Mass. Gen. Laws, ch. 111, § 13.

Petitioner objected to the admission of the certificates, asserting that our Confrontation Clause decision in *Crawford* v. *Washington*, 541 U. S. 36 (2004), required the analysts to testify in person. The objection was overruled, and the certificates were admitted pursuant to state law as "prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed." Mass. Gen. Laws, ch. 111, § 13.

The jury found Melendez-Diaz guilty. He appealed, contending, among other things, that admission of the certificates violated his Sixth Amendment right to be confronted with the witnesses against him. The Appeals Court of Massachusetts rejected the claim, affirmance order, 69 Mass. App. 1114, 870 N. E. 2d 676, 2007 WL 2189152, *4, n. 3 (July 31, 2007), relying on the Massachusetts Supreme Judicial Court's decision in *Commonwealth* v. *Verde*, 444 Mass. 279, 283–285, 827 N. E. 2d 701, 705–706 (2005), which held that the authors of certificates of forensic analysis are not subject to confrontation under the Sixth Amendment. The Supreme Judicial Court denied review. 449 Mass. 1113, 874 N. E. 2d 407 (2007). We granted certiorari. 552 U. S. 1256 (2008).

II

The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, *Pointer* v. *Texas*, 380 U. S. 400, 403 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford*, after reviewing the Clause's historical underpinnings, we held that it guarantees a defendant's right to confront those "who 'bear testimony' " against him. 541 U. S., at 51. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Id.*, at 54.

Our opinion described the class of testimonial statements covered by the Confrontation Clause as follows:

> "Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.*, at 51–52 (internal quotation marks and citations omitted).

There is little doubt that the documents at issue in this case fall within the "core class of testimonial statements" thus described. Our description of that category mentions affidavits twice. See also *White* v. *Illinois*, 502 U. S. 346, 365 (1992) (THOMAS, J., concurring in part and concurring in judgment) ("[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"). The documents at issue here, while denominated by Massachusetts law "certificates," are quite plainly affidavits: "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths." Black's Law Dictionary 62 (8th ed. 2004). They are incontrovertibly a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Crawford*, *supra*, at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial. The "certificates" are functionally identical

to live, in-court testimony, doing "precisely what a witness does on direct examination." *Davis* v. *Washington*, 547 U. S. 813, 830 (2006) (emphasis deleted).

Here, moreover, not only were the affidavits "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,'" *Crawford*, *supra*, at 52, but under Massachusetts law the *sole purpose* of the affidavits was to provide "prima facie evidence of the composition, quality, and the net weight" of the analyzed substance, Mass. Gen. Laws, ch. 111, § 13. We can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves. See App. to Pet. for Cert. 25a, 27a, 29a.

In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "'be confronted with'" the analysts at trial. *Crawford*, *supra*, at 54.[1]

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[1] Contrary to the dissent's suggestion, *post*, at 332–333, 335–336 (opinion of KENNEDY, J.), we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," *post*, at 335, this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation, *post*, at 336, from *United States* v. *Lott*, 854 F. 2d 244, 250 (CA7 1988), "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records. See *infra*, at 321–322, 324.

III

Respondent and the dissent advance a potpourri of analytic arguments in an effort to avoid this rather straightforward application of our holding in *Crawford.* Before addressing them, however, we must assure the reader of the falsity of the dissent's opening alarum that we are "sweep-[ing] away an accepted rule governing the admission of scientific evidence" that has been "established for at least 90 years" and "extends across at least 35 States and six Federal Courts of Appeals." *Post,* at 330.

The vast majority of the state-court cases the dissent cites in support of this claim come not from the last 90 years, but from the last 30, and not surprisingly nearly all of them rely on our decision in *Ohio* v. *Roberts,* 448 U. S. 56 (1980), or its since-rejected theory that unconfronted testimony was admissible as long as it bore indicia of reliability, *id.,* at 66. See *post,* at 357–358.[2] As for the six Federal Courts of Appeals cases cited by the dissent, five of them postdated and expressly relied on *Roberts.* See *post,* at 349–350. The sixth predated *Roberts* but relied entirely on the same erroneous theory. See *Kay* v. *United States,* 255 F. 2d 476, 480–481 (CA4 1958) (rejecting Confrontation Clause challenge "where there is reasonable necessity for [the evidence] and where . . . the evidence has those qualities of reliability and trustworthiness").

A review of cases that predate the *Roberts* era yields a mixed picture. As the dissent notes, three State Supreme Court decisions from the early 20th century denied confrontation with respect to certificates of analysis regarding a

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[2] The exception is a single pre-*Roberts* case that relied on longstanding Massachusetts precedent. See *Commonwealth* v. *Harvard,* 356 Mass. 452, 462, 253 N. E. 2d 346, 352 (1969). Others are simply irrelevant, since they involved medical reports created for treatment purposes, which would not be testimonial under our decision today. See, *e. g., Baber* v. *State,* 775 So. 2d 258, 258–259 (Fla. 2000); *State* v. *Garlick,* 313 Md. 209, 223–225, 545 A. 2d 27, 34–35 (1988).

substance's alcohol content. See *post*, at 349 (citing cases from Massachusetts, Connecticut, and Virginia). But other state courts in the same era reached the opposite conclusion. See *Torres* v. *State*, 113 Tex. Crim. 1, 2–4, 18 S. W. 2d 179, 180 (1929); *Volrich* v. *State*, 4 Ohio L. Abs. 253 (App. 1925) *(per curiam)*. At least this much is entirely clear: In faithfully applying *Crawford* to the facts of this case, we are not overruling 90 years of settled jurisprudence. It is the dissent that seeks to overturn precedent by resurrecting *Roberts* a mere five years after it was rejected in *Crawford*.

We turn now to the various legal arguments raised by respondent and the dissent.

A

Respondent first argues that the analysts are not subject to confrontation because they are not "accusatory" witnesses, in that they do not directly accuse petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence linking petitioner to the contraband. See Brief for Respondent 10. This finds no support in the text of the Sixth Amendment or in our case law.

The Sixth Amendment guarantees a defendant the right "to be confronted with the witnesses *against him*." (Emphasis added.) To the extent the analysts were witnesses (a question resolved above), they certainly provided testimony *against* petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine. The contrast between the text of the Confrontation Clause and the text of the adjacent Compulsory Process Clause confirms this analysis. While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses "against him," the Compulsory Process Clause guarantees a defendant the right to call witnesses "in his favor." U. S. Const., Amdt. 6. The text of the Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the for-

mer;[3] the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.

It is often, indeed perhaps usually, the case that an adverse witness's testimony, taken alone, will not suffice to convict. Yet respondent fails to cite a single case in which such testimony was admitted absent a defendant's opportunity to cross-examine.[4] Unsurprisingly, since such a holding would be contrary to longstanding case law. In *Kirby* v. *United States*, 174 U. S. 47 (1899), the Court considered Kirby's conviction for receiving stolen property, the evidence for which consisted, in part, of the records of conviction of three individuals who were found guilty of stealing the relevant property. *Id.*, at 53. Though this evidence proved only that the property was stolen, and not that Kirby received it, the Court nevertheless ruled that admission of the records violated Kirby's rights under the Confrontation Clause. *Id.*, at 55. See also *King* v. *Turner*, 1 Mood. 347, 168 Eng. Rep. 1298 (1832) (confession by one defendant to having stolen certain goods could not be used as evidence against another defendant accused of receiving the stolen property).

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[3] The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections. See *infra*, at 327.

[4] Respondent cites our decision in *Gray* v. *Maryland*, 523 U. S. 185 (1998). That case did indeed distinguish between evidence that is "incriminating on its face" and evidence that "bec[omes] incriminating . . . only when linked with evidence introduced later at trial," *id.*, at 191 (internal quotation marks omitted). But it did so for the entirely different purpose of determining when a nontestifying codefendant's confession, redacted to remove all mention of the defendant, could be admitted into evidence with instruction for the jury not to consider the confession as evidence against the nonconfessor. The very premise of the case was that, without the limiting instruction even admission of a redacted confession containing evidence of the latter sort *would have* violated the defendant's Sixth Amendment rights. See *id.*, at 190–191.

B

Respondent and the dissent argue that the analysts should not be subject to confrontation because they are not "conventional" (or "typical" or "ordinary") witnesses of the sort whose *ex parte* testimony was most notoriously used at the trial of Sir Walter Raleigh. *Post*, at 343–345; Brief for Respondent 28. It is true, as the Court recognized in *Crawford*, that *ex parte* examinations of the sort used at Raleigh's trial have "long been thought a paradigmatic confrontation violation." 541 U. S., at 52. But the paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the *ex parte* examinations in *Raleigh's Case*, 2 How. St. Tr. 1 (1603). That use provoked such an outcry precisely because it flouted the deeply rooted common-law tradition "of live testimony in court subject to adversarial testing." *Crawford*, *supra*, at 43 (citing 3 W. Blackstone, Commentaries on the Laws of England 373–374 (1768)). See also *Crawford*, *supra*, at 43–47.

In any case, the purported distinctions respondent and the dissent identify between this case and Sir Walter Raleigh's "conventional" accusers do not survive scrutiny. The dissent first contends that a "conventional witness recalls events observed in the past, while an analyst's report contains near-contemporaneous observations of the test." *Post*, at 345. It is doubtful that the analyst's reports in this case could be characterized as reporting "near-contemporaneous observations"; the affidavits were completed almost a week after the tests were performed. See App. to Pet. for Cert. 24a–29a (the tests were performed on November 28, 2001, and the affidavits sworn on December 4, 2001). But regardless, the dissent misunderstands the role that "near-contemporaneity" has played in our case law. The dissent notes that that factor was given "substantial weight" in *Davis*, *post*, at 345, but in fact that decision *disproves* the dissent's position. There the Court considered

the admissibility of statements made to police officers responding to a report of a domestic disturbance. By the time officers arrived the assault had ended, but the victim's statements—written and oral—were sufficiently close in time to the alleged assault that the trial court admitted her affidavit as a "present sense impression." 547 U. S., at 820 (internal quotation marks omitted). Though the witness's statements in *Davis* were "near-contemporaneous" to the events she reported, we nevertheless held that they could *not* be admitted absent an opportunity to confront the witness. *Id.*, at 830.

A second reason the dissent contends that the analysts are not "conventional witnesses" (and thus not subject to confrontation) is that they "observe[d] neither the crime nor any human action related to it." *Post*, at 345. The dissent provides no authority for this particular limitation of the type of witnesses subject to confrontation. Nor is it conceivable that all witnesses who fit this description would be outside the scope of the Confrontation Clause. For example, is a police officer's investigative report describing the crime scene admissible absent an opportunity to examine the officer? The dissent's novel exception from coverage of the Confrontation Clause would exempt all expert witnesses—a hardly "unconventional" class of witnesses.

A third respect in which the dissent asserts that the analysts are not "conventional" witnesses and thus not subject to confrontation is that their statements were not provided in response to interrogation. *Post*, at 345–346. See also Brief for Respondent 29. As we have explained, "[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation." *Davis*, *supra*, at 822–823, n. 1. Respondent and the dissent cite no authority, and we are aware of none, holding that a person who volunteers his testimony is any less a "'witness against' the defendant," Brief for Respondent 26, than one who is responding to interrogation. In any event, the ana-

lysts' affidavits in this case *were* presented in response to a police request. See Mass. Gen. Laws, ch. 111, §§ 12–13. If an affidavit submitted in response to a police officer's request to "write down what happened" suffices to trigger the Sixth Amendment's protection (as it apparently does, see *Davis*, 547 U. S., at 819–820; *id.*, at 840, n. 5 (THOMAS, J., concurring in judgment in part and dissenting in part)), then the analysts' testimony should be subject to confrontation as well.

C

Respondent claims that there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is "prone to distortion or manipulation," and the testimony at issue here, which is the "resul[t] of neutral, scientific testing." Brief for Respondent 29. Relatedly, respondent and the dissent argue that confrontation of forensic analysts would be of little value because "one would not reasonably expect a laboratory professional . . . to feel quite differently about the results of his scientific test by having to look at the defendant." *Id.*, at 31 (internal quotation marks omitted); see *post*, at 339.

This argument is little more than an invitation to return to our overruled decision in *Roberts*, 448 U. S. 56, which held that evidence with "particularized guarantees of trustworthiness" was admissible notwithstanding the Confrontation Clause. *Id.*, at 66. What we said in *Crawford* in response to that argument remains true:

> "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. . . .
>
> . . . . . .
>
> "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial be-

> cause a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." 541 U. S., at 61–62.

Respondent and the dissent may be right that there are other ways—and in some cases better ways—to challenge or verify the results of a forensic test.[5] But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.

Nor is it evident that what respondent calls "neutral scientific testing" is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, "[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency." National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 183 (2009) (hereinafter National Academy Report). And "[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." *Id.*, at 23–24. A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.

Confrontation is one means of ensuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant, *post*, at 339, the same cannot be said of the fraudulent analyst. See Brief for National Innocence

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[5] Though surely not always. Some forensic analyses, such as autopsies and breathalyzer tests, cannot be repeated, and the specimens used for other analyses have often been lost or degraded.

Network as *Amicus Curiae* 15–17 (discussing cases of documented "drylabbing" where forensic analysts report results of tests that were never performed); National Academy Report 44–48 (discussing documented cases of fraud and error involving the use of forensic evidence). Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony. See *Coy* v. *Iowa*, 487 U. S. 1012, 1019 (1988). And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.

Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that "[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics." Metzger, Cheating the Constitution, 59 Vand. L. Rev. 475, 491 (2006). One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases. Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 14 (2009). And the National Academy Report concluded:

> "The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country." National Academy Report, at *xx*.[6]

[6] Contrary to the dissent's suggestion, *post,* at 351, we do not "rel[y] in such great measure" on the deficiencies of crime-lab analysts shown by this report to resolve the constitutional question presented in this case. The analysts who swore the affidavits provided testimony against Melendez-Diaz, and they are therefore subject to confrontation; we would reach the same conclusion if all analysts always possessed the scientific

Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.

This case is illustrative. The affidavits submitted by the analysts contained only the bare-bones statement that "[t]he substance was found to contain: Cocaine." App. to Pet. for Cert. 24a, 26a, 28a. At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed. While we still do not know the precise tests used by the analysts, we are told that the laboratories use "methodology recommended by the Scientific Working Group for the Analysis of Seized Drugs," App. to Brief for Petitioner 1a–2a. At least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination. See 2 P. Giannelli & E. Imwinkelried, Scientific Evidence § 23.03[c], pp. 532–533, and ch. 23A, p. 607 (4th ed. 2007) (identifying four "critical errors" that analysts may commit in interpreting the results of the commonly used gas chromatography/mass spectrometry analysis); Shellow, The Application of *Daubert* to the Identification of Drugs, 2 Shepard's Expert & Scientific Evidence Quarterly 593, 600 (1995) (noting that while spectrometers may be equipped with computerized matching systems, "forensic analysts in crime laboratories typically do not utilize this feature of the instrument, but rely exclusively on their subjective judgment").

The same is true of many of the other types of forensic evidence commonly used in criminal prosecutions. "[T]here is wide variability across forensic science disciplines with regard to techniques, methodologies, reliability, types and

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acumen of Mme. Curie and the veracity of Mother Teresa. We discuss the report only to refute the suggestion that this category of evidence is uniquely reliable and that cross-examination of the analysts would be an empty formalism.

numbers of potential errors, research, general acceptability, and published material." National Academy Report 6–7. See also *id.*, at 138–139, 142–143, 154–155 (discussing problems of subjectivity, bias, and unreliability of common forensic tests such as latent fingerprint analysis, pattern/impression analysis, and toolmark and firearms analysis). Contrary to respondent's and the dissent's suggestion, there is little reason to believe that confrontation will be useless in testing analysts' honesty, proficiency, and methodology—the features that are commonly the focus in the cross-examination of experts.

D

Respondent argues that the analysts' affidavits are admissible without confrontation because they are "akin to the types of official and business records admissible at common law." Brief for Respondent 35. But the affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless.

Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in *Palmer* v. *Hoffman*, 318 U. S. 109 (1943), made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad's operations, it was "calculated for use essentially in the court, not in the business." *Id.*, at 114.[7] The analysts'

[7] The early common-law cases likewise involve records prepared for the administration of an entity's affairs, and not for use in litigation. See, *e. g.*, *King* v. *Rhodes*, 1 Leach 24, 168 Eng. Rep. 115 (1742) (admitting into evidence ship's musterbook); *King* v. *Martin*, 2 Camp. 100, 101, 170 Eng. Rep. 1094, 1095 (1809) (vestrybook); *King* v. *Aickles*, 1 Leach 390, 391–392, 168 Eng. Rep. 297, 298 (1785) (prison logbook).

certificates—like police reports generated by law enforcement officials—do not qualify as business or public records for precisely the same reason. See Rule 803(8) (defining public records as "excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel").

Respondent seeks to rebut this limitation by noting that at common law the results of a coroner's inquest were admissible without an opportunity for confrontation. But as we have previously noted, whatever the status of coroner's reports at common law in England, they were not accorded any special status in American practice. See *Crawford*, 541 U. S., at 47, n. 2; *Giles* v. *California*, 554 U. S. 353, 399–400 (2008) (BREYER, J., dissenting); Note, Evidence—Official Records—Coroner's Inquest, 65 U. Pa. L. Rev. 290 (1917).

The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record—or a copy thereof—for use as evidence. See *post*, at 347. But a clerk's authority in that regard was narrowly circumscribed. He was permitted "to certify to the correctness of a copy of a record kept in his office," but had "no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." *State* v. *Wilson*, 141 La. 404, 409, 75 So. 95, 97 (1917). See also *State* v. *Champion*, 116 N. C. 987, 988–989, 21 S. E. 700, 700–701 (1895); 5 J. Wigmore, Evidence § 1678 (3d ed. 1940). The dissent suggests that the fact that this exception was "'narrowly circumscribed'" makes no difference. See *post*, at 348. To the contrary, it makes all the difference in the world. It shows that even the line of cases establishing the one narrow exception the dissent has been able to identify simultaneously vindicates the general rule applicable to the present case. A clerk could by affidavit *authenticate* or provide a copy of an other-

wise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.[8]

Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition—it was prepared by a public officer in the regular course of his official duties—and although the clerk was certainly not a "conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation. See *People* v. *Bromwich*, 200 N. Y. 385, 388–389, 93 N. E. 933, 934 (1911); *People* v. *Goodrode*, 132 Mich. 542, 547, 94 N. W. 14, 16 (1903); Wigmore, *supra*, § 1678.[9]

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[8] The dissent's reliance on our decision in *Dowdell* v. *United States*, 221 U. S. 325 (1911), see *post*, at 348–349, is similarly misplaced. As the opinion stated in *Dowdell*—and as this Court noted in *Davis* v. *Washington*, 547 U. S. 813, 825 (2006)—the judge and clerk who made the statements at issue in *Dowdell* were not witnesses for purposes of the Confrontation Clause because their statements concerned only the conduct of defendants' prior trial, not any facts regarding defendants' guilt or innocence. 221 U. S., at 330–331.

[9] An earlier line of 19th-century state-court cases also supports the notion that forensic analysts' certificates were not admitted into evidence as public or business records. See *Commonwealth* v. *Waite*, 93 Mass. 264, 266 (1865); *Shivers* v. *Newton*, 45 N. J. L. 469, 476 (Sup. Ct. 1883); *State* v. *Campbell*, 64 N. H. 402, 403, 13 A. 585, 586 (1888). In all three cases, defendants—who were prosecuted for selling adulterated milk—objected to the admission of the state chemists' certificates of analysis. In all three cases, the objection was defeated because the chemist testified live at trial. That the prosecution came forward with live witnesses in all three cases suggests doubt as to the admissibility of the certificates without opportunity for cross-examination.

Respondent also misunderstands the relationship between the business-and-official-records hearsay exceptions and the Confrontation Clause. As we stated in *Crawford:* "Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy." 541 U. S., at 56. Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

E

Respondent asserts that we should find no Confrontation Clause violation in this case because petitioner had the ability to subpoena the analysts. But that power—whether pursuant to state law or the Compulsory Process Clause—is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear. See, *e. g., Davis*, 547 U. S., at 820 ("[The witness] was subpoenaed, but she did not appear at . . . trial"). Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* af-

fidavits and waits for the defendant to subpoena the affiants if he chooses.

F

Finally, respondent asks us to relax the requirements of the Confrontation Clause to accommodate the "'necessities of trial and the adversary process.'" Brief for Respondent 59. It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.

We also doubt the accuracy of respondent's and the dissent's dire predictions. The dissent, respondent, and its *amici* highlight the substantial total number of controlled-substance analyses performed by state and federal laboratories in recent years. But only some of those tests are implicated in prosecutions, and only a small fraction of those cases actually proceed to trial. See Brief for Law Professors as *Amici Curiae* 7–8 (nearly 95% of convictions in state and federal courts are obtained via guilty plea).[10]

Perhaps the best indication that the sky will not fall after today's decision is that it has not done so already. Many States have already adopted the constitutional rule we an-

[10] The dissent provides some back-of-the-envelope calculations regarding the number of court appearances that will result from today's ruling. *Post*, at 342. Those numbers rely on various unfounded assumptions: that the prosecution will place into evidence a drug analysis certificate in every case; that the defendant will never stipulate to the nature of the controlled substance; that even where no such stipulation is made, every defendant will object to the evidence or otherwise demand the appearance of the analyst. These assumptions are wildly unrealistic, and, as discussed below, the figures they produce do not reflect what has in fact occurred in those jurisdictions that have already adopted the rule we announce today.

nounce today,[11] while many others permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report, *id.*, at 13–15 (cataloging such state laws). Despite these widespread practices, there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst's appearance at trial. Indeed, in Massachusetts itself, a defendant may subpoena the analyst to appear at trial, see Brief for Respondent 57, and yet there is no indication that obstructionist defendants are abusing the privilege.

The dissent finds this evidence "far less reassuring than promised." *Post*, at 356. But its doubts rest on two flawed premises. First, the dissent believes that those state statutes "requiring the defendant to give early notice of his intent to confront the analyst" are "burden-shifting statutes [that] may be invalidated by the Court's reasoning." *Post*, at 350, 356. That is not so. In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial. See, *e. g.*, Ga. Code Ann. § 35–3–154.1 (2006); Tex. Code Crim. Proc. Ann., Art. 38.41, § 4 (Vernon 2005); Ohio Rev. Code Ann. § 2925.51(C) (Lexis 2006). Contrary to the dissent's

[11] *State* v. *Johnson*, 982 So. 2d 672, 680–681 (Fla. 2008); *Hinojos-Mendoza* v. *People*, 169 P. 3d 662, 666–667 (Colo. 2007); *State* v. *Birchfield*, 342 Ore. 624, 631–632, 157 P. 3d 216, 220 (2007); *State* v. *March*, 216 S. W. 3d 663, 666–667 (Mo. 2007); *Thomas* v. *United States*, 914 A. 2d 1, 12–13 (D. C. 2006); *State* v. *Caulfield*, 722 N. W. 2d 304, 310 (Minn. 2006); *Las Vegas* v. *Walsh*, 121 Nev. 899, 904–906, 124 P. 3d 203, 207–208 (2005); *People* v. *McClanahan*, 191 Ill. 2d 127, 133–134, 729 N. E. 2d 470, 474–475 (2000); *Miller* v. *State*, 266 Ga. 850, 854–855, 472 S. E. 2d 74, 78–79 (1996); *Barnette* v. *State*, 481 So. 2d 788, 792 (Miss. 1985).

perception, these statutes shift no burden whatever. The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections. See *Wainwright* v. *Sykes*, 433 U. S. 72, 86–87 (1977). It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. See Fed. Rules Crim. Proc. 12.1(a), (e), 16(b)(1)(C); Comment, Alibi Notice Rules: The Preclusion Sanction as Procedural Default, 51 U. Chi. L. Rev. 254, 254–255, 281–285 (1984) (discussing and cataloging state notice-of-alibi rules); *Taylor* v. *Illinois*, 484 U. S. 400, 411 (1988); *Williams* v. *Florida*, 399 U. S. 78, 81–82 (1970). There is no conceivable reason why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial. See *Hinojos-Mendoza* v. *People*, 169 P. 3d 662, 670 (Colo. 2007) (discussing and approving Colorado's notice-and-demand provision). Today's decision will not disrupt criminal prosecutions in the many large States whose practice is already in accord with the Confrontation Clause.[12]

Second, the dissent notes that several of the state-court cases that have already adopted this rule did so pursuant to our decision in *Crawford*, and not "independently . . . as a matter of state law." *Post*, at 356. That may be so. But in

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[12] As the dissent notes, *post*, at 355, *some* state statutes "requir[e] defense counsel to subpoena the analyst, to show good cause for demanding the analyst's presence, or even to affirm under oath an intent to cross-examine the analyst." We have no occasion today to pass on the constitutionality of every variety of statute commonly given the notice-and-demand label. It suffices to say that what we have referred to as the "simplest form [of] notice-and-demand statutes," *supra*, at 326, is constitutional; that such provisions are in place in a number of States; and that in those States, and in other States that require confrontation without notice-and-demand, there is no indication that the dire consequences predicted by the dissent have materialized.

assessing the likely practical effects of today's ruling, it is irrelevant *why* those courts adopted this rule; it matters only *that* they did so. It is true that many of these decisions are recent, but if the dissent's dire predictions were accurate, and given the large number of drug prosecutions at the state level, one would have expected immediate and dramatic results. The absence of such evidence is telling.

But it is not surprising. Defense attorneys and their clients will often stipulate to the nature of the substance in the ordinary drug case. It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion.[13] The *amicus* brief filed by district attorneys in support of the Commonwealth in the Massachusetts Supreme Judicial Court case upon which the Appeals Court here relied said that "it is almost always the case that [analysts' certificates] are admitted without objection. Generally, defendants do not object to the admission of drug certificates most likely because there is no benefit to a defendant from such testimony." Brief for District Attorneys in Support of the Commonwealth in No. SJC–09320 (Mass.), p. 7 (footnote omitted). Given these strategic considerations, and in light of the experience in those States that already provide the same or similar protections to defendants, there is little reason to believe that our decision today will commence the parade of horribles respondent and the dissent predict.

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[13] Contrary to the dissent's suggestion, *post,* at 352–353, we do not cast aspersions on trial judges, who we trust will not be antagonized by good-faith requests for analysts' appearance at trial. Nor do we expect defense attorneys to refrain from zealous representation of their clients. We simply do not expect defense attorneys to believe that their clients' interests (or their own) are furthered by objections to analysts' reports whose conclusions counsel have no intention of challenging.

* * *

This case involves little more than the application of our holding in *Crawford* v. *Washington*, 541 U. S. 36. The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error.[14] We therefore reverse the judgment of the Appeals Court of Massachusetts and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

I write separately to note that I continue to adhere to my position that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *White* v. *Illinois*, 502 U. S. 346, 365 (1992) (opinion concurring in part and concurring in judgment); see also *Giles* v. *California*, 554 U. S. 353, 378 (2008) (concurring opinion) (characterizing statements within the scope of the Confrontation Clause to include those that are "sufficiently formal to resemble the Marian examinations" because they were Mirandized or custodial or "accompanied by [a] similar indicia of formality" (internal quotation marks omitted)); *Davis* v. *Washington*, 547 U. S. 813, 836 (2006) (opinion concurring in judgment in part and dissenting in part) (reiterating that the Clause encompasses

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[14] We of course express no view as to whether the error was harmless. The Appeals Court of Massachusetts did not reach that question, and we decline to address it in the first instance. Cf. *Coy* v. *Iowa*, 487 U. S. 1012, 1021–1022 (1988). In connection with that determination, however, we disagree with the dissent's contention, *post*, at 353, that "only an analyst's testimony suffices to prove [the] fact" that "the substance is cocaine." Today's opinion, while insisting upon retention of the confrontation requirement, in no way alters the type of evidence (including circumstantial evidence) sufficient to sustain a conviction.

extrajudicial statements contained in the types of formalized materials listed in *White*, *supra*, at 365 (opinion of THOMAS, J.)). I join the Court's opinion in this case because the documents at issue in this case "are quite plainly affidavits," *ante*, at 310. As such, they "fall within the core class of testimonial statements" governed by the Confrontation Clause. *Ibid.* (internal quotation marks omitted).

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE BREYER, and JUSTICE ALITO join, dissenting.

The Court sweeps away an accepted rule governing the admission of scientific evidence. Until today, scientific analysis could be introduced into evidence without testimony from the "analyst" who produced it. This rule has been established for at least 90 years. It extends across at least 35 States and six Federal Courts of Appeals. Yet the Court undoes it based on two recent opinions that say nothing about forensic analysts: *Crawford* v. *Washington*, 541 U. S. 36 (2004), and *Davis* v. *Washington*, 547 U. S. 813 (2006).

It is remarkable that the Court so confidently disregards a century of jurisprudence. We learn now that we have misinterpreted the Confrontation Clause—hardly an arcane or seldom-used provision of the Constitution—for the first 218 years of its existence. The immediate systemic concern is that the Court makes no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses—"witnesses" being the word the Framers used in the Confrontation Clause.

Crawford and *Davis* dealt with ordinary witnesses—women who had seen, and in two cases been the victim of, the crime in question. Those cases stand for the proposition that formal statements made by a conventional witness—one who has personal knowledge of some aspect of the defendant's guilt—may not be admitted without the witness appearing at trial to meet the accused face to face. But

Crawford and *Davis* do not say—indeed, could not have said, because the facts were not before the Court—that anyone who makes a testimonial statement is a witness for purposes of the Confrontation Clause, even when that person has, in fact, witnessed nothing to give them personal knowledge of the defendant's guilt.

Because *Crawford* and *Davis* concerned typical witnesses, the Court should have done the sensible thing and limited its holding to witnesses as so defined. Indeed, as JUSTICE THOMAS warned in his opinion in *Davis*, the Court's approach has become "disconnected from history and unnecessary to prevent abuse." 547 U. S., at 838 (opinion concurring in judgment in part and dissenting in part). The Court's reliance on the word "testimonial" is of little help, of course, for that word does not appear in the text of the Clause.

The Court dictates to the States, as a matter of constitutional law, an as-yet-undefined set of rules governing what kinds of evidence may be admitted without in-court testimony. Indeed, under today's opinion the States bear an even more onerous burden than they did before *Crawford.* Then, the States at least had the guidance of the hearsay rule and could rest assured that "where the evidence f[ell] within a firmly rooted hearsay exception," the Confrontation Clause did not bar its admission. *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980) (overruled by *Crawford*). Now, without guidance from any established body of law, the States can only guess what future rules this Court will distill from the sparse constitutional text. See, *e. g.*, Méndez, *Crawford* v. *Washington:* A Critique, 57 Stan. L. Rev. 569, 586–593 (2004) (discussing unanswered questions regarding testimonial statements).

The Court's opinion suggests this will be a body of formalistic and wooden rules, divorced from precedent, common sense, and the underlying purpose of the Clause. Its ruling has vast potential to disrupt criminal procedures that already give ample protections against the misuse of scientific

evidence. For these reasons, as more fully explained below, the Court's opinion elicits my respectful dissent.

I

A

1

The Court says that, before the results of a scientific test may be introduced into evidence, the defendant has the right to confront the "analysts." *Ante,* at 310–311. One must assume that this term, though it appears nowhere in the Confrontation Clause, nevertheless has some constitutional substance that now must be elaborated in future cases. There is no accepted definition of analyst, and there is no established precedent to define that term.

Consider how many people play a role in a routine test for the presence of illegal drugs. One person prepares a sample of the drug, places it in a testing machine, and retrieves the machine's printout—often, a graph showing the frequencies of radiation absorbed by the sample or the masses of the sample's molecular fragments. See 2 P. Giannelli & E. Imwinkelried, Scientific Evidence § 23.03 (4th ed. 2007) (describing common methods of identifying drugs, including infrared spectrophotometry, nuclear magnetic resonance, gas chromatography, and mass spectrometry). A second person interprets the graph the machine prints out—perhaps by comparing that printout with published, standardized graphs of known drugs. *Ibid.* Meanwhile, a third person—perhaps an independent contractor—has calibrated the machine and, having done so, has certified that the machine is in good working order. Finally, a fourth person—perhaps the laboratory's director—certifies that his subordinates followed established procedures.

It is not at all evident which of these four persons is the analyst to be confronted under the rule the Court announces today. If all are witnesses who must appear for in-court confrontation, then the Court has, for all practical purposes,

forbidden the use of scientific tests in criminal trials. As discussed further below, requiring even one of these individuals to testify threatens to disrupt if not end many prosecutions where guilt is clear but a newly found formalism now holds sway. See Part I–C, *infra*.

It is possible to read the Court's opinion, however, to say that all four must testify. Each one has contributed to the test's result and has, at least in some respects, made a representation about the test. Person One represents that a pure sample, properly drawn, entered the machine and produced a particular printout. Person Two represents that the printout corresponds to a known drug. Person Three represents that the machine was properly calibrated at the time. Person Four represents that all the others performed their jobs in accord with established procedures.

And each of the four has power to introduce error. A laboratory technician might adulterate the sample. The independent contractor might botch the machine's calibration. And so forth. The reasons for these errors may range from animus against the particular suspect or all criminal suspects to unintentional oversight; from gross negligence to good-faith mistake. It is no surprise that a plausible case can be made for deeming each person in the testing process an analyst under the Court's opinion.

Consider the independent contractor who has calibrated the testing machine. At least in a routine case, where the machine's result appears unmistakable, that result's accuracy depends entirely on the machine's calibration. The calibration, in turn, can be proved only by the contractor's certification that he or she did the job properly. That certification appears to be a testimonial statement under the Court's definition: It is a formal, out-of-court statement, offered for the truth of the matter asserted, and made for the purpose of later prosecution. See *ante*, at 309–311. It is not clear, under the Court's ruling, why the independent contractor is not also an analyst.

Consider the person who interprets the machine's printout. His or her interpretation may call for the exercise of professional judgment in close cases. See Giannelli & Imwinkelried, *supra.* If we assume no person deliberately introduces error, this interpretive step is the one most likely to permit human error to affect the test's result. This exercise of judgment might make this participant an analyst. The Court implies as much. See *ante,* at 318–320.

And we must yet consider the laboratory director who certifies the ultimate results. The director is arguably the most effective person to confront for revealing any ambiguity in findings, variations in procedures, or problems in the office, as he or she is most familiar with the standard procedures, the office's variations, and problems in prior cases or with particular analysts. The prosecution may seek to introduce his or her certification into evidence. The Court implies that only those statements that are actually entered into evidence require confrontation. See *ante,* at 309. This could mean that the director is also an analyst, even if his or her certification relies upon or restates work performed by subordinates.

The Court offers no principles or historical precedent to determine which of these persons is the analyst. All contribute to the test result. And each is equally remote from the scene, has no personal stake in the outcome, does not even know the accused, and is concerned only with the performance of his or her role in conducting the test.

It could be argued that the only analyst who must testify is the person who signed the certificate. Under this view, a laboratory could have one employee sign certificates and appear in court, which would spare all the other analysts this burden. But the Court has already rejected this arrangement. The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second:

> "[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman [here, the laboratory employee who signs the certificate] *recite* the unsworn hearsay testimony of the declarant [here, the analyst who performs the actual test], instead of having the declarant sign a deposition. Indeed, if there is one point for which no case—English or early American, state or federal—can be cited, that is it." 547 U. S., at 826.

Under this logic, the Court's holding cannot be cabined to the person who signs the certificates. If the signatory is restating the testimonial statements of the true analysts—whoever they might be—then those analysts, too, must testify in person.

Today's decision demonstrates that even in the narrow category of scientific tests that identify a drug, the Court cannot define with any clarity who the analyst is. Outside this narrow category, the range of other scientific tests that may be affected by the Court's new confrontation right is staggering. See, *e. g.*, Comment, Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement, 96 Cal. L. Rev. 1093, 1094, 1115 (2008) (noting that every court post-*Crawford* has held that autopsy reports are not testimonial, and warning that a contrary rule would "effectively functio[n] as a statute of limitations for murder").

2

It is difficult to confine at this point the damage the Court's holding will do in other contexts. Consider just two—establishing the chain of custody and authenticating a copy of a document.

It is the obligation of the prosecution to establish the chain of custody for evidence sent to testing laboratories—that is, to establish "the identity and integrity of physical evidence

by tracing its continuous whereabouts." 23 C. J. S., Criminal Law § 1142, p. 66 (2006). Meeting this obligation requires representations—that one officer retrieved the evidence from the crime scene, that a second officer checked it into an evidence locker, that a third officer verified the locker's seal was intact, and so forth. The iron logic of which the Court is so enamored would seem to require in-court testimony from each human link in the chain of custody. That, of course, has never been the law. See, *e. g.*, *United States* v. *Lott*, 854 F. 2d 244, 250 (CA7 1988) ("[G]aps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility"); 29A Am. Jur. 2d, Evidence § 962, p. 269 (2008) ("The fact that one of the persons in control of a fungible substance does not testify at trial does not, without more, make the substance or testimony relating to it inadmissible"); 23 C. J. S., *supra*, § 1142, at 67 ("It is generally not necessary that every witness who handled the evidence testify").

It is no answer for the Court to say that "[i]t is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence." *Ante*, at 311, n. 1. The case itself determines which links in the chain are crucial—not the prosecution. In any number of cases, the crucial link in the chain will not be available to testify, and so the evidence will be excluded for lack of a proper foundation.

Consider another context in which the Court's holding may cause disruption: The long-accepted practice of authenticating copies of documents by means of a certificate from the document's custodian stating that the copy is accurate. See, *e. g.*, Fed. Rule Evid. 902(4) (in order to be self-authenticating, a copy of a public record must be "certified as correct by the custodian"); Rule 902(11) (business record must be "accompanied by a written declaration of its custodian"). Under one possible reading of the Court's opinion, recordkeepers will be required to testify. So far, courts have not read *Crawford* and *Davis* to impose this largely

meaningless requirement. See, *e. g.*, *United States* v. *Adefehinti*, 510 F. 3d 319, 327–328 (CADC 2008) (certificates authenticating bank records may be admitted without confrontation); *United States* v. *Ellis*, 460 F. 3d 920, 927 (CA7 2006) (certificate authenticating hospital records). But the breadth of the Court's ruling today, and its undefined scope, may well be such that these courts now must be deemed to have erred. The risk of that consequence ought to tell us that something is very wrong with the Court's analysis.

Because the Court is driven by nothing more than a wooden application of the *Crawford* and *Davis* definition of "testimonial," divorced from any guidance from history, precedent, or common sense, there is no way to predict the future applications of today's holding. Surely part of the justification for the Court's formalism must lie in its predictability. There is nothing predictable here, however, other than the uncertainty and disruption that now must ensue.

B

With no precedent to guide us, let us assume that the Court's analyst is the person who interprets the machine's printout. This result makes no sense. The Confrontation Clause is not designed, and does not serve, to detect errors in scientific tests. That should instead be done by conducting a new test. Or, if a new test is impossible, the defendant may call his own expert to explain to the jury the test's flaws and the dangers of relying on it. And if, in an extraordinary case, the particular analyst's testimony is necessary to the defense, then, of course, the defendant may subpoena the analyst. The Court frets that the defendant may be unable to do so "when the [analyst] is unavailable or simply refuses to appear." *Ante*, at 324. But laboratory analysts are not difficult to locate or to compel. As discussed below, analysts already devote considerable time to appearing in court when subpoenaed to do so. See Part I–C, *infra;* see also Brief for State of Alabama et al. as *Amici Curiae* 26–28. Neither the

Court, petitioner, nor *amici* offer any reason to believe that defendants have trouble subpoenaing analysts in cases where the analysts' in-court testimony is necessary.

The facts of this case illustrate the formalistic and pointless nature of the Court's reading of the Clause. Petitioner knew, well in advance of trial, that the Commonwealth would introduce the tests against him. The bags of cocaine were in court, available for him to test, and entered into evidence. Yet petitioner made no effort, before or during trial, to mount a defense against the analysts' results. Petitioner could have challenged the tests' reliability by seeking discovery concerning the testing methods used or the qualifications of the laboratory analysts. See Mass. Rule Crim. Proc. 14(a)(2) (2009). He did not do so. Petitioner could have sought to conduct his own test. See Rule 41. Again, he did not seek a test; indeed, he did not argue that the drug was not cocaine. Rather than dispute the authenticity of the samples tested or the accuracy of the tests performed, petitioner argued to the jury that the prosecution had not shown that he had possessed or dealt in the drugs.

Despite not having prepared a defense to the analysts' results, petitioner's counsel made what can only be described as a *pro forma* objection to admitting the results without in-court testimony, presumably from one particular analyst. Today the Court, by deciding that this objection should have been sustained, transforms the Confrontation Clause from a sensible procedural protection into a distortion of the criminal justice system.

It is difficult to perceive how the Court's holding will advance the purposes of the Confrontation Clause. One purpose of confrontation is to impress upon witnesses the gravity of their conduct. See *Coy* v. *Iowa*, 487 U. S. 1012, 1019–1020 (1988). A witness, when brought to face the person his or her words condemn, might refine, reformulate, reconsider, or even recant earlier statements. See *ibid.* A further purpose is to alleviate the danger of one-sided inter-

rogations by adversarial government officials who might distort a witness' testimony. The Clause guards against this danger by bringing the interrogation into the more neutral and public forum of the courtroom. See *Maryland* v. *Craig*, 497 U. S. 836, 869–870 (1990) (SCALIA, J., dissenting) (discussing the "value of the confrontation right in guarding against a child's distorted or coerced recollections"); see also Comment, 96 Cal. L. Rev., at 1120–1122 ("During private law-enforcement questioning, police officers or prosecutors can exert pressure on the witness without a high risk of being discovered. Courtroom questioning, in contrast, is public and performed in front of the jury, judge and defendant. Pressure is therefore harder to exert in court").

But neither purpose is served by the rule the Court announces today. It is not plausible that a laboratory analyst will retract his or her prior conclusion upon catching sight of the defendant the result condemns. After all, the analyst is far removed from the particular defendant and, indeed, claims no personal knowledge of the defendant's guilt. And an analyst performs hundreds if not thousands of tests each year and will not remember a particular test or the link it had to the defendant.

This is not to say that analysts are infallible. They are not. It may well be that if the State does not introduce the machine printout or the raw results of a laboratory analysis; if it does not call an expert to interpret a test, particularly if that test is complex or little known; if it does not establish the chain of custody and the reliability of the laboratory; then the State will have failed to meet its burden of proof. That result follows because the State must prove its case beyond a reasonable doubt, without relying on presumptions, unreliable hearsay, and the like. See *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 446 (1978) (refusing to permit a "'conclusive presumption [of intent],'" which "'would effectively eliminate intent as an ingredient of the offense'" (quoting *Morissette* v. *United States*, 342 U. S. 246, 275

(1952))). The State must permit the defendant to challenge the analyst's result. See *Holmes* v. *South Carolina*, 547 U. S. 319, 331 (2006) (affirming the defendant's right to "have a meaningful opportunity to present a complete defense" (internal quotation marks omitted)). The rules of evidence, including those governing reliability under hearsay principles and the latitude to be given expert witnesses; the rules against irrebutable presumptions; and the overriding principle that the prosecution must make its case beyond a reasonable doubt—all these are part of the protections for the accused. The States, however, have some latitude in determining how these rules should be defined.

The Confrontation Clause addresses who must testify. It simply does not follow, however, that this clause, in lieu of the other rules set forth above, controls who the prosecution must call on every issue. Suppose, for instance, that the defense challenges the procedures for a secure chain of custody for evidence sent to a laboratory and then returned to the police. The defense has the right to call its own witnesses to show that the chain of custody is not secure. But that does not mean it can demand that, in the prosecution's case in chief, each person who is in the chain of custody—and who had an undoubted opportunity to taint or tamper with the evidence—must be called by the prosecution under the Confrontation Clause. And the same is true with laboratory technicians.

The Confrontation Clause is simply not needed for these matters. Where, as here, the defendant does not even dispute the accuracy of the analyst's work, confrontation adds nothing.

C

For the sake of these negligible benefits, the Court threatens to disrupt forensic investigations across the country and to put prosecutions nationwide at risk of dismissal based on erratic, all-too-frequent instances when a particular laboratory technician, now invested by the Court's new constitu-

tional designation as the analyst, simply does not or cannot appear.

Consider first the costs today's decision imposes on criminal trials. Our own Court enjoys weeks, often months, of notice before cases are argued. We receive briefs well in advance. The argument itself is ordered. A busy trial court, by contrast, must consider not only attorneys' schedules but also those of witnesses and juries. Trial courts have huge caseloads to be processed within strict time limits. Some cases may unexpectedly plead out at the last minute; others, just as unexpectedly, may not. Some juries stay out longer than predicted; others must be reconstituted. An analyst cannot hope to be the trial court's top priority in scheduling. The analyst must instead face the prospect of waiting for days in a hallway outside the courtroom before being called to offer testimony that will consist of little more than a rote recital of the written report. See Part I–B, *supra*.

As matters stood before today's opinion, analysts already spent considerable time appearing as witnesses in those few cases where the defendant, unlike petitioner in this case, contested the analyst's result and subpoenaed the analyst. See Brief for State of Alabama et al. as *Amici Curiae* 26–28 (testifying takes time); *ante*, at 328 (before today's opinion, it was "'almost always the case that [analysts' certificates] [we]re admitted without objection'" in Massachusetts courts). By requiring analysts also to appear in the far greater number of cases where defendants do not dispute the analyst's result, the Court imposes enormous costs on the administration of justice.

Setting aside, for a moment, all the other crimes for which scientific evidence is required, consider the costs the Court's ruling will impose on state drug prosecutions alone. In 2004, the most recent year for which data are available, drug possession and trafficking resulted in 362,850 felony convictions in state courts across the country. See Dept. of Justice, Bureau of Justice Statistics, M. Durose & P. Langan,

Felony Sentences in State Courts, 2004, p. 2 (July 2007). Roughly 95% of those convictions were products of plea bargains, see *id.*, at 1, which means that state courts saw more than 18,000 drug trials in a single year.

The analysts responsible for testing the drugs at issue in those cases now bear a crushing burden. For example, the district attorney in Philadelphia prosecuted 25,000 drug crimes in 2007. Brief for National Dist. Attorneys Association et al. as *Amici Curiae* 12–13. Assuming that number remains the same, and assuming that 95% of the cases end in a plea bargain, each of the city's 18 drug analysts, *ibid.*, will be required to testify in more than 69 trials next year. Cleveland's district attorney prosecuted 14,000 drug crimes in 2007. *Ibid.* Assuming that number holds, and that 95% of the cases end in a plea bargain, each of the city's six drug analysts (two of whom work only part time) must testify in 117 drug cases next year. *Id.*, at 13.

The Federal Government may face even graver difficulties than the States because its operations are so widespread. For example, the Federal Bureau of Investigation (FBI) laboratory at Quantico, Virginia, supports federal, state, and local investigations across the country. Its 500 employees conduct over 1 million scientific tests each year. Dept. of Justice, FBI Laboratory 2007, Message from the FBI Laboratory Director, http://www.fbi.gov/hq/lab/lab2007/labannual07.pdf (as visited June 22, 2009, and available in Clerk of Court's case file). The Court's decision means that before any of those million tests reaches a jury, at least one of the laboratory's analysts must board a plane, find his or her way to an unfamiliar courthouse, and sit there waiting to read aloud notes made months ago.

The Court purchases its meddling with the Confrontation Clause at a dear price, a price not measured in taxpayer dollars alone. Guilty defendants will go free, on the most technical grounds, as a direct result of today's decision, adding nothing to the truth-finding process. The analyst will

not always make it to the courthouse in time. He or she may be ill; may be out of the country; may be unable to travel because of inclement weather; or may at that very moment be waiting outside some other courtroom for another defendant to exercise the right the Court invents today. If for any reason the analyst cannot make it to the courthouse in time, then, the Court holds, the jury cannot learn of the analyst's findings (unless, by some unlikely turn of events, the defendant previously cross-examined the analyst). *Ante*, at 309. The result, in many cases, will be that the prosecution cannot meet its burden of proof, and the guilty defendant goes free on a technicality that, because it results in an acquittal, cannot be reviewed on appeal.

The Court's holding is a windfall to defendants, one that is unjustified by any demonstrated deficiency in trials, any well-understood historical requirement, or any established constitutional precedent.

II

All of the problems with today's decision—the imprecise definition of "analyst," the lack of any perceptible benefit, the heavy societal costs—would be of no moment if the Constitution did, in fact, require the Court to rule as it does today. But the Constitution does not.

The Court's fundamental mistake is to read the Confrontation Clause as referring to a kind of out-of-court statement—namely, a testimonial statement—that must be excluded from evidence. The Clause does not refer to kinds of statements. Nor does the Clause contain the word "testimonial." The text, instead, refers to kinds of persons, namely, to "witnesses against" the defendant. Laboratory analysts are not "witnesses against" the defendant as those words would have been understood at the framing. There is simply no authority for this proposition.

Instead, the Clause refers to a conventional "witness"—meaning one who witnesses (that is, perceives) an event that gives him or her personal knowledge of some aspect of the

defendant's guilt. Both *Crawford* and *Davis* concerned just this kind of ordinary witness—and nothing in the Confrontation Clause's text, history, or precedent justifies the Court's decision to expand those cases.

A

The Clause states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U. S. Const., Amdt. 6. Though there is "virtually no evidence of what the drafters of the Confrontation Clause intended it to mean," *White* v. *Illinois*, 502 U. S. 346, 359 (1992) (THOMAS, J., concurring in part and concurring in judgment), it is certain the Framers did not contemplate that an analyst who conducts a scientific test far removed from the crime would be considered a "witnes[s] against" the defendant.

The Framers were concerned with a typical witness—one who perceived an event that gave rise to a personal belief in some aspect of the defendant's guilt. There is no evidence that the Framers understood the Clause to extend to unconventional witnesses. As discussed below, there is significant evidence to the contrary. See Part II–B, *infra.* In these circumstances, the historical evidence in support of the Court's position is "'too meager . . . to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution.'" *Boumediene* v. *Bush*, 553 U. S. 723, 752 (2008) (quoting *Reid* v. *Covert*, 354 U. S. 1, 64 (1957) (Frankfurter, J., concurring in result)). The Court goes dangerously wrong when it bases its constitutional interpretation upon historical guesswork.

The infamous treason trial of Sir Walter Raleigh provides excellent examples of the kinds of witnesses to whom the Confrontation Clause refers. *Raleigh's Case,* 2 How. St. Tr. 1 (1603); see *Crawford*, 541 U. S., at 44–45 (Raleigh's trial informs our understanding of the Clause because it was, at the time of the framing, one of the "most notorious in-

stances" of the abuse of witnesses' out-of-court statements); *ante*, at 315 (same). Raleigh's accusers claimed to have heard Raleigh speak treason, so they were witnesses in the conventional sense. We should limit the Confrontation Clause to witnesses like those in Raleigh's trial.

The Court today expands the Clause to include laboratory analysts, but analysts differ from ordinary witnesses in at least three significant ways. First, a conventional witness recalls events observed in the past, while an analyst's report contains near-contemporaneous observations of the test. An observation recorded at the time it is made is unlike the usual act of testifying. A typical witness must recall a previous event that he or she perceived just once, and thus may have misperceived or misremembered. But an analyst making a contemporaneous observation need not rely on memory; he or she instead reports the observations at the time they are made. We gave this consideration substantial weight in *Davis*. There, the "primary purpose" of the victim's 911 call was "to enable police assistance to meet an ongoing emergency," rather than "to establish or prove past events potentially relevant to later criminal prosecution." 547 U. S., at 822, 827. See also *People* v. *Geier*, 41 Cal. 4th 555, 605–609, 161 P. 3d 104, 139–141 (2007). The Court cites no authority for its holding that an observation recorded at the time it is made is an act of "witness[ing]" for purposes of the Confrontation Clause.

Second, an analyst observes neither the crime nor any human action related to it. Often, the analyst does not know the defendant's identity, much less have personal knowledge of an aspect of the defendant's guilt. The analyst's distance from the crime and the defendant, in both space and time, suggests the analyst is not a witness against the defendant in the conventional sense.

Third, a conventional witness responds to questions under interrogation. See, *e. g.*, *Raleigh's Case*, *supra*, at 15–20. But laboratory tests are conducted according to scientific

protocols; they are not dependent upon or controlled by interrogation of any sort. Put differently, out-of-court statements should only "require confrontation if they are produced by, or with the involvement of, adversarial government officials responsible for investigating and prosecuting crime." Comment, 96 Cal. L. Rev., at 1118. There is no indication that the analysts here—who work for the State Laboratory Institute, a division of the Massachusetts Department of Public Health—were adversarial to petitioner. Nor is there any evidence that adversarial officials played a role in formulating the analysts' certificates.

Rather than acknowledge that it expands the Confrontation Clause beyond conventional witnesses, the Court relies on our recent opinions in *Crawford* and *Davis*. *Ante*, at 309–311. The Court assumes, with little analysis, that *Crawford* and *Davis* extended the Clause to any person who makes a "testimonial" statement. But the Court's confident tone cannot disguise the thinness of these two reeds. Neither *Crawford* nor *Davis* considered whether the Clause extends to persons far removed from the crime who have no connection to the defendant. Instead, those cases concerned conventional witnesses. *Davis*, *supra*, at 826–830 (witnesses were victims of defendants' assaults); *Crawford*, *supra*, at 38 (witness saw defendant stab victim).

It is true that *Crawford* and *Davis* employed the term "testimonial," and thereby suggested that any testimonial statement, by any person, no matter how distant from the defendant and the crime, is subject to the Confrontation Clause. But that suggestion was not part of the holding of *Crawford* or *Davis*. Those opinions used the adjective "testimonial" to avoid the awkward phrasing required by reusing the noun "witness." The Court today transforms that turn of phrase into a new and sweeping legal rule, by holding that anyone who makes a formal statement for the purpose of later prosecution—no matter how removed from the crime—must be considered a "witnes[s] against" the defendant.

Ante, at 309–311. The Court cites no authority to justify this expansive new interpretation.

B

No historical evidence supports the Court's conclusion that the Confrontation Clause was understood to extend beyond conventional witnesses to include analysts who conduct scientific tests far removed from the crime and the defendant. Indeed, what little evidence there is contradicts this interpretation.

Though the Framers had no forensic scientists, they did use another kind of unconventional witness—the copyist. A copyist's work may be as essential to a criminal prosecution as the forensic analyst's. To convict a man of bigamy, for example, the State often requires his marriage records. See, *e. g.*, *Williams* v. *State*, 54 Ala. 131, 134, 135 (1875); *State* v. *Potter*, 52 Vt. 33, 38 (1879). But if the original records cannot be taken from the archive, the prosecution must rely on copies of those records, made for the purpose of introducing the copies into evidence at trial. See *ibid.* In that case, the copyist's honesty and diligence are just as important as the analyst's here. If the copyist falsifies a copy, or even misspells a name or transposes a date, those flaws could lead the jury to convict. Because so much depends on his or her honesty and diligence, the copyist often prepares an affidavit certifying that the copy is true and accurate.

Such a certificate is beyond question a testimonial statement under the Court's definition: It is a formal out-of-court statement offered for the truth of two matters (the copyist's honesty and the copy's accuracy), and it is prepared for a criminal prosecution.

During the Framers' era copyists' affidavits were accepted without hesitation by American courts. See, *e. g.*, *United States* v. *Percheman*, 7 Pet. 51, 85 (1833) (opinion for the Court by Marshall, C. J.); see also Advisory Committee's Note on Fed. Rule Evid. 902(4), 28 U. S. C. App., p. 390 ("The

common law . . . recognized the procedure of authenticating copies of public records by certificate"); 5 J. Wigmore, Evidence §§ 1677, 1678 (J. Chadbourn rev. 1974). And courts admitted copyists' affidavits in criminal as well as civil trials. See *Williams*, *supra*; *Potter*, *supra*. This demonstrates that the framing generation, in contrast to the Court today, did not consider the Confrontation Clause to require in-court confrontation of unconventional authors of testimonial statements.

The Court attempts to explain away this historical exception to its rule by noting that a copyist's authority is "narrowly circumscribed." *Ante*, at 322. But the Court does not explain why that matters, nor, if it does matter, why laboratory analysts' authority should not also be deemed "narrowly circumscribed" so that they, too, may be excused from testifying. And drawing these fine distinctions cannot be squared with the Court's avowed allegiance to formalism. Determining whether a witness' authority is "narrowly circumscribed" has nothing to do with *Crawford*'s testimonial framework. It instead appears much closer to the pre-*Crawford* rule of *Ohio* v. *Roberts*, under which a statement could be admitted without testimony if it "bears adequate indicia of reliability." 448 U. S., at 66 (internal quotation marks omitted).

In keeping with the traditional understanding of the Confrontation Clause, this Court in *Dowdell* v. *United States*, 221 U. S. 325 (1911), rejected a challenge to the use of certificates, sworn out by a clerk of court, a trial judge, and a court reporter, stating that defendants had been present at trial. Those certificates, like a copyist's certificate, met every requirement of the Court's current definition of "testimonial." In rejecting the defendants' claim that use of the certificates violated the Confrontation Clause, the Court in *Dowdell* explained that the officials who executed the certificates "were not witnesses against the accused" because they "were not asked to testify to facts concerning [the de-

fendants'] guilt or innocence." *Id.*, at 330. Indeed, as recently as *Davis*, the Court reaffirmed *Dowdell.* 547 U. S., at 825.

By insisting that every author of a testimonial statement appear for confrontation, on pain of excluding the statement from evidence, the Court does violence to the Framers' sensible, and limited, conception of the right to confront "witnesses against" the defendant.

C

In addition to lacking support in historical practice or in this Court's precedent, the Court's decision is also contrary to authority extending over at least 90 years, 35 States, and six Federal Courts of Appeals.

Almost 100 years ago three State Supreme Courts held that their State Constitutions did not require analysts to testify in court. In a case much like this one, the Massachusetts Supreme Judicial Court upheld the admission of a certificate stating that the liquid seized from the defendant contained alcohol, even though the author of the certificate did not testify. *Commonwealth* v. *Slavski*, 245 Mass. 405, 413, 140 N. E. 465, 467 (1923). The highest courts in Connecticut and Virginia reached similar conclusions under their own Constitutions. *State* v. *Torello*, 103 Conn. 511, 131 A. 429 (1925); *Bracy* v. *Commonwealth*, 119 Va. 867, 89 S. E. 144 (1916). Just two state courts appear to have read a State Constitution to require a contrary result. *State* v. *Clark*, 1998 MT 221, ¶¶ 18–25, 290 Mont. 479, 484–489, 964 P. 2d 766, 770–772 (laboratory drug report requires confrontation under Montana's Constitution, which is "[u]nlike its federal counterpart"); *State* v. *Birchfield*, 342 Ore. 624, 157 P. 3d 216 (2007), but see *id.*, at 631–632, 157 P. 3d, at 220 (suggesting that a "typical notice requirement" would be lawful).

As for the Federal Constitution, before *Crawford* the authority was stronger still: The Sixth Amendment does not require analysts to testify in court. All Federal Courts of

Appeals to consider the issue agreed. *Sherman* v. *Scott*, 62 F. 3d 136, 139–142 (CA5 1995); *Minner* v. *Kerby*, 30 F. 3d 1311, 1313–1315 (CA10 1994); *United States* v. *Baker*, 855 F. 2d 1353, 1359–1360 (CA8 1988); *Reardon* v. *Manson*, 806 F. 2d 39 (CA2 1986); *Kay* v. *United States*, 255 F. 2d 476, 480–481 (CA4 1958); see also *Manocchio* v. *Moran*, 919 F. 2d 770, 777–782 (CA1 1990) (autopsy report stating cause of victim's death). Some 24 state courts, and the Court of Appeals for the Armed Forces, were in accord. See Appendix A, *infra*. (Some cases cited in the appendixes concern doctors, coroners, and calibrators rather than laboratory analysts, but their reasoning is much the same.) Eleven more state courts upheld burden-shifting statutes that reduce, if not eliminate, the right to confrontation by requiring the defendant to take affirmative steps prior to trial to summon the analyst. See *ibid.* Because these burden-shifting statutes may be invalidated by the Court's reasoning, these 11 decisions, too, appear contrary to today's opinion. See Part III–B, *infra*. Most of the remaining States, far from endorsing the Court's view, appear not to have addressed the question prior to *Crawford*. Against this weight of authority, the Court proffers just two cases from intermediate state courts of appeals. *Ante*, at 313.

On a practical level, today's ruling would cause less disruption if the States' hearsay rules had already required analysts to testify. But few States require this. At least 16 state courts have held that their evidentiary rules permit scientific test results, calibration certificates, and the observations of medical personnel to enter evidence without in-court testimony. See Appendix B, *infra*. The Federal Courts of Appeals have reached the same conclusion in applying the federal hearsay rule. *United States* v. *Garnett*, 122 F. 3d 1016, 1018–1019 (CA11 1997) *(per curiam); United States* v. *Gilbert*, 774 F. 2d 962, 965 (CA9 1985) *(per curiam); United States* v. *Ware*, 247 F. 2d 698, 699–700 (CA7 1957); but see *United States* v. *Oates*, 560 F. 2d 45, 82 (CA2 1977)

(report prepared by law enforcement not admissible under public-records or business-records exceptions to federal hearsay rule).

The modern trend in the state courts has been away from the Court's rule and toward the admission of scientific test results without testimony—perhaps because the States have recognized the increasing reliability of scientific testing. See Appendix B, *infra* (citing cases from three States overruling or limiting previous precedents that had adopted the Court's rule as a matter of state law). It appears that a mere six courts continue to interpret their States' hearsay laws to require analysts to testify. See *ibid.* And, of course, where courts have grounded their decisions in state law, rather than the Constitution, the legislatures in those States have had, until now, the power to abrogate the courts' interpretation if the costs were shown to outweigh the benefits. Today the Court strips that authority from the States by carving the minority view into the constitutional text.

State legislatures, and not the Members of this Court, have the authority to shape the rules of evidence. The Court therefore errs when it relies in such great measure on the recent report of the National Academy of Sciences. *Ante*, at 318–320 (discussing National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward (2009)). That report is not directed to this Court, but rather to the elected representatives in Congress and the state legislatures, who, unlike Members of this Court, have the power and competence to determine whether scientific tests are unreliable and, if so, whether testimony is the proper solution to the problem.

The Court rejects the well-established understanding—extending across at least 90 years, 35 States, and six Federal Courts of Appeals—that the Constitution does not require analysts to testify in court before their analysis may be introduced into evidence. The only authority on which the Court can rely is its own speculation on the meaning of the

word "testimonial," made in two recent opinions that said nothing about scientific analysis or scientific analysts.

III

In an attempt to show that the "sky will not fall after today's decision," *ante,* at 325, the Court makes three arguments, none of which withstands scrutiny.

A

In an unconvincing effort to play down the threat that today's new rule will disrupt or even end criminal prosecutions, the Court professes a hope that defense counsel will decline to raise what will soon be known as the *Melendez-Diaz* objection. *Ante,* at 328. The Court bases this expectation on its understanding that defense attorneys surrender constitutional rights because the attorneys do not "want to antagonize the judge or jury by wasting their time." *Ibid.*

The Court's reasoning is troubling on at least two levels. First, the Court's speculation rests on the apparent belief that our Nation's trial judges and jurors are unwilling to accept zealous advocacy and that, once "antagonize[d]" by it, will punish such advocates with adverse rulings. *Ibid.* The Court offers no support for this stunning slur on the integrity of the Nation's courts. It is commonplace for the defense to request, at the conclusion of the prosecution's opening case, a directed verdict of acquittal. If the prosecution has failed to prove an element of the crime—even an element that is technical and rather obvious, such as movement of a car in interstate commerce—then the case must be dismissed. Until today one would not have thought that judges should be angered at the defense for making such motions, nor that counsel has some sort of obligation to avoid being troublesome when the prosecution has not done all the law requires to prove its case.

Second, even if the Court were right to expect trial judges to feel "antagonize[d]" by *Melendez-Diaz* objections and to

then vent their anger by punishing the lawyer in some way, there is no authority to support the Court's suggestion that a lawyer may shirk his or her professional duties just to avoid judicial displeasure. There is good reason why the Court cites no authority for this suggestion—it is contrary to what some of us, at least, have long understood to be defense counsel's duty to be a zealous advocate for every client. This Court has recognized the bedrock principle that a competent criminal defense lawyer must put the prosecution to its proof:

> "[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' *Anders* v. *California*, 386 U. S. 738, 743 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted . . . the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *United States* v. *Cronic*, 466 U. S. 648, 656–657 (1984) (footnotes omitted).

See also ABA Model Code of Professional Responsibility, Canon 7–1, in ABA Compendium of Professional Responsibility Rules and Standards (2008) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . " (footnotes omitted)).

The instant case demonstrates how zealous defense counsel will defend their clients. To convict, the prosecution must prove the substance is cocaine. Under the Court's new rule, apparently only an analyst's testimony suffices to prove that fact. (Of course there will also be a large universe of other crimes, ranging from homicide to robbery, where scien-

tific evidence is necessary to prove an element.) In cases where scientific evidence is necessary to prove an element of the crime, the Court's rule requires the prosecution to call the person identified as the analyst; this requirement has become a new prosecutorial duty linked with proving the State's case beyond a reasonable doubt. Unless the Court is ashamed of its new rule, it is inexplicable that the Court seeks to limit its damage by hoping that defense counsel will be derelict in their duty to insist that the prosecution prove its case. That is simply not the way the adversarial system works.

In any event, the Court's hope is sure to prove unfounded. The Court surmises that "[i]t is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis." *Ante*, at 328. This optimistic prediction misunderstands how criminal trials work. If the defense does not plan to challenge the test result, "highlight[ing]" that result through testimony does not harm the defense as the Court supposes. If the analyst cannot reach the courtroom in time to testify, however, a *Melendez-Diaz* objection grants the defense a great windfall: The analyst's work cannot come into evidence. Given the prospect of such a windfall (which may, in and of itself, secure an acquittal) few zealous advocates will pledge, prior to trial, not to raise a *Melendez-Diaz* objection. Defense counsel will accept the risk that the jury may hear the analyst's live testimony, in exchange for the chance that the analyst fails to appear and the government's case collapses. And if, as here, the defense is not that the substance was harmless, but instead that the accused did not possess it, the testimony of the technician is a formalism that does not detract from the defense case.

In further support of its unlikely hope, the Court relies on the Brief for Law Professors as *Amici Curiae* 7–8, which reports that nearly 95% of convictions are obtained via guilty

plea and thus do not require in-court testimony from laboratory analysts. *Ante*, at 325. What the Court does not consider is how its holding will alter these statistics. The defense bar today gains the formidable power to require the government to transport the analyst to the courtroom at the time of trial. Zealous counsel will insist upon concessions: a plea bargain, or a more lenient sentence in exchange for relinquishing this remarkable power.

B

As further reassurance that the "sky will not fall after today's decision," *ibid.*, the Court notes that many States have enacted burden-shifting statutes that require the defendant to assert his Confrontation Clause right prior to trial or else "forfeit" it "by silence," *ante*, at 326. The Court implies that by shifting the burden to the defendant to take affirmative steps to produce the analyst, these statutes reduce the burden on the prosecution.

The Court holds that these burden-shifting statutes are valid because, in the Court's view, they "shift no burden whatever." *Ante*, at 327. While this conclusion is welcome, the premise appears flawed. Even what the Court calls the "simplest form" of burden-shifting statutes, *ante*, at 326, do impose requirements on the defendant, who must make a formal demand, with proper service, well before trial. Some statutes impose more requirements, for instance by requiring defense counsel to subpoena the analyst, to show good cause for demanding the analyst's presence, or even to affirm under oath an intent to cross-examine the analyst. See generally Metzger, Cheating the Constitution, 59 Vand. L. Rev. 475, 481–485 (2006). In a future case, the Court may find that some of these more onerous burden-shifting statutes violate the Confrontation Clause because they "impos[e] a burden . . . on the defendant to bring . . . adverse witnesses into court." *Ante*, at 324.

The burden-shifting statutes thus provide little reassurance that this case will not impose a meaningless formalism across the board.

C

In a further effort to support its assessment that today's decision will not cause disruption, the Court cites 10 decisions from States that, the Court asserts, "have already adopted the constitutional rule we announce today." *Ante*, at 325–326, and n. 11. The Court assures us that "there is no evidence that the criminal justice system has ground to a halt in the[se] States." *Ante*, at 326.

On inspection, the citations prove far less reassuring than promised. Seven were decided by courts that considered themselves bound by *Crawford*. These cases thus offer no support for the Court's assertion that the state jurists independently "adopted" the Court's interpretation as a matter of state law. Quite the contrary, the debate in those seven courts was over just how far this Court intended *Crawford* to sweep. See, *e. g.*, *State* v. *Belvin*, 986 So. 2d 516, 526 (Fla. 2008) (Wells, J., concurring in part and dissenting in part) ("I believe that the majority has extended the *Crawford* and *Davis* decisions beyond their intended reach" (citations omitted)). The Court should correct these courts' overbroad reading of *Crawford*, not endorse it. Were the Court to do so, these seven jurisdictions might well change their position.

Moreover, because these seven courts only "adopted" the Court's position in the wake of *Crawford*, their decisions are all quite recent. These States have not yet been subject to the widespread, adverse results of the formalism the Court mandates today.

The citations also fail to reassure for a different reason. Five of the Court's ten citations—including all three pre-*Crawford* cases—come from States that have reduced the confrontation right. Four States have enacted a burden-shifting statute requiring the defendant to give early notice of his intent to confront the analyst. See Part III–B, *supra;*

Colorado: *Hinojos-Mendoza* v. *People*, 169 P. 3d 662, 668–671 (Colo. 2007), Colo. Rev. Stat. Ann. § 16–3–309 (2008) (defendant must give notice 10 days before trial); Georgia: Compare *Miller* v. *State*, 266 Ga. 850, 854–855, 472 S. E. 2d 74, 78–79 (1996) (striking down earlier notice statute requiring defendant to show good cause, prior to trial, to call the analyst), with Ga. Code Ann. § 35–3–154.1 (2006) (defendant must give notice 10 days before trial); Illinois: *People* v. *McClanahan*, 191 Ill. 2d 127, 133–134, 729 N. E. 2d 470, 474–475 (2000), Ill. Comp. Stat., ch. 725, § 5/115–15 (West 2006) (defendant must give notice "within 7 days" of "receipt of the report"); Oregon: *State* v. *Birchfield*, 342 Ore., at 631–632, 157 P. 3d, at 220 (suggesting that a "typical notice requirement" would be lawful), see Ore. Rev. Stat. § 475.235 (2007) (defendant must give notice 15 days before trial). A fifth State, Mississippi, excuses the prosecution from producing the analyst who conducted the test, so long as it produces someone. Compare *Barnette* v. *State*, 481 So. 2d 788, 792 (Miss. 1985) (cited by the Court), with *McGowen* v. *State*, 859 So. 2d 320, 339–340 (Miss. 2003) (the Sixth Amendment does not require confrontation with the particular analyst who conducted the test). It is possible that neither Mississippi's practice nor the burden-shifting statutes can be reconciled with the Court's holding. See Part III–B, *supra*. The disruption caused by today's decision has yet to take place in these States.

* * *

Laboratory analysts who conduct routine scientific tests are not the kind of conventional witnesses to whom the Confrontation Clause refers. The judgment of the Appeals Court of Massachusetts should be affirmed.

APPENDIXES

A

The following authorities held, prior to *Crawford*, that the Confrontation Clause does not require confrontation of the

analyst who conducted a routine scientific test: *United States* v. *Vietor*, 10 M. J. 69, 72 (Ct. Mil. App. 1980) (laboratory drug report); *State* v. *Cosgrove*, 181 Conn. 562, 574–578, 436 A. 2d 33, 40–41 (1980) (same); *Howard* v. *United States*, 473 A. 2d 835, 838–839 (D. C. 1984) (same); *Baber* v. *State*, 775 So. 2d 258 (Fla. 2000) (blood-alcohol test); *Commonwealth* v. *Harvard*, 356 Mass. 452, 253 N. E. 2d 346 (1969) (laboratory drug report); *DeRosa* v. *First Judicial Dist. Court of State ex rel. Carson City*, 115 Nev. 225, 232–233, 985 P. 2d 157, 162 (1999) *(per curiam)* (blood-alcohol test); *State* v. *Coombs*, 149 N. H. 319, 321–322, 821 A. 2d 1030, 1032 (2003) (blood-alcohol test); *State* v. *Fischer*, 459 N. W. 2d 818 (N. D. 1990) (laboratory drug report); *Commonwealth* v. *Carter*, 593 Pa. 562, 932 A. 2d 1261 (2007) (laboratory drug report; applying pre-*Crawford* law); *State* v. *Tavares*, 590 A. 2d 867, 872–873 (R. I. 1991) (laboratory analysis of victim's bodily fluid); *State* v. *Hutto*, 325 S. C. 221, 228–230, 481 S. E. 2d 432, 436 (1997) (footprint); *State* v. *Best*, 146 Ariz. 1, 3–4, 703 P. 2d 548, 550–551 (App. 1985) (fingerprint); *State* v. *Christian*, 119 N. M. 776, 895 P. 2d 676 (App. 1995) (blood-alcohol test); *State* v. *Sosa*, 59 Wash. App. 678, 684–687, 800 P. 2d 839, 843–844 (1990) (laboratory drug report).

The following authorities held, prior to *Crawford*, that the Confrontation Clause does not require confrontation of the results of autopsy and hospital reports describing the victim's injuries: *People* v. *Clark*, 3 Cal. 4th 41, 157–159, 833 P. 2d 561, 627–628 (1992) (autopsy report); *Henson* v. *State*, 332 A. 2d 773, 774–776 (Del. 1975) (treating physician's report of victim's injuries, with medical conclusions redacted); *Collins* v. *State*, 267 Ind. 233, 235–236, 369 N. E. 2d 422, 423 (1977) (autopsy report); *State* v. *Wilburn*, 196 La. 113, 115–118, 198 So. 765, 765–766 (1940) (hospital record stating victim's cause of death (citing *State* v. *Parker*, 7 La. Ann. 83 (1852) (coroner's written inquest stating cause of death))); *State* v. *Garlick*, 313 Md. 209, 223–225, 545 A. 2d 27, 34 (1988) (blood test showing presence of illegal drug); *People* v. *Kirt-*

doll, 391 Mich. 370, 385–391, 217 N. W. 2d 37, 46–48 (1974) (treating physician's report describing victim's injuries); *State* v. *Spikes*, 67 Ohio St. 2d 405, 411–415, 423 N. E. 2d 1122, 1128–1130 (1981) (treating physician's report of defendant's injuries); *State* v. *Kreck*, 86 Wash. 2d 112, 117–120, 542 P. 2d 782, 786–787 (1975) (laboratory report stating that murder victim's blood contained poison).

The following authorities held, prior to *Crawford*, that the Confrontation Clause does not require confrontation of certificates stating that instruments were in good working order at the time of a test: *State* v. *Ing*, 53 Haw. 466, 467–473, 497 P. 2d 575, 577–579 (1972) (certificate that police car's speedometer was in working order), accord, *State* v. *Ofa*, 9 Haw. App. 130, 135–139, 828 P. 2d 813, 817–818 (1992) *(per curiam)* (certificate that breathalyzer was in working order); *State* v. *Ruiz*, 120 N. M. 534, 903 P. 2d 845 (App. 1995) (same); *State* v. *Dilliner*, 212 W. Va. 135, 141–142, 569 S. E. 2d 211, 217–218 (2002) (same); *State* v. *Huggins*, 659 P. 2d 613, 616–617 (Alaska App. 1982) (same); *State* v. *Conway*, 70 Ore. App. 721, 690 P. 2d 1128 (1984) (same).

The following decisions reduced the right to confront the results of scientific tests by upholding burden-shifting statutes that require the defendant to take affirmative steps prior to trial to summon the analyst: *Johnson* v. *State*, 303 Ark. 12, 18–20, 792 S. W. 2d 863, 866–867 (1990) (defendant must give notice 10 days before trial); *State* v. *Davison*, 245 N. W. 2d 321 (Iowa 1976), Iowa Code § 749A.2 (1975), now codified as Iowa Code § 691.2 (2009) (same); *State* v. *Crow*, 266 Kan. 690, 974 P. 2d 100 (1999) (defendant must give notice within 10 days of receiving the result and must show that the result will be challenged at trial); *State* v. *Christianson*, 404 A. 2d 999 (Me. 1979) (defendant must give notice 10 days before trial); *State* v. *Miller*, 170 N. J. 417, 436–437, 790 A. 2d 144, 156 (2002) (defendant must give notice within 10 days of receiving the result and must show that the result will be challenged at trial); *State* v. *Smith*, 312 N. C. 361, 381–382,

323 S. E. 2d 316, 328 (1984) (defendant must subpoena analyst); *State* v. *Hancock*, 317 Ore. 5, 9–12, 854 P. 2d 926, 928–930 (1993) (same), but see *State* v. *Birchfield*, 342 Ore. 624, 157 P. 3d 216 (reducing defendant's burden); *State* v. *Hughes*, 713 S. W. 2d 58 (Tenn. 1986) (defendant must subpoena analyst); *Magruder* v. *Commonwealth*, 275 Va. 283, 295–300, 657 S. E. 2d 113, 119–121 (2008) (defendant must " 'call the person performing such analysis,' " at the State's expense); *People* v. *Mayfield-Ulloa*, 817 P. 2d 603 (Colo. App. 1991) (defendant must give notice to State and the analyst 10 days before trial); *State* v. *Matthews*, 632 So. 2d 294, 300–302 (La. App. 1993) (defendant must give notice five days before trial).

B

The following authorities hold that State Rules of Evidence permit the results of routine scientific tests to be admitted into evidence without confrontation: *State* v. *Torres*, 60 Haw. 271, 589 P. 2d 83 (1978) (X ray of victim's body); *State* v. *Davis*, 269 N. W. 2d 434, 440 (Iowa 1978) (laboratory analysis of victim's bodily fluid); *State* v. *Taylor*, 486 S. W. 2d 239, 241–243 (Mo. 1972) (microscopic comparison of wood chip retrieved from defendant's clothing with wood at crime scene); *State* v. *Snider*, 168 Mont. 220, 229–230, 541 P. 2d 1204, 1210 (1975) (laboratory drug report); *People* v. *Porter*, 46 App. Div. 2d 307, 311–313, 362 N. Y. S. 2d 249, 255–256 (1974) (blood-alcohol report); *Robertson* v. *Commonwealth*, 211 Va. 62, 64–68, 175 S. E. 2d 260, 262–264 (1970) (laboratory analysis of victim's bodily fluid); *Kreck*, *supra*, at 117–120, 542 P. 2d, at 786–787 (laboratory report stating that murder victim's blood contained poison).

The following authorities hold that State Rules of Evidence permit autopsy and hospital reports to be admitted into evidence without confrontation: *People* v. *Williams*, 174 Cal. App. 2d 364, 389–391, 345 P. 2d 47, 63–64 (1959) (autopsy report); *Henson*, *supra*, at 775–776 (report of physician who examined victim); *Wilburn*, *supra*, at 115–118, 198 So.,

at 765–766 (hospital record stating victim's cause of death); *Garlick*, 313 Md., at 223–225, 545 A. 2d, at 34 (blood test); *State* v. *Reddick*, 53 N. J. 66, 68–69, 248 A. 2d 425, 426–427 (1968) *(per curiam)* (autopsy report stating factual findings, but not opinions, of medical examiner); *People* v. *Nisonoff*, 293 N. Y. 597, 59 N. E. 2d 420 (1944) (same).

The following authorities hold that State Rules of Evidence permit certificates, which state that scientific instruments were in good working order, to be admitted into evidence without confrontation: *Wester* v. *State*, 528 P. 2d 1179, 1183 (Alaska 1974) (certificate stating that breathalyzer machine was in working order); *Best* v. *State*, 328 A. 2d 141, 143 (Del. 1974) (certificate that breathalyzer was in working order); *State* v. *Rines*, 269 A. 2d 9, 13–15 (Me. 1970) (manufacturer's certificate stating that blood-alcohol test kit was in working order admissible under the business-records exception); *McIlwain* v. *State*, 700 So. 2d 586, 590–591 (Miss. 1997) (same).

Taking the minority view, the following authorities interpret state hearsay rules to require confrontation of the results of routine scientific tests or observations of medical personnel: *State* v. *Sandoval-Tena*, 138 Idaho 908, 912, 71 P. 3d 1055, 1059 (2003) (laboratory drug report inadmissible under state hearsay rule); *Spears* v. *State*, 241 So. 2d 148 (Miss. 1970) (nurse's observation of victim inadmissible under state hearsay rule and Constitution); *State* v. *James*, 255 S. C. 365, 179 S. E. 2d 41 (1971) (chemical analysis of victim's bodily fluid inadmissible under state hearsay rule); *Cole* v. *State*, 839 S. W. 2d 798 (Tex. Crim. App. 1990) (laboratory drug report inadmissible under state hearsay rule); *State* v. *Workman*, 2005 UT 66, ¶¶ 9–20, 122 P. 3d 639, 642–643 (same); *State* v. *Williams*, 2002 WI 58, ¶¶ 32–62, 253 Wis. 2d 99, 118–127, 644 N. W. 2d 919, 928–932 (same), but see *id.*, at 109–117, 644 N. W. 2d, at 924–927 (no confrontation violation where expert testified based on test results prepared by an out-of-court analyst).

This summary does not include decisions that find test results inadmissible because the State failed to lay a proper foundation. Rather than endorse the minority view, those cases merely reaffirm the government's burden to prove the authenticity of its evidence and the applicability of an exception to the state hearsay rule. See, *e. g.*, *State* v. *Fisher*, 178 N. W. 2d 380 (Iowa 1970) (laboratory test of victim's bodily fluid inadmissible under business-records exception because the prosecution did not show that it was kept in regular course of business); *State* v. *Foster*, 198 Kan. 52, 422 P. 2d 964 (1967) (no foundation laid for introduction of blood-alcohol test because the prosecution did not show that the test was conducted in the usual course of business); *Moon* v. *State*, 300 Md. 354, 367–371, 478 A. 2d 695, 702–703 (1984) (blood-alcohol test inadmissible because insufficient foundational evidence that the test was conducted in a reliable manner); cf. *Davis*, *supra*, at 440 (laboratory test of victim's bodily fluid admitted under business-records exception to state hearsay rule); *Garlick*, *supra*, at 215, n. 2, 223–225, 545 A. 2d, at 30, n. 2, 34 (laboratory test of defendant's blood falls within "firmly rooted" hearsay exception).

Three States once espoused the minority view but appear to have changed course to some degree: *People* v. *Lewis*, 294 Mich. 684, 293 N. W. 907 (1940) (hospital record describing victim's injuries inadmissible hearsay), overruled by *Kirtdoll*, 391 Mich., at 372, 217 N. W. 2d, at 39 (noting that "[i]n its 35-year-long history, *Lewis* . . . has never been relied upon to actually deny admission into evidence of a business entry record in a criminal case"), but see *People* v. *McDaniel*, 469 Mich. 409, 670 N. W. 2d 659 (2003) *(per curiam)* (police laboratory report inadmissible hearsay); *State* v. *Tims*, 9 Ohio St. 2d 136, 137–138, 224 N. E. 2d 348, 350 (1967) (hospital record describing victim's injuries inadmissible hearsay), overruled by *Spikes*, 67 Ohio St. 2d, at 411–415, 423 N. E. 2d, at 1128–1130; *State* v. *Henderson*, 554 S. W. 2d 117 (Tenn. 1977) (laboratory drug report inadmissible absent confronta-

tion), abrogated by statute as recognized by *Hughes*, 713 S. W. 2d 58 (statute permitted defendant to subpoena analyst who prepared blood-alcohol report; by not doing so, defendant waived his right to confront the analyst).

Syllabus

SAFFORD UNIFIED SCHOOL DISTRICT #1 ET AL. *v.* REDDING

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

No. 08–479. Argued April 21, 2009—Decided June 25, 2009

After escorting 13-year-old Savana Redding from her middle school classroom to his office, Assistant Principal Wilson showed her a day planner containing knives and other contraband. She admitted owning the planner, but said that she had lent it to her friend Marissa and that the contraband was not hers. He then produced four prescription-strength, and one over-the-counter, pain relief pills, all of which are banned under school rules without advance permission. She denied knowledge of them, but Wilson said that he had a report that she was giving pills to fellow students. She denied it and agreed to let him search her belongings. He and Helen Romero, an administrative assistant, searched Savana's backpack, finding nothing. Wilson then had Romero take Savana to the school nurse's office to search her clothes for pills. After Romero and the nurse, Peggy Schwallier, had Savana remove her outer clothing, they told her to pull her bra out and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found. Savana's mother filed suit against petitioner school district (Safford), Wilson, Romero, and Schwallier, alleging that the strip search violated Savana's Fourth Amendment rights. Claiming qualified immunity, the individuals (hereinafter petitioners) moved for summary judgment. The District Court granted the motion, finding that there was no Fourth Amendment violation, and the en banc Ninth Circuit reversed. Following the protocol for evaluating qualified immunity claims, see *Saucier* v. *Katz*, 533 U. S. 194, 200, the court held that the strip search was unjustified under the Fourth Amendment test for searches of children by school officials set out in *New Jersey* v. *T. L. O.*, 469 U. S. 325. It then applied the test for qualified immunity. Finding that Savana's right was clearly established at the time of the search, it reversed the summary judgment as to Wilson, but affirmed as to Schwallier and Romero because they were not independent decisionmakers.

Held:

1. The search of Savana's underwear violated the Fourth Amendment. Pp. 370–377.

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(a) For school searches, "the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause." *T. L. O.*, 469 U. S., at 341. Under the resulting reasonable suspicion standard, a school search "will be permissible . . . when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.*, at 342. The required knowledge component of reasonable suspicion for a school administrator's evidence search is that it raise a moderate chance of finding evidence of wrongdoing. Pp. 370–371.

(b) Wilson had sufficient suspicion to justify searching Savana's backpack and outer clothing. A week earlier, a student, Jordan, had told the principal and Wilson that students were bringing drugs and weapons to school and that he had gotten sick from some pills. On the day of the search, Jordan gave Wilson a pill that he said came from Marissa. Learning that the pill was prescription strength, Wilson called Marissa out of class and was handed the day planner. Once in his office, Wilson, with Romero present, had Marissa turn out her pockets and open her wallet, producing, *inter alia*, an over-the-counter pill that Marissa claimed was Savana's. She also denied knowing about the day planner's contents. Wilson did not ask her when she received the pills from Savana or where Savana might be hiding them. After a search of Marissa's underwear by Romero and Schwallier revealed no additional pills, Wilson called Savana into his office. He showed her the day planner and confirmed her relationship with Marissa. He knew that the girls had been identified as part of an unusually rowdy group at a school dance, during which alcohol and cigarettes were found in the girls' bathroom. He had other reasons to connect them with this contraband, for Jordan had told the principal that before the dance, he had attended a party at Savana's house where alcohol was served. Thus, Marissa's statement that the pills came from Savana was sufficiently plausible to warrant suspicion that Savana was involved in pill distribution. A student who is reasonably suspected of giving out contraband pills is reasonably suspected of carrying them on her person and in her backpack. Looking into Savana's bag, in her presence and in the relative privacy of Wilson's office, was not excessively intrusive, any more than Romero's subsequent search of her outer clothing. Pp. 371–374.

(c) Because the suspected facts pointing to Savana did not indicate that the drugs presented a danger to students or were concealed in her underwear, Wilson did not have sufficient suspicion to warrant extending the search to the point of making Savana pull out her underwear.

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Romero and Schwallier said that they did not see anything when Savana pulled out her underwear, but a strip search and its Fourth Amendment consequences are not defined by who was looking and how much was seen. Savana's actions in their presence necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings. Savana's subjective expectation of privacy is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation is indicated by the common reaction of other young people similarly searched, whose adolescent vulnerability intensifies the exposure's patent intrusiveness. Its indignity does not outlaw the search, but it does implicate the rule that "the search [be] 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *T. L. O.*, *supra*, at 341. Here, the content of the suspicion failed to match the degree of intrusion. Because Wilson knew that the pills were common pain relievers, he must have known of their nature and limited threat and had no reason to suspect that large amounts were being passed around or that individual students had great quantities. Nor could he have suspected that Savana was hiding common painkillers in her underwear. When suspected facts must support the categorically extreme intrusiveness of a search down to an adolescent's body, petitioners' general belief that students hide contraband in their clothing falls short; a reasonable search that extensive calls for suspicion that it will succeed. Nondangerous school contraband does not conjure up the specter of stashes in intimate places, and there is no evidence of such behavior at the school; neither Jordan nor Marissa suggested that Savana was doing that, and the search of Marissa yielded nothing. Wilson also never determined when Marissa had received the pills from Savana; had it been a few days before, that would weigh heavily against any reasonable conclusion that Savana presently had the pills on her person, much less in her underwear. Pp. 374–377.

2. Although the strip search violated Savana's Fourth Amendment rights, petitioners Wilson, Romero, and Schwallier are protected from liability by qualified immunity because "clearly established law [did] not show that the search violated the Fourth Amendment," *Pearson* v. *Callahan*, 555 U. S. 223, 243–244. The intrusiveness of the strip search here cannot, under *T. L. O.*, be seen as justifiably related to the circumstances, but lower court cases viewing school strip searches differently are numerous enough, with well-reasoned majority and dissenting opin-

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ions, to counsel doubt about the clarity with which the right was previously stated. Pp. 377–379.

3. The issue of petitioner Safford's liability under *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 694, should be addressed on remand. P. 379.

531 F. 3d 1071, affirmed in part, reversed in part, and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, BREYER, and ALITO, JJ., joined, and in which STEVENS and GINSBURG, JJ., joined as to Parts I–III. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, J., joined, *post,* p. 379. GINSBURG, J., filed an opinion concurring in part and dissenting in part, *post,* p. 381. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part, *post,* p. 382.

Matthew W. Wright argued the cause for petitioners. With him on the briefs was *David K. Pauole.*

David A. O'Neil argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were then-*Acting Solicitor General Kneedler*, *Acting Assistant Attorney General Hertz*, *Deputy Solicitor General Katyal*, *Leonard Schaitman*, *Robert Kamenshine*, *Mark Pennak*, *Edward H. Jurith*, *Linda V. Priebe*, *Philip H. Rosenfelt*, *Stephen H. Freid*, *Daniel J. Dell'Orto*, and *Karen L. Lambert.*

Adam B. Wolf argued the cause for respondent. With him on the brief were *Graham A. Boyd*, *M. Allen Hopper*, *Steven R. Shapiro*, *Bruce G. Macdonald*, *Andrew J. Petersen*, and *Daniel Joseph Pochoda.**

**David R. Day*, *Francisco M. Negrón, Jr.*, and *Thomas E. M. Hutton* filed a brief for the National School Boards Association et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Juvenile Law Center et al. by *Marsha L. Levick;* for the National Association of Social Workers et al. by *Julia M. Carpenter*, *Carolyn I. Polowy*, and *Michael D. Simpson;* for the Rutherford Institute et al. by *John W. Whitehead*, *Clint Bolick*, *Nicholas C. Dranias*, *Timothy Lynch*, and *Ilya Shapiro;* and for the Urban Justice Center et al. by *Raymond H. Brescia.*

JUSTICE SOUTER delivered the opinion of the Court.

The issue here is whether a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school. Because there were no reasons to suspect the drugs presented a danger or were concealed in her underwear, we hold that the search did violate the Constitution, but because there is reason to question the clarity with which the right was established, the official who ordered the unconstitutional search is entitled to qualified immunity from liability.

I

The events immediately prior to the search in question began in 13-year-old Savana Redding's math class at Safford Middle School one October day in 2003. The assistant principal of the school, Kerry Wilson, came into the room and asked Savana to go to his office. There, he showed her a day planner, unzipped and open flat on his desk, in which there were several knives, lighters, a permanent marker, and a cigarette. Wilson asked Savana whether the planner was hers; she said it was, but that a few days before she had lent it to her friend, Marissa Glines. Savana stated that none of the items in the planner belonged to her.

Wilson then showed Savana four white prescription-strength ibuprofen 400-mg pills, and one over-the-counter blue naproxen 200-mg pill, all used for pain and inflammation but banned under school rules without advance permission. He asked Savana if she knew anything about the pills. Savana answered that she did not. Wilson then told Savana that he had received a report that she was giving these pills to fellow students; Savana denied it and agreed to let Wilson search her belongings. Helen Romero, an administrative assistant, came into the office, and together with Wilson they searched Savana's backpack, finding nothing.

At that point, Wilson instructed Romero to take Savana to the school nurse's office to search her clothes for pills. Romero and the nurse, Peggy Schwallier, asked Savana to remove her jacket, socks, and shoes, leaving her in stretch pants and a T-shirt (both without pockets), which she was then asked to remove. Finally, Savana was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found.

Savana's mother filed suit against Safford Unified School District #1, Wilson, Romero, and Schwallier for conducting a strip search in violation of Savana's Fourth Amendment rights. The individuals (hereinafter petitioners) moved for summary judgment, raising a defense of qualified immunity. The District Court for the District of Arizona granted the motion on the ground that there was no Fourth Amendment violation, and a panel of the Ninth Circuit affirmed. 504 F. 3d 828 (2007).

A closely divided Circuit sitting en banc, however, reversed. Following the two-step protocol for evaluating claims of qualified immunity, see *Saucier* v. *Katz*, 533 U. S. 194, 200 (2001), the Ninth Circuit held that the strip search was unjustified under the Fourth Amendment test for searches of children by school officials set out in *New Jersey* v. *T. L. O.*, 469 U. S. 325 (1985). 531 F. 3d 1071, 1081–1087 (2008). The Circuit then applied the test for qualified immunity, and found that Savana's right was clearly established at the time of the search: "'[t]hese notions of personal privacy are "clearly established" in that they inhere in all of us, particularly middle school teenagers, and are inherent in the privacy component of the Fourth Amendment's proscription against unreasonable searches.'" *Id.*, at 1088–1089 (quoting *Brannum* v. *Overton Cty. School Bd.*, 516 F. 3d 489, 499 (CA6 2008)). The upshot was reversal of summary judgment as to Wilson, while affirming the judgments in favor of Schwallier, the school nurse, and Romero, the administrative

assistant, since they had not acted as independent decisionmakers. 531 F. 3d, at 1089.

We granted certiorari, 555 U. S. 1130 (2009), and now affirm in part, reverse in part, and remand.

II

The Fourth Amendment "right of the people to be secure in their persons . . . against unreasonable searches and seizures" generally requires a law enforcement officer to have probable cause for conducting a search. "Probable cause exists where 'the facts and circumstances within [an officer's] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed," *Brinegar* v. *United States*, 338 U. S. 160, 175–176 (1949) (quoting *Carroll* v. *United States*, 267 U. S. 132, 162 (1925)), and that evidence bearing on that offense will be found in the place to be searched.

In *T. L. O.*, we recognized that the school setting "requires some modification of the level of suspicion of illicit activity needed to justify a search," 469 U. S., at 340, and held that for searches by school officials "a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause," *id.*, at 341. We have thus applied a standard of reasonable suspicion to determine the legality of a school administrator's search of a student, *id.*, at 342, 345, and have held that a school search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction," *id.*, at 342.

A number of our cases on probable cause have an implicit bearing on the reliable knowledge element of reasonable suspicion, as we have attempted to flesh out the knowledge com-

ponent by looking to the degree to which known facts imply prohibited conduct, see, *e. g.*, *Adams* v. *Williams*, 407 U. S. 143, 148 (1972); *id.*, at 160, n. 9 (Marshall, J., dissenting), the specificity of the information received, see, *e. g.*, *Spinelli* v. *United States*, 393 U. S. 410, 416–417 (1969), and the reliability of its source, see, *e. g.*, *Aguilar* v. *Texas*, 378 U. S. 108, 114 (1964). At the end of the day, however, we have realized that these factors cannot rigidly control, *Illinois* v. *Gates*, 462 U. S. 213, 230 (1983), and we have come back to saying that the standards are "fluid concepts that take their substantive content from the particular contexts" in which they are being assessed, *Ornelas* v. *United States*, 517 U. S. 690, 696 (1996).

Perhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer's evidence search is that it raise a "fair probability," *Gates*, 462 U. S., at 238, or a "substantial chance," *id.*, at 244, n. 13, of discovering evidence of criminal activity. The lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing.

III

A

In this case, the school's policies strictly prohibit the nonmedical use, possession, or sale of any drug on school grounds, including "'[a]ny prescription or over-the-counter drug, except those for which permission to use in school has been granted pursuant to Board policy.'" App. to Pet. for Cert. 128a.[1] A week before Savana was searched, another

[1] When the object of a school search is the enforcement of a school rule, a valid search assumes, of course, the rule's legitimacy. But the legitimacy of the rule usually goes without saying as it does here. The Court said plainly in *New Jersey* v. *T. L. O.*, 469 U. S. 325, 342, n. 9 (1985), that standards of conduct for schools are for school administrators to determine without second-guessing by courts lacking the experience to appreciate what may be needed. Except in patently arbitrary instances, Fourth

student, Jordan Romero (no relation of the school's administrative assistant), told the principal and Assistant Principal Wilson that "certain students were bringing drugs and weapons on campus," and that he had been sick after taking some pills that "he got from a classmate." App. 8a. On the morning of October 8, the same boy handed Wilson a white pill that he said Marissa Glines had given him. He told Wilson that students were planning to take the pills at lunch.

Wilson learned from Peggy Schwallier, the school nurse, that the pill was ibuprofen 400 mg, available only by prescription. Wilson then called Marissa out of class. Outside the classroom, Marissa's teacher handed Wilson the day planner, found within Marissa's reach, containing various contraband items. Wilson escorted Marissa back to his office.

In the presence of Helen Romero, Wilson requested Marissa to turn out her pockets and open her wallet. Marissa produced a blue pill, several white ones, and a razor blade. Wilson asked where the blue pill came from, and Marissa answered, "'I guess it slipped in when *she* gave me the IBU 400s.'" *Id.*, at 13a. When Wilson asked whom she meant, Marissa replied, "'Savana Redding.'" *Ibid.* Wilson then enquired about the day planner and its contents; Marissa denied knowing anything about them. Wilson did not ask Marissa any followup questions to determine whether there was any likelihood that Savana presently had pills: neither asking when Marissa received the pills from Savana nor where Savana might be hiding them.

Amendment analysis takes the rule as a given, as it obviously should do in this case. There is no need here either to explain the imperative of keeping drugs out of schools, or to explain the reasons for the school's rule banning all drugs, no matter how benign, without advance permission. Teachers are not pharmacologists trained to identify pills and powders, and an effective drug ban has to be enforceable fast. The plenary ban makes sense, and there is no basis to claim that the search was unreasonable owing to some defect or shortcoming of the rule it was aimed at enforcing.

Schwallier did not immediately recognize the blue pill, but information provided through a poison control hotline[2] indicated that the pill was a 200-mg dose of an antiinflammatory drug, generically called naproxen, available over the counter. At Wilson's direction, Marissa was then subjected to a search of her bra and underpants by Romero and Schwallier, as Savana was later on. The search revealed no additional pills.

It was at this juncture that Wilson called Savana into his office and showed her the day planner. Their conversation established that Savana and Marissa were on friendly terms: while she denied knowledge of the contraband, Savana admitted that the day planner was hers and that she had lent it to Marissa. Wilson had other reports of their friendship from staff members, who had identified Savana and Marissa as part of an unusually rowdy group at the school's opening dance in August, during which alcohol and cigarettes were found in the girls' bathroom. Wilson had reason to connect the girls with this contraband, for Wilson knew that Jordan Romero had told the principal that before the dance, he had been at a party at Savana's house where alcohol was served. Marissa's statement that the pills came from Savana was thus sufficiently plausible to warrant suspicion that Savana was involved in pill distribution.

This suspicion of Wilson's was enough to justify a search of Savana's backpack and outer clothing.[3] If a student is

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[2] Poison control centers across the country maintain 24-hour help hotlines to provide "immediate access to poison exposure management instructions and information on potential poisons." American Association of Poison Control Centers, online at http://www.aapcc.org/dnn/About/tabid/74/Default.aspx (all Internet materials as visited June 19, 2009, and available in Clerk of Court's case file).

[3] There is no question here that justification for the school officials' search was required in accordance with the *T. L. O.* standard of reasonable suspicion, for it is common ground that Savana had a reasonable expectation of privacy covering the personal things she chose to carry in her backpack, cf. 469 U. S., at 339, and that Wilson's decision to look through it was a "search" within the meaning of the Fourth Amendment.

reasonably suspected of giving out contraband pills, she is reasonably suspected of carrying them on her person and in the carryall that has become an item of student uniform in most places today. If Wilson's reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making. And the look into Savana's bag, in her presence and in the relative privacy of Wilson's office, was not excessively intrusive, any more than Romero's subsequent search of her outer clothing.

B

Here it is that the parties part company, with Savana's claim that extending the search at Wilson's behest to the point of making her pull out her underwear was constitutionally unreasonable. The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it. Romero and Schwallier directed Savana to remove her clothes down to her underwear, and then "pull out" her bra and the elastic band on her underpants. *Id.*, at 23a. Although Romero and Schwallier stated that they did not see anything when Savana followed their instructions, App. to Pet. for Cert. 135a, we would not define strip search and its Fourth Amendment consequences in a way that would guarantee litigation about who was looking and how much was seen. The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.

Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing,

frightening, and humiliating. The reasonableness of her expectation (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure. See Brief for National Association of Social Workers et al. as *Amici Curiae* 6–14; Hyman & Perone, The Other Side of School Violence: Educator Policies and Practices that may Contribute to Student Misbehavior, 36 J. School Psychology 7, 13 (1998) (strip search can "result in serious emotional damage"). The common reaction of these adolescents simply registers the obviously different meaning of a search exposing the body from the experience of nakedness or near undress in other school circumstances. Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be, see, *e. g.*, New York City Dept. of Education, Reg. No. A–432, p. 2 (2005), online at http://docs.nycenet.edu/docushare/dsweb/Get/Document-21/A-432.pdf ("Under no circumstances shall a strip-search of a student be conducted").

The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in *T. L. O.*, that "the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place." 469 U. S., at 341 (internal quotation marks omitted). The scope will be permissible, that is, when it is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.*, at 342.

Here, the content of the suspicion failed to match the degree of intrusion. Wilson knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or

one Aleve.[4] He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, Wilson had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills.

Nor could Wilson have suspected that Savana was hiding common painkillers in her underwear. Petitioners suggest, as a truth universally acknowledged, that "students . . . hid[e] contraband in or under their clothing," Reply Brief for Petitioners 8, and cite a smattering of cases of students with contraband in their underwear, *id.*, at 8–9. But when the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off. But nondangerous school contraband does not raise the specter of stashes in intimate places, and there is no evidence in the record of any general practice among Safford Middle School students of hiding that sort of thing in underwear; neither Jordan nor Marissa suggested to Wilson that Savana was doing that, and the preceding search of Marissa that Wilson ordered yielded nothing. Wilson never even determined when Marissa had received the pills from Savana; if it had been a few days before, that would weigh heavily against any reasonable conclusion that Savana presently had the pills on her person, much less in her underwear.

In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her

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[4] An Advil tablet, caplet, or gel caplet contains 200 mg ibuprofen. See 2007 Physicians' Desk Reference for Nonprescription Drugs, Dietary Supplements, and Herbs 674 (28th ed. 2006). An Aleve caplet contains 200 mg naproxen and 20 mg sodium. See *id.*, at 675.

underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable.

In so holding, we mean to cast no ill reflection on the assistant principal, for the record raises no doubt that his motive throughout was to eliminate drugs from his school and protect students from what Jordan Romero had gone through. Parents are known to overreact to protect their children from danger, and a school official with responsibility for safety may tend to do the same. The difference is that the Fourth Amendment places limits on the official, even with the high degree of deference that courts must pay to the educator's professional judgment.

We do mean, though, to make it clear that the *T. L. O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.

IV

A school official searching a student is "entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment." *Pearson* v. *Callahan*, 555 U. S. 223, 243–244 (2009). To be established clearly, however, there is no need that "the very action in question [have] previously been held unlawful." *Wilson* v. *Layne*, 526 U. S. 603, 615 (1999). The unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason, as Judge Posner has said, that "[t]he easiest cases don't even arise." *K. H.* v. *Morgan*, 914 F. 2d 846, 851 (CA7 1990). But even as to action less than an outrage, "officials can still be on notice that their conduct violates es-

tablished law . . . in novel factual circumstances." *Hope* v. *Pelzer*, 536 U. S. 730, 741 (2002).

T. L. O. directed school officials to limit the intrusiveness of a search, "in light of the age and sex of the student and the nature of the infraction," 469 U. S., at 342, and as we have just said at some length, the intrusiveness of the strip search here cannot be seen as justifiably related to the circumstances. But we realize that the lower courts have reached divergent conclusions regarding how the *T. L. O.* standard applies to such searches.

A number of judges have read *T. L. O.* as the en banc minority of the Ninth Circuit did here. The Sixth Circuit upheld a strip search of a high school student for a drug, without any suspicion that drugs were hidden next to her body. *Williams* v. *Ellington*, 936 F. 2d 881, 882–883, 887 (1991). And other courts considering qualified immunity for strip searches have read *T. L. O.* as "a series of abstractions, on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other," *Jenkins* v. *Talladega City Bd. of Ed.*, 115 F. 3d 821, 828 (CA11 1997) (en banc), which made it impossible "to establish clearly the contours of a Fourth Amendment right . . . [in] the wide variety of possible school settings different from those involved in *T. L. O.*" itself, *ibid.* See also *Thomas* v. *Roberts*, 323 F. 3d 950 (CA11 2003) (granting qualified immunity to a teacher and police officer who conducted a group strip search of a fifth grade class when looking for a missing $26).

We think these differences of opinion from our own are substantial enough to require immunity for the school officials in this case. We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear. That said, however, the cases viewing school strip searches differently

from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted.

V

The strip search of Savana Redding was unreasonable and a violation of the Fourth Amendment, but petitioners Wilson, Romero, and Schwallier are nevertheless protected from liability through qualified immunity. Our conclusions here do not resolve, however, the question of the liability of petitioner Safford Unified School District #1 under *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 694 (1978), a claim the Ninth Circuit did not address. The judgment of the Ninth Circuit is therefore affirmed in part and reversed in part, and this case is remanded for consideration of the *Monell* claim.

It is so ordered.

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

In *New Jersey* v. *T. L. O.*, 469 U. S. 325 (1985), the Court established a two-step inquiry for determining the reasonableness of a school official's decision to search a student. First, the Court explained, the search must be "'justified at its inception'" by the presence of "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.*, at 342. Second, the search must be "permissible in its scope," which is achieved "when the measures adopted are reasonably related to the objectives of the search and *not excessively intrusive in light of the age and sex of the student and the nature of the infraction.*" *Ibid.* (emphasis added).

Nothing the Court decides today alters this basic framework. It simply applies *T. L. O.* to declare unconstitutional

a strip search of a 13-year-old honors student that was based on a groundless suspicion that she might be hiding medicine in her underwear. This is, in essence, a case in which clearly established law meets clearly outrageous conduct. I have long believed that "'[i]t does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude.'" *Id.*, at 382, n. 25 (opinion concurring in part and dissenting in part) (quoting *Doe* v. *Renfrow*, 631 F. 2d 91, 92–93 (CA7 1980)). The strip search of Savana Redding in this case was both more intrusive and less justified than the search of the student's purse in *T. L. O.* Therefore, while I join Parts I–III of the Court's opinion, I disagree with its decision to extend qualified immunity to the school official who authorized this unconstitutional search.

The Court reaches a contrary conclusion about qualified immunity based on the fact that various Courts of Appeals have adopted seemingly divergent views about *T. L. O.*'s application to strip searches. *Ante*, at 377–378. But the clarity of a well-established right should not depend on whether jurists have misread our precedents. And while our cases have previously noted the "divergence of views" among courts in deciding whether to extend qualified immunity, *e. g.*, *Pearson* v. *Callahan*, 555 U. S. 223, 245 (2009) (noting the unsettled constitutionality of the so-called "consent-once-removed" doctrine); *Wilson* v. *Layne*, 526 U. S. 603, 618 (1999) (considering conflicting views on the constitutionality of law enforcement's practice of allowing the media to enter a private home to observe and film attempted arrests), we have relied on that consideration only to spare officials from having "'to predict the *future course* of constitutional law,'" *id.*, at 617 (quoting *Procunier* v. *Navarette*, 434 U. S. 555, 562 (1978); emphasis added). In this case, by contrast, we chart no new constitutional path. We merely decide whether the decision to strip search Savana Redding, on these facts, was

prohibited under *T. L. O.* Our conclusion leaves the boundaries of the law undisturbed.*

The Court of Appeals properly rejected the school official's qualified immunity defense, and I would affirm that court's judgment in its entirety.

JUSTICE GINSBURG, concurring in part and dissenting in part.

I agree with the Court that Assistant Principal Wilson's subjection of 13-year-old Savana Redding to a humiliating stripdown search violated the Fourth Amendment. But I also agree with JUSTICE STEVENS, *ante*, at 379–380 and this page (opinion concurring in part and dissenting in part), that our opinion in *New Jersey* v. *T. L. O.*, 469 U. S. 325 (1985), "clearly established" the law governing this case.

Fellow student Marissa Glines, caught with pills in her pocket, accused Redding of supplying them. App. 13a. Asked where the blue pill among several white pills in Glines's pocket came from, Glines answered: "I guess it slipped in when *she* gave me the IBU 400s." *Ibid.* Asked next "who is *she*?", Glines responded: "Savana Redding." *Ibid.* As the Court observes, *ante*, at 372, 376, no followup questions were asked. Wilson did not test Glines's accusation for veracity by asking Glines when did Redding give her the pills, where, for what purpose. Any reasonable search for the pills would have ended when inspection of Redding's backpack and jacket pockets yielded nothing. Wilson had no cause to suspect, based on prior experience at the school or clues in this case, that Redding had hidden pills—containing the equivalent of two Advils or one Aleve—in her underwear or body. To make matters worse, Wilson did not release Redding, to return to class or to go home, after the

*In fact, in *T. L. O.* we cited with approval a Ninth Circuit case, *Bilbrey* v. *Brown*, 738 F. 2d 1462 (1984), which held that a strip search performed under similar circumstances violated the Constitution. 469 U. S., at 332, n. 2; *id.*, at 341, and n. 6 (adopting *Bilbrey*'s reasonable suspicion standard).

search. Instead, he made her sit on a chair outside his office for over two hours. At no point did he attempt to call her parent. Abuse of authority of that order should not be shielded by official immunity.

In contrast to *T. L. O.*, where a teacher discovered a student smoking in the lavatory, and where the search was confined to the student's purse, the search of Redding involved her body and rested on the bare accusation of another student whose reliability the Assistant Principal had no reason to trust. The Court's opinion in *T. L. O.* plainly stated the controlling Fourth Amendment law: A search ordered by a school official, even if "justified at its inception," crosses the constitutional boundary if it becomes "excessively intrusive in light of the age and sex of the student and the nature of the infraction." 469 U. S., at 342 (internal quotation marks omitted).

Here, "the nature of the [supposed] infraction," the slim basis for suspecting Savana Redding, and her "age and sex," *ibid.*, establish beyond doubt that Assistant Principal Wilson's order cannot be reconciled with this Court's opinion in *T. L. O.* Wilson's treatment of Redding was abusive, and it was not reasonable for him to believe that the law permitted it. I join JUSTICE STEVENS in dissenting from the Court's acceptance of Wilson's qualified immunity plea, and would affirm the Court of Appeals' judgment in all respects.

JUSTICE THOMAS, concurring in the judgment in part and dissenting in part.

I agree with the Court that the judgment against the school officials with respect to qualified immunity should be reversed. See *ante*, at 377–379. Unlike the majority, however, I would hold that the search of Savana Redding did not violate the Fourth Amendment. The majority imposes a vague and amorphous standard on school administrators. It also grants judges sweeping authority to second-guess the measures that these officials take to maintain discipline in

their schools and ensure the health and safety of the students in their charge. This deep intrusion into the administration of public schools exemplifies why the Court should return to the common-law doctrine of *in loco parentis* under which "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." *Morse* v. *Frederick*, 551 U. S. 393, 414 (2007) (THOMAS, J., concurring). But even under the prevailing Fourth Amendment test established by *New Jersey* v. *T. L. O.*, 469 U. S. 325 (1985), all petitioners, including the school district, are entitled to judgment as a matter of law in their favor.

I

"Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place." *Id.*, at 337. Thus, although public school students retain Fourth Amendment rights under this Court's precedent, see *id.*, at 333–337, those rights "are different . . . than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children," *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 656 (1995); see also *T. L. O.*, 469 U. S., at 339 (identifying "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds"). For nearly 25 years this Court has understood that "[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." *Ibid.* In schools, "[e]vents calling for discipline are frequent occurrences and sometimes require immediate, effective action." *Goss* v. *Lopez*, 419 U. S. 565, 580 (1975); see also *T. L. O.*, 469 U. S., at 340 (explaining that schools have a "legitimate need

to maintain an environment in which learning can take place").

For this reason, school officials retain broad authority to protect students and preserve "order and a proper educational environment" under the Fourth Amendment. *Id.*, at 339. This authority requires that school officials be able to engage in the "close supervision of schoolchildren, as well as . . . enforc[e] rules against conduct that would be perfectly permissible if undertaken by an adult." *Ibid.* Seeking to reconcile the Fourth Amendment with this unique public school setting, the Court in *T. L. O.* held that a school search is "reasonable" if it is "'justified at its inception'" and "'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.*, at 341–342 (quoting *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968)). The search under review easily meets this standard.

A

A "search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *T. L. O.*, *supra*, at 341–342 (footnote omitted). As the majority rightly concedes, this search was justified at its inception because there were reasonable grounds to suspect that Redding possessed medication that violated school rules. See *ante*, at 373. A finding of reasonable suspicion "does not deal with hard certainties, but with probabilities." *United States* v. *Cortez*, 449 U. S. 411, 418 (1981); see also *T. L. O.*, *supra*, at 346 ("[T]he requirement of reasonable suspicion is not a requirement of absolute certainty"). To satisfy this standard, more than a mere "hunch" of wrongdoing is required, but "considerably" less suspicion is needed than would be required to "satisf[y] a preponderance of the evidence standard." *United States* v.

Arvizu, 534 U. S. 266, 274 (2002) (internal quotation marks omitted).

Furthermore, in evaluating whether there is a reasonable "particularized and objective" basis for conducting a search based on suspected wrongdoing, government officials must consider the "totality of the circumstances." *Id.*, at 273 (internal quotation marks omitted). School officials have a specialized understanding of the school environment, the habits of the students, and the concerns of the community, which enables them to "'formulat[e] certain common-sense conclusions about human behavior.'" *United States* v. *Sokolow*, 490 U. S. 1, 8 (1989) (quoting *Cortez*, *supra*, at 418). And like police officers, school officials are "entitled to make an assessment of the situation in light of [this] specialized training and familiarity with the customs of the [school]." See *Arvizu*, *supra*, at 276.

Here, petitioners had reasonable grounds to suspect that Redding was in possession of prescription and nonprescription drugs in violation of the school's prohibition of the "nonmedical use, possession, or sale of a drug" on school property or at school events. 531 F. 3d 1071, 1076 (CA9 2008) (en banc); see also *id.*, at 1107 (Hawkins, J., dissenting) (explaining that the school policy defined "drugs" to include "'[a]ny prescription or over-the-counter drug, except those for which permission to use in school has been granted'"). As an initial matter, school officials were aware that a few years earlier, a student had become "seriously ill" and "spent several days in intensive care" after ingesting prescription medication obtained from a classmate. App. 10a. Fourth Amendment searches do not occur in a vacuum; rather, context must inform the judicial inquiry. See *Cortez*, *supra*, at 417–418. In this instance, the suspicion of drug possession arose at a middle school that had "a history of problems with students using and distributing prohibited and illegal substances on campus." App. 7a, 10a.

The school's substance-abuse problems had not abated by the 2003–2004 school year, which is when the challenged search of Redding took place. School officials had found alcohol and cigarettes in the girls' bathroom during the first school dance of the year and noticed that a group of students including Redding and Marissa Glines smelled of alcohol. *Ibid.* Several weeks later, another student, Jordan Romero, reported that Redding had hosted a party before the dance where she served whiskey, vodka, and tequila. *Id.*, at 8a, 11a. Romero had provided this report to school officials as a result of a meeting his mother scheduled with the officials after Romero "bec[a]me violent" and "sick to his stomach" one night and admitted that "he had taken some pills that he had got[ten] from a classmate." *Id.*, at 7a–8a, 10a–11a. At that meeting, Romero admitted that "certain students were bringing drugs and weapons on campus." *Id.*, at 8a, 11a. One week later, Romero handed the assistant principal a white pill that he said he had received from Glines. *Id.*, at 11a. He reported "that a group of students [were] planning on taking the pills at lunch." *Ibid.*

School officials justifiably took quick action in light of the lunchtime deadline. The assistant principal took the pill to the school nurse who identified it as prescription-strength 400-mg ibuprofen. *Id.*, at 12a. A subsequent search of Glines and her belongings produced a razor blade, a naproxen 200-mg pill, and several ibuprofen 400-mg pills. *Id.*, at 13a. When asked, Glines claimed that she had received the pills from Redding. *Ibid.* A search of Redding's planner, which Glines had borrowed, then uncovered "several knives, several lighters, a cigarette, and a permanent marker." *Id.*, at 12a, 14a, 22a. Thus, as the majority acknowledges, *ante*, at 373–374, the totality of relevant circumstances justified a search of Redding for pills.[1]

[1] To be sure, Redding denied knowledge of the pills and the materials in her planner. App. 14a. But her denial alone does not negate the reason-

B

The remaining question is whether the search was reasonable in scope. Under *T. L. O.*, "a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." 469 U. S., at 342. The majority concludes that the school officials' search of Redding's underwear was not "'reasonably related in scope to the circumstances which justified the interference in the first place,'" see *ante*, at 374–377, notwithstanding the officials' reasonable suspicion that Redding "was involved in pill distribution," *ante*, at 373. According to the majority, to be reasonable, this school search required a showing of "danger to the students from the power of the drugs or their quantity" or a "reason to suppose that [Redding] was carrying pills in her underwear." *Ante*, at 376–377. Each of these additional requirements is an unjustifiable departure from bedrock Fourth Amendment law in the school setting, where this Court has heretofore read the Fourth Amendment to grant considerable leeway to school officials. Because the school officials searched in a location where the pills could have been hidden, the search was reasonable in scope under *T. L. O.*

1

The majority finds that "subjective and reasonable societal expectations of personal privacy support . . . treat[ing]" this type of search, which it labels a "strip search," as "categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of

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able suspicion held by school officials. See *New Jersey* v. *T. L. O.*, 469 U. S. 325, 345 (1985) (finding search reasonable even though "T. L. O. had been accused of smoking, and had denied the accusation in the strongest possible terms when she stated that she did not smoke at all").

outer clothing and belongings." *Ante*, at 374.[2] Thus, in the majority's view, although the school officials had reasonable suspicion to believe that Redding had the pills on her person, see *ante*, at 373–374, they needed some greater level of particularized suspicion to conduct this "strip search." There is no support for this contortion of the Fourth Amendment.

The Court has generally held that the reasonableness of a search's scope depends only on whether it is limited to the area that is capable of concealing the object of the search. See, *e. g.*, *Wyoming* v. *Houghton*, 526 U. S. 295, 307 (1999) (Police officers "may inspect passengers' belongings found in the car that are capable of concealing the object of the search"); *Florida* v. *Jimeno*, 500 U. S. 248, 251 (1991) ("The scope of a search is generally defined by its expressed object"); *United States* v. *Johns*, 469 U. S. 478, 487 (1985) (search reasonable because "there is no plausible argument that the object of the search could not have been concealed in the packages"); *United States* v. *Ross*, 456 U. S. 798, 820 (1982) ("A lawful search . . . generally extends to the entire area in which the object of the search may be found").[3]

In keeping with this longstanding rule, the "nature of the infraction" referenced in *T. L. O.* delineates the proper scope of a search of students in a way that is identical to that per-

[2] Like the dissent below, "I would reserve the term 'strip search' for a search that required its subject to fully disrobe in view of officials." 531 F. 3d 1071, 1091, n. 1 (CA9 2008) (opinion of Hawkins, J.). The distinction between a strip search and the search at issue in this case may be slight, but it is a distinction that the law has drawn. See, *e. g.*, *Sandin* v. *Conner*, 515 U. S. 472, 475 (1995) ("The officer subjected Conner to a strip search, complete with an inspection of the rectal area"); *Bell* v. *Wolfish*, 441 U. S. 520, 558, and n. 39 (1979) (describing visual inspection of body cavities as "part of a strip search").

[3] The Court has adopted a different standard for searches involving an "intrusio[n] into the human body." *Schmerber* v. *California*, 384 U. S. 757, 770 (1966). The search here does not implicate the Court's cases governing bodily intrusions, however, because it did not involve a "physical intrusion, penetrating beneath the skin," *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 616 (1989).

mitted for searches outside the school—*i. e.*, the search must be limited to the areas where the object of that infraction could be concealed. See *Horton* v. *California*, 496 U. S. 128, 141 (1990) ("Police with a warrant for a rifle may search only places where rifles might be" (internal quotation marks omitted)); *Ross*, *supra*, at 824 ("[P]robable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase"). A search of a student therefore is permissible in scope under *T. L. O.* so long as it is objectively reasonable to believe that the area searched could conceal the contraband. The dissenting opinion below correctly captured this Fourth Amendment standard, noting that "if a student were rumored to have brought a baseball bat on campus in violation of school policy, a search of that student's shirt pocket would be patently unjustified." 531 F. 3d, at 1104 (opinion of Hawkins, J.).

The analysis of whether the scope of the search here was permissible under that standard is straightforward. Indeed, the majority does not dispute that "general background possibilities" establish that students conceal "contraband in their underwear." *Ante*, at 376. It acknowledges that school officials had reasonable suspicion to look in Redding's backpack and outer clothing because if "Wilson's reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making." *Ante*, at 374. The majority nevertheless concludes that proceeding any further with the search was unreasonable. See *ante*, at 374–377; see also *ante*, at 381 (GINSBURG, J., concurring in part and dissenting in part) ("Any reasonable search for the pills would have ended when inspection of Redding's backpack and jacket pockets yielded nothing"). But there is no support for this conclusion. The reasonable suspicion that Redding possessed the pills for distribution purposes did not dissipate simply because the search of her backpack turned up nothing. It was eminently reasonable to conclude that the back-

pack was empty because Redding was secreting the pills in a place she thought no one would look. See *Ross*, *supra*, at 820 ("Contraband goods rarely are strewn" about in plain view; "by their very nature such goods must be withheld from public view").

Redding would not have been the first person to conceal pills in her undergarments. See Hicks, Man Gets 17-Year Drug Sentence, Times-Tribune (Corbin, Ky.), Oct. 7, 2008, pp. 1, 5 (Drug courier "told officials she had the [OxyContin] pills concealed in her crotch"); Conley, Whitehaven: Traffic Stop Yields Hydrocodone Pills, Commercial Appeal (Memphis, Tenn.), Aug. 3, 2007, p. B3 ("An additional 40 hydrocodone pills were found in her pants"); Caywood, Police Vehicle Chase Leads to Drug Arrests, Telegram & Gazette (Worcester, Mass.), June 7, 2008, p. A7 (25-year-old "allegedly had a cigar tube stuffed with pills tucked into the waistband of his pants"); Hubartt, 23-Year-Old Charged With Dealing Ecstasy, Journal Gazette (Fort Wayne, Ind.), Aug. 8, 2007, p. 2C ("[W]hile he was being put into a squad car, his pants fell down and a plastic bag containing pink and orange pills fell on the ground"); Sebastian Residents Arrested in Drug Sting, Vero Beach Press Journal, Sept. 16, 2006, p. B2 (Arrestee "told them he had more pills 'down my pants' "). Nor will she be the last after today's decision, which announces the safest place to secrete contraband in school.

2

The majority compounds its error by reading the "nature of the infraction" aspect of the *T. L. O.* test as a license to limit searches based on a judge's assessment of a particular school policy. According to the majority, the scope of the search was impermissible because the school official "must have been aware of the nature and limited threat of the specific drugs he was searching for" and because he "had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving

great numbers of pills." *Ante,* at 376. Thus, in order to locate a rationale for finding a Fourth Amendment violation in this case, the majority retreats from its observation that the school's firm no-drug policy "makes sense, and there is no basis to claim that the search was unreasonable owing to some defect or shortcoming of the rule it was aimed at enforcing." *Ante,* at 372, n. 1.

Even accepting the majority's assurances that it is not attacking the rule's reasonableness, it certainly is attacking the rule's importance. This approach directly conflicts with *T. L. O.* in which the Court was "unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." 469 U. S., at 342, n. 9. Indeed, the Court in *T. L. O.* expressly rejected the proposition that the majority seemingly endorses—that "some rules regarding student conduct are by nature too 'trivial' to justify a search based upon reasonable suspicion." *Ibid.;* see also *id.,* at 343, n. 9 ("The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment").

The majority's decision in this regard also departs from another basic principle of the Fourth Amendment: that law enforcement officials can enforce with the same vigor all rules and regulations irrespective of the perceived importance of any of those rules. "In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable." *Virginia* v. *Moore,* 553 U. S. 164, 171 (2008). The Fourth Amendment rule for searches is the same: Police officers are entitled to search regardless of the perceived triviality of the underlying law.

As we have explained, requiring police to make "sensitive, case-by-case determinations of government need," *Atwater* v. *Lago Vista*, 532 U. S. 318, 347 (2001), for a particular prohibition before conducting a search would "place police in an almost impossible spot," *id.*, at 350.

The majority has placed school officials in this "impossible spot" by questioning whether possession of ibuprofen and naproxen causes a severe enough threat to warrant investigation. Had the suspected infraction involved a street drug, the majority implies that it would have approved the scope of the search. See *ante*, at 376 (relying on the "limited threat of the specific drugs he was searching for"); *ibid.* (relying on the limited "power of the drugs" involved). In effect, then, the majority has replaced a school rule that draws no distinction among drugs with a new one that does. As a result, a full search of a student's person for prohibited drugs will be permitted only if the Court agrees that the drug in question was sufficiently dangerous. Such a test is unworkable and unsound. School officials cannot be expected to halt searches based on the possibility that a court might later find that the particular infraction at issue is not severe enough to warrant an intrusive investigation.[4]

[4] JUSTICE GINSBURG suggests that requiring Redding to "sit on a chair outside [the assistant principal's] office for over two hours" and failing to call her parents before conducting the search constitutes an "[a]buse of authority" that "should not be shielded by official immunity." See *ante*, at 382. But the school was under no constitutional obligation to call Redding's parents before conducting the search: "[R]easonableness under the Fourth Amendment does not require employing the least intrusive means, because the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty.* v. *Earls*, 536 U. S. 822, 837 (2002) (internal quotation marks and brackets omitted). For the same reason, the Constitution did not require school officials to ask "followup questions" after they had already developed reasonable suspicion that Redding possessed drugs. See *ante*, at 372, 376 (majority opinion); *ante*, at 381 (opinion of GINSBURG, J.). In any event, the suggestion that requiring Redding to sit in a chair

A rule promulgated by a school board represents the judgment of school officials that the rule is needed to maintain "school order" and "a proper educational environment." *T. L. O.*, 469 U. S., at 343, n. 9. Teachers, administrators, and the local school board are called upon both to "protect the . . . safety of students and school personnel" and "maintain an environment conducive to learning." *Id.*, at 353 (Blackmun, J., concurring in judgment). They are tasked with "watch[ing] over a large number of students" who "are inclined to test the outer boundaries of acceptable conduct and to imitate the misbehavior of a peer if that misbehavior is not dealt with quickly." *Id.*, at 352. In such an environment, something as simple as a "water pistol or peashooter can wreak [havoc] until it is taken away." *Ibid.* The danger posed by unchecked distribution and consumption of prescription pills by students certainly needs no elaboration.

Judges are not qualified to second-guess the best manner for maintaining quiet and order in the school environment. Such institutional judgments, like those concerning the selection of the best methods for "restrain[ing students] from assaulting one another, abusing drugs and alcohol, and committing other crimes," *id.*, at 342, n. 9, "involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country," *Collins* v. *Harker Heights*, 503 U. S. 115, 129 (1992); cf. *Regents of Univ. of Mich.* v. *Ewing*, 474 U. S. 214, 226 (1985) (observing that federal courts are not "suited to evaluat[ing] the substance of the multitude of academic decisions" or disciplinary decisions "that are made daily by faculty members of public educa-

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for two hours amounted to a deprivation of her constitutional rights, or that school officials are required to engage in detailed interrogations before conducting searches for drugs, only reinforces the conclusion that the Judiciary is ill equipped to second-guess the daily decisions made by public administrators. Cf. *Beard* v. *Banks*, 548 U. S. 521, 536–537 (2006) (THOMAS, J., concurring in judgment).

tional institutions"). It is a mistake for judges to assume the responsibility for deciding which school rules are important enough to allow for invasive searches and which rules are not.

3

Even if this Court were authorized to second-guess the importance of school rules, the Court's assessment of the importance of this district's policy is flawed. It is a crime to possess or use prescription-strength ibuprofen without a prescription. See Ariz. Rev. Stat. Ann. § 13–3406(A)(1) (West Supp. 2008) ("A person shall not knowingly . . . [p]ossess or use a prescription-only drug unless the person obtains the prescription-only drug pursuant to a valid prescription of a prescriber who is licensed pursuant to [state law]").[5] By prohibiting unauthorized prescription drugs on school grounds—and conducting a search to ensure students abide by that prohibition—the school rule here was consistent with a routine provision of the state criminal code. It hardly seems unreasonable for school officials to enforce a rule that, in effect, proscribes conduct that amounts to a crime.

Moreover, school districts have valid reasons for punishing the unauthorized possession of prescription drugs on school

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[5] Arizona's law is not idiosyncratic; many States have separately criminalized the unauthorized possession of prescription drugs. See, *e. g.*, Mo. Rev. Stat. § 577.628(1) (2008 Cum. Supp.) ("No person less than twenty-one years of age shall possess upon the real property comprising a public or private elementary or secondary school or school bus prescription medication without a valid prescription for such medication"); Okla. Stat., Tit. 59, § 353.24(2) (West 2008 Supp.) ("It shall be unlawful for any person, firm or corporation to . . . [s]ell, offer for sale, barter or give away any unused quantity of drugs obtained by prescription, except . . . as otherwise provided by the [State] Board of Pharmacy"); Utah Code Ann. § 58–17b–501(12) (Lexis 2007) (" 'Unlawful conduct' includes: . . . using a prescription drug . . . for himself that was not lawfully prescribed for him by a practitioner"); see also Ala. Code § 34–23–7 (2002); Del. Code Ann., Tit. 16, § 4754A(a)(4) (2003); Fla. Stat. § 499.005(14) (2007); N. H. Rev. Stat. Ann. § 318:42(I) (West Supp. 2008).

property as severely as the possession of street drugs; "[t]eenage abuse of over-the-counter and prescription drugs poses an increasingly alarming national crisis." Get Teens Off Drugs, 72 The Education Digest, No. 4, p. 75 (Dec. 2006). As one study noted, "more young people ages 12–17 abuse prescription drugs than any illicit drug except marijuana—more than cocaine, heroin, and methamphetamine combined." Executive Office of the President, Office of National Drug Control Policy (ONDCP), Prescription for Danger 1 (Jan. 2008) (hereinafter Prescription for Danger). And according to a 2005 survey of teens, "nearly one in five (19 percent or 4.5 million) admit abusing prescription drugs in their lifetime." Columbia University, The National Center on Addiction and Substance Abuse (CASA), "You've Got Drugs!" V: Prescription Drug Pushers on the Internet 2 (July 2008); see also Dept. of Health and Human Services, National Institute on Drug Abuse, High School and Youth Trends 2 (Dec. 2008) ("In 2008, 15.4 percent of 12th-graders reported using a prescription drug nonmedically within the past year").

School administrators can reasonably conclude that this high rate of drug abuse is being fueled, at least in part, by the increasing presence of prescription drugs on school campuses. See, *e. g.*, Gibson, Grand Forks Schools See Rise in Prescription Drug Abuse, Grand Forks Herald, Nov. 16, 2008, pp. A1, A6 (explaining that "prescription drug abuse is growing into a larger problem" as students " 'bring them to school and sell them or just give them to their friends' "). In a 2008 survey, "44 percent of teens sa[id] drugs are used, kept or sold on the grounds of their schools." CASA, National Survey of American Attitudes on Substance Abuse XIII: Teens and Parents 19 (Aug. 2008) (hereinafter National Survey). The risks posed by the abuse of these drugs are every bit as serious as the dangers of using a typical street drug.

Teenagers are nevertheless apt to "believe the myth that these drugs provide a medically safe high." ONDCP, Teens

and Prescription Drugs: An Analysis of Recent Trends on the Emerging Drug Threat 3 (Feb. 2007) (hereinafter Teens and Prescription Drugs). But since 1999, there has "been a dramatic increase in the number of poisonings and even deaths associated with the abuse of prescription drugs." Prescription for Danger 4; see also Dept. of Health and Human Services, The NSDUH Report: Trends in Nonmedical Use of Prescription Pain Relievers: 2002 to 2007, p. 1 (Feb. 5, 2009) ("[A]pproximately 324,000 emergency department visits in 2006 involved the nonmedical use of pain relievers"); CASA, Under the Counter: The Diversion and Abuse of Controlled Prescription Drugs in the U. S., p. 25 (July 2005) ("In 2002, abuse of controlled prescription drugs was implicated in at least 23 percent of drug-related emergency department admissions and 20.4 percent of all single drug-related emergency department deaths"). At least some of these injuries and deaths are likely due to the fact that "[m]ost controlled prescription drug abusers are polysubstance abusers," *id.*, at 3, a habit that is especially likely to result in deadly drug combinations. Furthermore, even if a child is not immediately harmed by the abuse of prescription drugs, research suggests that prescription drugs have become "gateway drugs to other substances of abuse." *Id.*, at 4; Healy, Skipping the Street, Los Angeles Times, Sept. 15, 2008, p. F1 ("Boomers made marijuana their 'gateway' . . . but a younger generation finds prescription drugs are an easier score"); see also National Survey 17 (noting that teens report "that prescription drugs are easier to buy than beer").

Admittedly, the ibuprofen and naproxen at issue in this case are not the prescription painkillers at the forefront of the prescription-drug-abuse problem. See Prescription for Danger 3 ("Pain relievers like Vicodin and OxyContin are the prescription drugs most commonly abused by teens"). But they are not without their own dangers. As nonsteroidal antiinflammatory drugs (NSAIDs), they pose a risk of death from overdose. The Pill Book 821, 827 (H. Silverman

ed., 13th ed. 2008) (observing that ibuprofen and naproxen are NSAIDs and "[p]eople have died from NSAID overdoses"). Moreover, the side effects caused by the use of NSAIDs can be magnified if they are taken in combination with other drugs. See, *e. g.*, Reactions Weekly, No. 1235, p. 18 (Jan. 17, 2009) ("A 17-year-old girl developed allergic interstitial nephritis and renal failure while receiving escitalopram and ibuprofen"); *id.*, No. 1232, at 26 (Dec. 13, 2008) ("A 16-month-old boy developed iron deficiency anaemia and hypoalbuminaemia during treatment with naproxen"); *id.*, No. 1220, at 15 (Sept. 20, 2008) (18-year-old "was diagnosed with pill-induced oesophageal perforation" after taking ibuprofen "and was admitted to the [intensive care unit]"); *id.*, No. 1170, at 20 (Sept. 22, 2007) ("A 12-year-old boy developed anaphylaxis following ingestion of ibuprofen").

If a student with a previously unknown intolerance to ibuprofen or naproxen were to take either drug and become ill, the public outrage would likely be directed toward the school for failing to take steps to prevent the unmonitored use of the drug. In light of the risks involved, a school's decision to establish and enforce a school prohibition on the possession of any unauthorized drug is thus a reasonable judgment.[6]

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In determining whether the search's scope was reasonable under the Fourth Amendment, it is therefore irrelevant whether officials suspected Redding of possessing

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[6] Schools have a significant interest in protecting all students from prescription drug abuse; young female students are no exception. See Teens and Prescription Drugs 2 ("Prescription drugs are the most commonly abused drug among 12–13-year-olds"). In fact, among 12- to 17-year-olds, females are "more likely than boys to have abused prescription drugs" and have "higher rates of dependence or abuse involving prescription drugs." *Id.*, at 5. Thus, rather than undermining the relevant governmental interest here, Redding's age and sex, if anything, increased the need for a search to prevent the reasonably suspected use of prescription drugs.

prescription-strength ibuprofen, nonprescription-strength naproxen, or some harder street drug. Safford prohibited its possession on school property. Reasonable suspicion that Redding was in possession of drugs in violation of these policies, therefore, justified a search extending to any area where small pills could be concealed. The search did not violate the Fourth Amendment.

II

By declaring the search unreasonable in this case, the majority has "'surrender[ed] control of the American public school system to public school students'" by invalidating school policies that treat all drugs equally and by second-guessing swift disciplinary decisions made by school officials. See *Morse*, 551 U. S., at 421 (THOMAS, J., concurring) (quoting *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 526 (1969) (Black, J., dissenting)). The Court's interference in these matters of great concern to teachers, parents, and students illustrates why the most constitutionally sound approach to the question of applying the Fourth Amendment in local public schools would in fact be the complete restoration of the common-law doctrine of *in loco parentis*.

"[I]n the early years of public schooling," courts applied the doctrine of *in loco parentis* to transfer to teachers the authority of a parent to "'command obedience, to control stubbornness, to quicken diligence, and to reform bad habits.'" *Morse*, *supra*, at 413–414 (THOMAS, J., concurring) (quoting *State* v. *Pendergrass*, 19 N. C. 365, 365–366 (1837)). So empowered, schoolteachers and administrators had almost complete discretion to establish and enforce the rules they believed were necessary to maintain control over their classrooms. See 2 J. Kent, Commentaries on American Law *205 ("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"); 1 W.

Blackstone, Commentaries on the Laws of England 441 (1765) ("He 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").[7] The perils of judicial policymaking inherent in applying Fourth Amendment protections to public schools counsel in favor of a return to the understanding that existed in this Nation's first public schools, which gave teachers discretion to craft the rules needed to carry out the disciplinary responsibilities delegated to them by parents.

If the common-law view that parents delegate to teachers their authority to discipline and maintain order were to be applied in this case, the search of Redding would stand. There can be no doubt that a parent would have had the authority to conduct the search at issue in this case. Parents have "immunity from the strictures of the Fourth Amendment" when it comes to searches of a child or that child's belongings. *T. L. O.*, 469 U. S., at 337; see also *id.*, at 336 (A parent's authority is "not subject to the limits of the Fourth Amendment"); *Griffin* v. *Wisconsin*, 483 U. S. 868, 876 (1987) ("[P]arental custodial authority" does not require "judicial approval for [a] search of a minor child's room").

As acknowledged by this Court, this principle is based on the "societal understanding of superior and inferior" with respect to the "parent and child" relationship. *Georgia* v. *Randolph*, 547 U. S. 103, 114 (2006). In light of this relation-

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[7] The one aspect of school discipline with respect to which the judiciary at times became involved was the "imposition of excessive physical punishment." *Morse*, 551 U. S., at 416 (THOMAS, J., concurring). Some early courts found corporal punishment proper "as long as the teacher did not act with legal malice or cause permanent injury"; while other courts intervened only if the punishment was "clearly excessive." *Ibid.* (emphasis deleted; internal quotation marks omitted) (collecting decisions).

ship, the Court has indicated that a parent can authorize a third-party search of a child by consenting to such a search, even if the child denies his consent. See *ibid.;* see also 4 W. LaFave, Search and Seizure § 8.3(d), p. 160 (4th ed. 2004) ("[A] father, as the head of the household with the responsibility and the authority for the discipline, training and control of his children, has a superior interest in the family residence to that of his minor son, so that the father's consent to search would be effective notwithstanding the son's contemporaneous on-the-scene objection" (internal quotation marks omitted)). Certainly, a search by the parent himself is no different, regardless of whether or not a child would prefer to be left alone. See *id.*, § 8.4(b), at 202 ("[E]ven [if] a minor child . . . may think of a room as 'his,' the overall dominance will be in his parents" (some internal quotation marks omitted)).

Restoring the common-law doctrine of *in loco parentis* would not, however, leave public schools entirely free to impose any rule they choose. "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." See *Morse*, *supra*, at 420 (THOMAS, J., concurring). Indeed, parents and local government officials have proved themselves quite capable of challenging overly harsh school rules or the enforcement of sensible rules in insensible ways.

For example, one community questioned a school policy that resulted in "an 11-year-old [being] arrested, handcuffed and taken to jail for bringing a plastic butter knife to school." Downey, Zero Tolerance Doesn't Always Add Up, Atlanta Journal-Constitution, Apr. 6, 2009, p. A11. In another, "[a]t least one school board member was outraged" when 14 elementary-school students were suspended for "imitating drug activity" after they combined Kool-Aid and sugar in plastic bags. Grant, Pupils Trading Sweet Mix Get Sour

Shot of Discipline, Pittsburgh Post-Gazette, May 18, 2006, pp. B1, B2. Individuals within yet another school district protested a "'zero-tolerance' policy toward weapons" that had become "'so rigid that it force[d] schools to expel any student who belongs to a military organization, a drum-and-bugle corps or any other legitimate extracurricular group and is simply transporting what amounts to harmless props.'" Richardson, School Gun Case Sparks Cries For "Common Sense," Washington Times, Feb. 13–14, 2009, pp. A1, A9.[8]

These local efforts to change controversial school policies through democratic processes have proved successful in many cases. See, *e. g.*, Postal, Schools' Zero Tolerance Could Lose Some Punch, Orlando Sentinel, Apr. 24, 2009, p. B3 ("State lawmakers want schools to dial back strict zero-tolerance policies so students do not end up in juvenile detention for some 'goofy thing'"); Richardson, Tolerance Waning for Zero-tolerance Rules, Washington Times, Apr. 21, 2009, p. A3 ("[A] few states have moved to relax their laws. Utah now allows students to bring asthma inhalers to school without violating the zero-tolerance policy on

[8] See also, *e. g.*, Smydo, Allderdice Parents Decry Suspensions, Pittsburgh Post-Gazette, Apr. 16, 2009, p. B1 (Parents "believe a one-day suspension for a first-time hallway infraction is an overreaction"); O'Brien & Buckham, Girl's Smooch on School Bus Leads to Suspension, Buffalo News, Jan. 6, 2008, p. B1 (Parents of 6-year-old say the "school officials overreacted" when they punished their daughter for "kissing a second-grade boy"); Stewart, Dad Says School Overreacted, Houston Chronicle, Dec. 12, 2007, p. B5 ("The father of a 13-year-old . . . said the school district overstepped its bounds when it suspended his daughter for taking a cell phone photo of another cheerleader getting out of the shower during a sleepover in his home"); Dumenigo & Mueller, "Cops and Robbers" Suspension Criticized at Sayreville School, Star-Ledger (New Jersey), Apr. 6, 2000, p. 15 ("'I think it's ridiculous,' said the mother of one of the [kindergarten] boys. 'They're little boys playing with each other. . . . [W]hen did a finger become a weapon?'").

drugs"); see also Nussbaum, Becoming Fed Up With Zero Tolerance, N. Y. Times, Sept. 3, 2000, section 14, pp. 1, 8 (discussing a report that found that "widespread use of zero-tolerance discipline policies was creating as many problems as it was solving and that there were many cases around the country in which students were harshly disciplined for infractions where there was no harm intended or done").

In the end, the task of implementing and amending public school policies is beyond this Court's function. Parents, teachers, school administrators, local politicians, and state officials are all better suited than judges to determine the appropriate limits on searches conducted by school officials. Preservation of order, discipline, and safety in public schools is simply not the domain of the Constitution. And, common sense is not a judicial monopoly or a constitutional imperative.

III

"[T]he nationwide drug epidemic makes the war against drugs a pressing concern in every school." *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty.* v. *Earls*, 536 U. S. 822, 834 (2002). And yet the Court has limited the authority of school officials to conduct searches for the drugs that the officials believe pose a serious safety risk to their students. By doing so, the majority has confirmed that a return to the doctrine of *in loco parentis* is required to keep the judiciary from essentially seizing control of public schools. Only then will teachers again be able to "'govern the[ir] pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn'" by making "'rules, giv[ing] commands, and punish[ing] disobedience'" without interference from judges. *Morse*, 551 U. S., at 414 (THOMAS, J., concurring). By deciding that it is better equipped to decide what behavior should be permitted in schools, the Court has undercut student safety and undermined the authority of school administrators and local officials. Even more trou-

bling, it has done so in a case in which the underlying response by school administrators was reasonable and justified. I cannot join this regrettable decision. I, therefore, respectfully dissent from the Court's determination that this search violated the Fourth Amendment.

Syllabus

ATLANTIC SOUNDING CO., INC., ET AL. *v.* TOWNSEND

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

No. 08–214. Argued March 2, 2009—Decided June 25, 2009

Atlantic Sounding Co. allegedly refused to pay maintenance and cure to respondent Townsend for injuries he suffered while working on its tugboat, and then filed this declaratory relief action regarding its obligations. Townsend filed suit under the Jones Act and general maritime law, alleging, *inter alia,* arbitrary and willful failure to provide maintenance and cure. He filed similar counterclaims in the declaratory judgment action, seeking punitive damages for the maintenance and cure claim. The District Court denied petitioners' motion to dismiss the punitive damages claim, but certified the question for interlocutory appeal. Following its precedent, the Eleventh Circuit held that punitive damages may be awarded for the willful withholding of maintenance and cure.

Held: Because punitive damages have long been an accepted remedy under general maritime law, and because neither *Miles* v. *Apex Marine Corp.,* 498 U. S. 19, nor the Jones Act altered this understanding, punitive damages for the willful and wanton disregard of the maintenance and cure obligation remain available as a matter of general maritime law. Pp. 408–425.

(a) Settled legal principles establish three points central to this case. Pp. 408–415.

(i) Punitive damages have long been an available remedy at common law for wanton, willful, or outrageous conduct. English law during the colonial era accorded juries the authority to award such damages when warranted. And American courts have likewise permitted such damages since at least 1784. This Court has also found punitive damages authorized as a matter of common-law doctrine. See, *e. g., Day* v. *Woodworth,* 13 How. 363. Pp. 409–410.

(ii) The common-law punitive damages tradition extends to claims arising under federal maritime law. See *Lake Shore & Michigan Southern R. Co.* v. *Prentice,* 147 U. S. 101, 108. One of this Court's first cases so indicating involved an action for marine trespass. See *The Amiable Nancy,* 3 Wheat. 546. And lower federal courts have found punitive damages available in maritime actions for particularly egregious tortious acts. Pp. 411–412.

Syllabus

(iii) Nothing in maritime law undermines this general rule's applicability in the maintenance and cure context. The maintenance and cure obligation dates back centuries as an aspect of general maritime law, and the failure of a seaman's employers to provide adequate medical care was the basis for awarding punitive damages in cases decided in the 1800's. This Court has since registered its agreement with such decisions and has subsequently found that in addition to wages, "maintenance" includes food and lodging at the ship's expense, and "cure" refers to medical treatment, *Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U. S. 438, 441. Moreover, an owner's failure to provide proper medical care for seamen has provided lower courts the impetus to award damages that appear to contain at least some punitive element. Pp. 412–414.

(iv) Under these settled legal principles, respondent is entitled to pursue punitive damages unless Congress has enacted legislation that departs from the common-law understanding. Pp. 414–415.

(b) The plain language of the Jones Act does not provide a basis for overturning the common-law rule. Congress enacted the Jones Act to overrule *The Osceola*, 189 U. S. 158, where the Court prohibited a seaman or his family from recovering for injuries or death suffered due to his employers' negligence. To that end, the Act created a statutory negligence cause of action, but it did not eliminate pre-existing remedies available to seamen for the separate common-law cause of action based on maintenance and cure. The Act bestows the right to "elect" to bring a Jones Act claim, thereby indicating a choice of actions for seamen—not an exclusive remedy. Because the then-accepted remedies arose from general maritime law, it necessarily follows that Congress envisioned their continued availability. See *Chandris, Inc.* v. *Latsis*, 515 U. S. 347, 354. Had the Jones Act been the only remaining remedy available, there would have been no election to make. And, the only statutory restrictions on general maritime maintenance and cure claims were enacted long after the Jones Act's passage and limit availability for only two discrete classes: foreign workers on offshore oil and mineral production facilities and sailing school students and instructors. This indicates that "Congress knows how to" restrict the traditional maintenance and cure remedy "when it wants to." *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U. S. 97, 106. This Court has consistently observed that the Jones Act preserves common-law causes of action such as maintenance and cure, see, *e. g.*, *The Arizona* v. *Anelich*, 298 U. S. 110, and its case law supports the view that punitive damages awards, in particular, continue to remain available in maintenance and cure actions, see *Vaughan* v. *Atkinson*, 369 U. S. 527. Pp. 415–418.

(c) Contrary to petitioners' argument, *Miles* does not limit recovery to the remedies available under the Jones Act. *Miles* does not address

either maintenance and cure actions in general or the availability of punitive damages for such actions. Instead, it grappled with the entirely different question whether general maritime law should provide a cause of action for wrongful death based on unseaworthiness. The Court found that the Jones Act and the Death on the High Seas Act (DOHSA), along with state statutes, supported recognition of a general maritime rule for wrongful death of a seaman. However, since Congress had chosen to limit the damages available in the Jones Act and DOHSA, excluding damages for loss of society or lost future earnings, 498 U. S., at 21, 31–32, its judgment must control the availability of remedies for wrongful-death actions brought under general maritime law, *id.*, at 32–36. *Miles'* reasoning does not apply here. Unlike *Miles*' situation, both the general maritime cause of action here (maintenance and cure) and the remedy (punitive damages) were well established before the Jones Act's passage. And unlike *Miles'* facts, the Jones Act does not address the general maritime cause of action here or its remedy. It is thus possible to adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act; unlike wrongful-death actions, this traditional understanding is not a matter to which "Congress has spoken directly." See *id.*, at 31. Moreover, petitioners' contrary view was directly rejected in *Norfolk Shipbuilding & Drydock Corp.* v. *Garris*, 532 U. S. 811, 820. If *Miles* presented no barrier to the *Garris* Court's endorsement of a previously unrecognized maritime cause of action for negligent wrongful death, there is no legitimate basis for a contrary conclusion here. Like negligence, the duty of maintenance and cure and the general availability of punitive damages have been recognized "for more than a century," 532 U. S., at 820. And because respondent does not ask this Court to alter statutory text or "expand" the maritime tort law's general principles, *Miles* does not require eliminating the general maritime remedy of punitive damages for the willful or wanton failure to comply with the duty to pay maintenance and cure. The fact that seamen commonly seek to recover under the Jones Act for maintenance and cure claims does not mean that the Jones Act provides the only remedy. See *Cortes* v. *Baltimore Insular Line, Inc.*, 287 U. S. 367, 374–375. The laudable quest for uniformity in admiralty does not require narrowing available damages to the lowest common denominator approved by Congress for distinct causes of action. Pp. 418–425.

496 F. 3d 1282, affirmed and remanded.

THOMAS, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and KENNEDY, JJ., joined, *post*, p. 425.

David W. McCreadie argued the cause for petitioners. With him on the briefs were *Eddie G. Godwin* and *Steven L. Brannock*.

Gerard Joseph Sullivan, Jr., argued the cause and filed a brief for respondent.*

JUSTICE THOMAS delivered the opinion of the Court.

The question presented by this case is whether an injured seaman may recover punitive damages for his employer's willful failure to pay maintenance and cure. Petitioners argue that under *Miles* v. *Apex Marine Corp.*, 498 U. S. 19 (1990), seamen may recover only those damages available under the Jones Act, 46 U. S. C. § 30104. We disagree. Historically, punitive damages have been available and awarded in general maritime actions, including some in maintenance and cure. We find that nothing in *Miles* or the Jones Act eliminates that availability.

I

Respondent Edgar L. Townsend was a crew member of the Motor Tug Thomas. After falling on the steel deck of the tugboat and injuring his arm and shoulder, respondent claimed that petitioner Atlantic Sounding,[1] the owner of the tugboat, advised him that it would not provide maintenance and cure. See 496 F. 3d 1282, 1283 (CA11 2007). "A claim for maintenance and cure concerns the vessel owner's obliga-

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**Lawrence W. Kaye, Edward C. Walton,* and *André M. Picciurro* filed a brief for the Cruise Lines International Association as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Association for Justice by *David W. Robertson* and *Leslie Frank Weisbrod;* and for the Sailors' Union of the Pacific by *John R. Hillsman* and *Lyle C. Cavin, Jr.*

A brief of *amicus curiae* was filed for Port Ministries International by *Tonya J. Meister* and *Charles R. Lipcon.*

[1] Atlantic Sounding Co., Inc., is a wholly owned subsidiary of Weeks Marine, Inc., the other petitioner in this case.

tion to provide food, lodging, and medical services to a seaman injured while serving the ship." *Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U. S. 438, 441 (2001).

Petitioners thereafter filed an action for declaratory relief regarding their obligations with respect to maintenance and cure. Respondent filed his own suit under the Jones Act and general maritime law, alleging negligence, unseaworthiness, arbitrary and willful failure to pay maintenance and cure, and wrongful termination. In addition, respondent filed similar counterclaims in the declaratory judgment action, seeking punitive damages for the denial of maintenance and cure. The District Court consolidated the cases. See 496 F. 3d, at 1283–1284.

Petitioners moved to dismiss respondent's punitive damages claim. The District Court denied the motion, holding that it was bound by the determination in *Hines* v. *J. A. LaPorte, Inc.*, 820 F. 2d 1187, 1189 (CA11 1987) *(per curiam)*, that punitive damages were available in an action for maintenance and cure. The court, however, agreed to certify the question for interlocutory appeal. See 496 F. 3d, at 1284. The United States Court of Appeals for the Eleventh Circuit agreed with the District Court that *Hines* controlled and held that respondent could pursue his punitive damages claim for the willful withholding of maintenance and cure. 496 F. 3d, at 1285–1286. The decision conflicted with those of other Courts of Appeals, see, *e. g.*, *Guevara* v. *Maritime Overseas Corp.*, 59 F. 3d 1496 (CA5 1995) (en banc); *Glynn* v. *Roy Al Boat Management Corp.*, 57 F. 3d 1495 (CA9 1995), and we granted certiorari, 555 U. S. 993 (2008).

II

Respondent claims that he is entitled to seek punitive damages as a result of petitioners' alleged breach of their "maintenance and cure" duty under general maritime law. We find no legal obstacle to his doing so.

A

Punitive damages have long been an available remedy at common law for wanton, willful, or outrageous conduct. Under English law during the colonial era, juries were accorded broad discretion to award damages as they saw fit. See, *e. g.*, *Lord Townsend* v. *Hughes*, 2 Mod. 150, 86 Eng. Rep. 994 (C. P. 1676) ("[I]n *civil actions* the plaintiff is to recover by way of compensation for the damages he hath sustained, and the jury are the proper judges thereof" (emphasis in original)); 1 T. Sedgwick, Measure of Damages § 349, p. 688 (9th ed. 1912) (hereinafter Sedgwick) ("Until comparatively recent times juries were as arbitrary judges of the amount of damages as of the facts"). The common-law view "was that 'in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.'" *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U. S. 340, 353 (1998) (quoting *Dimick* v. *Schiedt*, 293 U. S. 474, 480 (1935); alteration in original).

The jury's broad discretion to set damages included the authority to award punitive damages when the circumstances of the case warranted. Just before the ratification of the Constitution, Lord Chief Justice Pratt explained: "[A] jury ha[s] it in [its] power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." *Wilkes* v. *Wood*, Lofft 1, 18–19, 98 Eng. Rep. 489, 498–499 (C. P. 1763); see also *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 25 (1991) (Scalia, J., concurring in judgment) ("[P]unitive or 'exemplary' damages have long been a part of Anglo-American law"); *Huckle* v. *Money*, 2 Wils. 205, 207, 95 Eng. Rep. 768, 769 (C. P. 1763) (declining to grant a new trial because the jury "ha[s] done right in giving exemplary damages").

American courts have likewise permitted punitive damages awards in appropriate cases since at least 1784. See, *e. g.*, *Genay* v. *Norris,* 1 S. C. L. 6, 7 (C. P. and Gen. Sess. 1784) (approving award of "very exemplary damages" because spiking wine represented a "very wanton outrage"); *Coryell* v. *Colbaugh,* 1 N. J. L. 77 (1791) (concluding that a breach of promise of marriage was "of the most atrocious and dishonourable nature" and supported "damages for *example's* sake, to prevent such offences in future" (emphasis in original)). Although some States elected not to allow juries to make such awards, the vast majority permitted them. See 1 Sedgwick §§ 352, 354, at 694, 700. By the middle of the 19th century, "punitive damages were undoubtedly an established part of the American common law of torts [and] no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount." *Haslip, supra,* at 26–27 (SCALIA, J., concurring in judgment).

This Court has also found the award of punitive damages to be authorized as a matter of common-law doctrine. In *Day* v. *Woodworth,* 13 How. 363 (1852), for example, the Court recognized the "well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant . . . ." *Id.,* at 371; see also *Philadelphia, W., & B. R. Co.* v. *Quigley,* 21 How. 202, 214 (1859) ("Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person"); *Barry* v. *Edmunds,* 116 U. S. 550, 562 (1886) ("[A]ccording to the settled law of this court, [a plaintiff] might show himself, by proof of the circumstances, to be entitled to exemplary damages calculated to vindicate his right and protect it against future similar invasions").

B

The general rule that punitive damages were available at common law extended to claims arising under federal maritime law. See *Lake Shore & Michigan Southern R. Co.* v. *Prentice*, 147 U. S. 101, 108 (1893) ("[C]ourts of admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages . . . "). One of this Court's first cases indicating that punitive damages were available involved an action for marine trespass. See *The Amiable Nancy*, 3 Wheat. 546 (1818). In the course of deciding whether to uphold the jury's award, Justice Story, writing for the Court, recognized that punitive damages are an available maritime remedy under the proper circumstances. Although the Court found that the particular facts of the case did not warrant such an award against the named defendants, it explained that "if this were a suit against the original wrong-doers, it might be proper to . . . visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct." *Id.*, at 558; see also *Barry*, *supra*, at 563 ("In *The Amiable Nancy*, which was the case of a marine tort, Mr. Justice Story spoke of exemplary damages as 'the proper punishment which belongs to . . . lawless misconduct' " (citation omitted)).

The lower federal courts followed suit, finding that punitive damages were available in maritime actions for tortious acts of a particularly egregious nature. See, *e. g.*, *McGuire* v. *The Golden Gate*, 16 F. Cas. 141, 143 (No. 8,815) (CC ND Cal. 1856) ("In an action against the perpetrator of the wrong, the aggrieved party would be entitled to recover not only actual damages but exemplary,—such as would vindicate his wrongs, and teach the tort feasor the necessity of reform"); *Ralston* v. *The State Rights*, 20 F. Cas. 201, 210 (No. 11,540) (DC ED Pa. 1836) ("[I]t is not legally correct . . . to say that a court cannot give exemplary damages, in a case like the present, against the owners of a vessel"); *Boston Mfg. Co.* v. *Fiske*, 3 F. Cas. 957 (No. 1,681) (CC Mass. 1820)

(Story, J.) ("In cases of marine torts, or illegal captures, it is far from being uncommon in the admiralty to allow costs and expences, and to mulct the offending parties, even in exemplary damages, where the nature of the case requires it"). In short, prior to enactment of the Jones Act in 1920, "maritime jurisprudence was replete with judicial statements approving punitive damages, especially on behalf of passengers and seamen." Robertson, Punitive Damages in American Maritime Law, 28 J. Mar. L. & Comm. 73, 115 (1997) (hereinafter Robertson); see also 2 Sedgwick § 599b, at 1156 ("Exemplary damages are awarded in Admiralty, as in other jurisdictions"); 2 J. Sutherland, Law of Damages § 392, p. 1272 (4th ed. 1916) ("As a rule a court of equity will not award [punitive] damages, but courts of admiralty will . . . " (footnote omitted)).[2]

C

Nothing in maritime law undermines the applicability of this general rule in the maintenance and cure context. See G. Gilmore & C. Black, Law of Admiralty § 6–13, p. 312 (2d ed. 1975) (hereinafter Gilmore & Black) (explaining that a seaman denied maintenance and cure "has a free option to claim damages (including punitive damages) under a general maritime law count"); Robertson 163 (concluding that breach of maintenance and cure is one of the particular torts for which general maritime law would most likely permit the

[2] Although punitive damages awards were rarely upheld on judicial review, but see *Roza* v. *Smith*, 65 F. 592, 596–597 (DC ND Cal. 1895); *Gallagher* v. *The Yankee*, 9 F. Cas. 1091, 1093 (No. 5,196) (DC ND Cal. 1859), that fact does not draw into question the basic understanding that punitive damages were considered an available maritime remedy. Indeed, in several cases in which a judgment awarding punitive damages was overturned on appeal, the reversal was based on unrelated grounds. See, *e. g.*, *The Margharita*, 140 F. 820, 824 (CA5 1905); *Pacific Packing & Nav. Co.* v. *Fielding*, 136 F. 577, 580 (CA9 1905); *Latchtimacker* v. *Jacksonville Towing & Wrecking Co.*, 181 F. 276, 278 (CC SD Fla. 1910).

awarding of punitive damages "assuming . . . the requisite level of blameworthiness"). Indeed, the legal obligation to provide maintenance and cure dates back centuries as an aspect of general maritime law, and the failure of a seaman's employers to provide him with adequate medical care was the basis for awarding punitive damages in cases decided as early as the 1800's.

The right to receive maintenance and cure was first recognized in this country in two lower court decisions authored by Justice Story. See *Harden* v. *Gordon*, 11 F. Cas. 480 (No. 6,047) (CC Me. 1823); *Reed* v. *Canfield*, 20 F. Cas. 426 (No. 11,641) (CC Mass. 1832). According to Justice Story, this common-law obligation to seamen was justified on humanitarian and economic grounds: "If some provision be not made for [seamen] in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. . . . [T]he merchant himself derives an ultimate benefit [because i]t encourages seamen to engage in perilous voyages with more promptitude, and at lower wages." *Harden*, *supra*, at 483; see also *Reed*, *supra*, at 429 ("The seaman is to be cured at the expense of the ship, of the sickness or injury sustained in the ship's service").

This Court has since registered its agreement with these decisions. "Upon a full review . . . of English and American authorities," the Court concluded that "the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued." *The Osceola*, 189 U. S. 158, 175 (1903). Decisions following *The Osceola* have explained that in addition to wages, "maintenance" includes food and lodging at the expense of their ship, and "cure" refers to medical treatment. *Lewis*, 531 U. S., at 441; see also Gilmore & Black § 6–12, at 305–306 (describing "maintenance and cure" as including medical expenses, a living allowance, and unearned wages).

In addition, the failure of a vessel owner to provide proper medical care for seamen has provided the impetus for damages awards that appear to contain at least some punitive element. For example, in *The City of Carlisle*, 39 F. 807 (DC Ore. 1889), the court added $1,000 to its damages award to compensate an apprentice seaman for "gross neglect and cruel maltreatment of the [seaman] since his injury." *Id.*, at 809, 817. The court reviewed the indignities to which the apprentice had been subjected as he recovered without any serious medical attention, see *id.*, at 810–812, and explained that "if owners do not wish to be mulct in damages for such misconduct, they should be careful to select men worthy to command their vessels and fit to be trusted with the safety and welfare of their crews, and particularly apprentice boys." *Id.*, at 817; see also *The Troop*, 118 F. 769, 770–771, 773 (DC Wash. 1902) (explaining that $4,000 was a reasonable award because the captain's "failure to observe the dictates of humanity" and obtain prompt medical care for an injured seaman constituted a "monstrous wrong").[3]

D

The settled legal principles discussed above establish three points central to resolving this case. First, punitive damages have long been available at common law. Second, the common-law tradition of punitive damages extends to maritime claims.[4] And third, there is no evidence that

[3] Although these cases do not refer to "punitive" or "exemplary" damages, scholars have characterized the awards authorized by these decisions as such. See Robertson 103–105; Edelman, *Guevara v. Maritime Overseas Corp.:* Opposing the Decision, 20 Tulane Mar. L. J. 349, 351, and n. 22 (1996).

[4] The dissent correctly notes that the handful of early cases involving maintenance and cure, by themselves, do not definitively resolve the question of punitive damages availability in such cases. See *post*, at 429–431 (opinion of ALITO, J.). However, it neglects to acknowledge that the general common-law rule made punitive damages available in maritime actions. See *supra*, at 411–412. Nor does the dissent explain why main-

claims for maintenance and cure were excluded from this general admiralty rule. Instead, the pre-Jones Act evidence indicates that punitive damages remain available for such claims under the appropriate factual circumstances. As a result, respondent is entitled to pursue punitive damages unless Congress has enacted legislation departing from this common-law understanding. As explained below, it has not.

III

A

The only statute that could serve as a basis for overturning the common-law rule in this case is the Jones Act. Congress enacted the Jones Act primarily to overrule *The Osceola*, *supra*, in which this Court prohibited a seaman or his family from recovering for injuries or death suffered due to his employers' negligence. To this end, the statute provides in relevant part:

> "A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section." 46 U. S. C. § 30104(a) (incorporating the Federal Employers' Liability Act, 45 U. S. C. §§ 51–60).

The Jones Act thus created a statutory cause of action for negligence, but it did not eliminate pre-existing remedies available to seamen for the separate common-law cause of

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tenance and cure actions should be excepted from this general rule. It is because of this rule, and the fact that these early cases support—rather than refute—its application to maintenance and cure actions, see *supra*, at 413–414, that the pre-Jones Act evidence supports the conclusion that punitive damages were available at common law where the denial of maintenance and cure involved wanton, willful, or outrageous conduct.

action based on a seaman's right to maintenance and cure. Section 30104 bestows upon the injured seaman the right to "elect" to bring a Jones Act claim, thereby indicating a choice of actions for seamen—not an exclusive remedy. See Funk & Wagnalls New Standard Dictionary of the English Language 798 (1913) (defining "elect" as "[t]o make choice of"); 1 Bouvier's Law Dictionary 979 (8th ed. 1914) (defining "election" as "[c]hoice; selection"). Because the then-accepted remedies for injured seamen arose from general maritime law, see *The Osceola*, 189 U. S., at 175, it necessarily follows that Congress was envisioning the continued availability of those common-law causes of action. See *Chandris, Inc.* v. *Latsis*, 515 U. S. 347, 354 (1995) ("Congress enacted the Jones Act in 1920 to remove the bar to suit for negligence articulated in *The Osceola*, thereby completing the trilogy of heightened legal protections [including maintenance and cure] that seamen receive because of their exposure to the perils of the sea" (internal quotation marks omitted)); *Stewart* v. *Dutra Constr. Co.*, 543 U. S. 481, 487 (2005) (describing the Jones Act as "remov[ing] this bar to negligence suits by seamen"). If the Jones Act had been the only remaining remedy available to injured seamen, there would have been no election to make.

In addition, the only statutory restrictions expressly addressing general maritime claims for maintenance and cure were enacted long after the passage of the Jones Act. They limit its availability for two discrete classes of people: foreign workers on offshore oil and mineral production facilities, see § 503(a)(2), 96 Stat. 1955, codified at 46 U. S. C. § 30105(b), and sailing school students and instructors, § 204, 96 Stat. 1589, codified at 46 U. S. C. § 50504(b). These provisions indicate that "Congress knows how to" restrict the traditional remedy of maintenance and cure "when it wants to." *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U. S. 97, 106 (1987). Thus, nothing in the statutory scheme for maritime

recovery restricts the availability of punitive damages for maintenance and cure for those, like respondent, who are not precluded from asserting the general maritime claim.

Further supporting this interpretation of the Jones Act, this Court has consistently recognized that the Act "was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it." *The Arizona* v. *Anelich*, 298 U. S. 110, 123 (1936); see also *American Export Lines, Inc.* v. *Alvez*, 446 U. S. 274, 282 (1980) (plurality opinion) (declining to "read the Jones Act as sweeping aside general maritime law remedies"); *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 43 (1943) ("It follows that the Jones Act, in extending a right of recovery to the seaman injured while in the service of his vessel by negligence, has done no more than supplement the remedy of maintenance and cure . . . "); *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130, 134, 138–139 (1928) (holding that the Jones Act "was not intended to restrict in any way the long-established right of a seaman to maintenance, cure and wages").

Not only have our decisions repeatedly observed that the Jones Act preserves common-law causes of action such as maintenance and cure, but our case law also supports the view that punitive damages awards, in particular, remain available in maintenance and cure actions after the Act's passage. In *Vaughan* v. *Atkinson*, 369 U. S. 527 (1962), for example, the Court permitted the recovery of attorney's fees for the "callous" and "willful and persistent" refusal to pay maintenance and cure. *Id.*, at 529–531. In fact, even the *Vaughan* dissenters, who believed that such fees were generally unavailable, agreed that a seaman "would be entitled to exemplary damages in accord with traditional concepts of the law of damages" where a "shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman." *Id.*, at 540 (opinion of Stewart, J.); see also *Fiske*, 3 F. Cas., at 957 (Story, J.) (arguing

that counsel fees are awardable in "[c]ourts of admiralty . . . not technically as costs, but upon the same principles, as they are often allowed damages in cases of torts, by courts of common law, as a recompense for injuries sustained, as exemplary damages, or as a remuneration for expences incurred, or losses sustained, by the misconduct of the other party").[5]

Nothing in the text of the Jones Act or this Court's decisions issued in the wake of its enactment undermines the continued existence of the common-law cause of action providing recovery for the delayed or improper provision of maintenance and cure. Petitioners do not deny the availability of punitive damages in general maritime law, or identify any cases establishing that such damages were historically unavailable for breach of the duty of maintenance and cure. The plain language of the Jones Act, then, does not provide the punitive damages bar that petitioners seek.

B

Petitioners nonetheless argue that the availability of punitive damages in this case is controlled by the Jones Act because of this Court's decision in *Miles*, 498 U. S. 19; see also *post*, at 428–429 (opinion of ALITO, J.). In *Miles*, petitioners argue, the Court limited recovery in maritime cases involving death or personal injury to the remedies available under the Jones Act and the Death on the High Seas Act (DOHSA),

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[5] In the wake of *Vaughan*, a number of lower courts expressly held that punitive damages can be recovered for the denial of maintenance and cure. See, *e. g.*, *Hines* v. *J. A. Laporte, Inc.*, 820 F. 2d 1187, 1189 (CA11 1987) *(per curiam)* (upholding punitive damages award of $5,000 for an "arbitrary and bad faith breach of the duty to furnish maintenance and cure"); *Robinson* v. *Pocahontas, Inc.*, 477 F. 2d 1048, 1049–1052 (CA1 1973) (affirming punitive damages award of $10,000 which was based, in part, on the defendant's initial withholding of maintenance and cure on the pretext that the seaman had been fired for cause).

46 U. S. C. §§ 30301–30306.[6] Petitioners' reading of *Miles* is far too broad.

Miles does not address either maintenance and cure actions in general or the availability of punitive damages for such actions. The decision instead grapples with the entirely different question whether general maritime law should provide a cause of action for wrongful death based on unseaworthiness. By providing a remedy for wrongful death suffered on the high seas or in territorial waters, the Jones Act and DOHSA displaced a general maritime rule that denied any recovery for wrongful death. See 498 U. S., at 23–34. This Court, therefore, was called upon in *Miles* to decide whether these new statutes supported an expansion of the relief available under pre-existing general maritime law to harmonize it with a cause of action created by statute.

The Court in *Miles* first concluded that the "unanimous legislative judgment behind the Jones Act, DOHSA, and the many state statutes" authorizing maritime wrongful-death actions supported the recognition of a general maritime action for wrongful death of a seaman. *Id.*, at 24 (discussing *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375 (1970), which overruled *The Harrisburg*, 119 U. S. 199 (1886)). Congress had chosen to limit, however, the damages available for wrongful-death actions under the Jones Act and DOHSA, such that damages were not statutorily available for loss of society or lost future earnings. See *Miles*, 498 U. S., at 21, 31–32. The Court thus concluded that Congress' judgment must control the availability of remedies for wrongful-death actions brought under general maritime law, *id.*, at 32–36.

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[6] DOHSA applies only to individuals killed (not merely injured) by conduct on the high seas. See 46 U. S. C. § 30302. Because this case involves injuries to a seaman, and not death on the high seas, DOHSA is not relevant.

The reasoning of *Miles* remains sound. As the Court in that case explained, "[w]e no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas." *Id.*, at 27. Furthermore, it was only because of congressional action that a general federal cause of action for wrongful death on the high seas and in territorial waters even existed; until then, there was no general common-law doctrine providing for such an action. As a result, to determine the remedies available under the common-law wrongful-death action, "an admiralty court should look primarily to these legislative enactments for policy guidance." *Ibid.* It would have been illegitimate to create common-law remedies that exceeded those remedies statutorily available under the Jones Act and DOHSA. See *id.*, at 36 ("We will not create, under our admiralty powers, a remedy . . . that goes well beyond the limits of Congress' ordered system of recovery for seamen's injury and death").

But application of that principle here does not lead to the outcome suggested by petitioners or the dissent. See *post*, at 425–426. Unlike the situation presented in *Miles*, both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act. See *supra*, at 409–414. Also unlike the facts presented by *Miles*, the Jones Act does not address maintenance and cure or its remedy.[7] It is therefore possible to adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act; unlike wrongful-death actions, this traditional understanding is not a matter to which "Congress has

[7] Respondent's claim is not affected by the statutory amendments to the Jones Act that limit maintenance and cure recovery in cases involving foreign workers on offshore oil and mineral production facilities, see 46 U. S. C. § 30105, or sailing school students and instructors, § 50504. See *supra*, at 416–417.

spoken directly." See *Miles*, *supra*, at 31 (citing *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, 625 (1978)). Indeed, the *Miles* Court itself acknowledged that "[t]he Jones Act evinces no general hostility to recovery under maritime law," 498 U. S., at 29, and noted that statutory remedy limitations "would not necessarily deter us, if recovery . . . were more consistent with the general principles of maritime tort law," *id.*, at 35. The availability of punitive damages for maintenance and cure actions is entirely faithful to these "general principles of maritime tort law," and no statute casts doubt on their availability under general maritime law.

Moreover, petitioners' contention that *Miles* precludes *any* action or remedy for personal injury beyond that made available under the Jones Act was directly rejected by this Court in *Norfolk Shipbuilding & Drydock Corp.* v. *Garris*, 532 U. S. 811, 818 (2001). That case involved the death of a harbor worker. *Ibid.* There, the Court recognized a maritime cause of action for wrongful death attributable to negligence although neither the Jones Act (which applies only to seamen) nor DOHSA (which does not cover territorial waters) provided such a remedy. *Id.*, at 817–818. The Court acknowledged that "it will be the better course, in many cases that assert new claims beyond what those statutes have seen fit to allow, to leave further development to Congress." *Id.*, at 820. But the Court concluded that the cause of action at issue there was "new only in the most technical sense" because "[t]he general maritime law has recognized the tort of negligence for more than a century, and it has been clear since *Moragne* that breaches of a maritime duty are actionable when they cause death, as when they cause injury." *Ibid.* The Court thus found that "Congress's occupation of this field is not yet so extensive as to preclude us from recognizing what is already logically compelled by our precedents." *Ibid.*

Because *Miles* presented no barrier to this endorsement of a previously unrecognized maritime cause of action for

negligent wrongful death, we see no legitimate basis for a contrary conclusion in the present case. Like negligence, "[t]he general maritime law has recognized . . . for more than a century" the duty of maintenance and cure and the general availability of punitive damages. See *Garris*, *supra*, at 820; see also *supra*, at 409–414. And because respondent does not ask this Court to alter statutory text or "expand" the general principles of maritime tort law, *Miles* does not require us to eliminate the general maritime remedy of punitive damages for the willful or wanton failure to comply with the duty to pay maintenance and cure. "We assume that Congress is aware of existing law when it passes legislation," *Miles*, *supra*, at 32, and the available history suggests that punitive damages were an established part of the maritime law in 1920, see *supra*, at 411–414.[8]

It remains true, of course, that "[a]dmiralty is not created in a vacuum; legislation has always served as an important source of both common law and admiralty principles." *Miles*, *supra*, at 24. And it also is true that the negligent denial of maintenance and cure may also be the subject of a Jones Act claim. See *Cortes* v. *Baltimore Insular Line, Inc.*, 287 U. S. 367 (1932).[9] But the fact that seamen commonly seek to recover under the Jones Act for the wrongful withholding of maintenance and cure does not mean that the

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[8] In light of the Court's decision in *Norfolk Shipbuilding & Drydock Corp.* v. *Garris*, 532 U. S. 811, 818 (2001), our reading of *Miles* cannot, as the dissent contends, represent an "abrup[t]" change of course. See *post*, at 425.

[9] For those maintenance and cure claims that do not involve personal injury (and thus cannot be asserted under the Jones Act), the dissent argues that punitive damages should be barred because such claims are based in contract, not tort. See *post*, at 431–432. But the right of maintenance and cure "was firmly established in the maritime law long before recognition of the distinction between tort and contract." *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 42 (1943). Although the right has been described as incident to contract, it cannot be modified or waived. See *Cortes*, 287 U. S., at 372.

Jones Act provides the only remedy for maintenance and cure claims. Indeed, contrary to petitioners' view that the Jones Act replaced in their entirety the remedies available at common law for maintenance and cure, the *Cortes* decision explicitly acknowledged a seaman's right to choose among overlapping statutory and common-law remedies for injuries sustained by the denial of maintenance and cure. See *id.*, at 374–375 (A seaman's "cause of action for personal injury created by the statute may have overlapped his cause of action for breach of the maritime duty of maintenance and cure . . . . In such circumstances it was his privilege, in so far as the causes of action covered the same ground, to sue indifferently on any one of them").[10]

As this Court has repeatedly explained, "remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures." *Fitzgerald* v. *United States Lines Co.*, 374 U. S. 16, 18 (1963); see also *Peterson*, 278 U. S., at 138, 139 (emphasizing that a seaman's action for maintenance and cure is "independent" and "cumulative" from other claims such as negligence and that the maintenance and cure right is "in no sense inconsistent with, or an alternative of, the right to recover compensatory damages [under the Jones Act]"). See also Gilmore & Black § 6–

[10] The fact that, in some cases, a violation of the duty of maintenance and cure may also give rise to a Jones Act claim, see *post*, at 426–427 (opinion of ALITO, J.), is significant only in that it requires admiralty courts to ensure against double recovery. See *Fitzgerald* v. *United States Lines Co.*, 374 U. S. 16, 18–19 (1963) (authorizing a jury trial when a maintenance and cure claim is joined with a Jones Act claim because "[r]equiring a seaman to split up his lawsuit, submitting part of it to a jury and part to a judge . . . can easily result in too much or too little recovery"). Thus, a court may take steps to ensure that any award of damages for lost wages in a Jones Act negligence claim is offset by the amount of lost wages awarded as part of a recovery of maintenance and cure. See, *e. g., Petition of Oskar Tiedemann & Co.*, 367 F. 2d 498, 505, n. 6 (CA3 1966); *Crooks* v. *United States*, 459 F. 2d 631, 633 (CA9 1972).

23, at 342 ("It is unquestioned law that both the Jones Act and the unseaworthiness remedies are additional to maintenance and cure: the seaman may have maintenance and cure and also one of the other two"). The laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action.[11] Although "Congress . . . is free to say this much and no more," *Miles*, 498 U. S., at 24 (internal quotation marks omitted), we will not attribute words to Congress that it has not written.

IV

Because punitive damages have long been an accepted remedy under general maritime law, and because nothing in the Jones Act altered this understanding, such damages for the willful and wanton disregard of the maintenance and cure obligation should remain available in the appropriate case as a matter of general maritime law.[12] Limiting recovery for maintenance and cure to whatever is permitted by the Jones Act would give greater pre-emptive effect to the Act than is required by its text, *Miles*, or any of this Court's other deci-

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[11] Although this Court has recognized that it may change maritime law in its operation as an admiralty court, see *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 271 (1979), petitioners have not asked the Court to do so in this case or pointed to any serious anomalies, with respect to the Jones Act or otherwise, that our holding may create. Nor have petitioners argued that the size of punitive damages awards in maintenance and cure cases necessitates a recovery cap, which the Court has elsewhere imposed. See *Exxon Shipping Co.* v. *Baker*, 554 U. S. 471, 514–515 (2008) (imposing a punitive-to-compensatory ratio of 1:1). We do not decide these issues.

[12] Because we hold that *Miles* does not render the Jones Act's damages provision determinative of respondent's remedies, we do not address the dissent's argument that the Jones Act, by incorporating the provisions of the Federal Employers' Liability Act, see 46 U. S. C. § 30104(a), prohibits the recovery of punitive damages in actions under that statute. See *post*, at 427–428.

sions interpreting the statute. For these reasons, 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 ALITO, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

In *Miles* v. *Apex Marine Corp.*, 498 U. S. 19 (1990), this Court provided a workable framework for analyzing the relief available on claims under general maritime law. Today, the Court abruptly changes course. I would apply the analytical framework adopted in *Miles*, and I therefore respectfully dissent.

I

In order to understand our decision in *Miles*, it is necessary to appreciate the nature of the authority that the *Miles* Court was exercising. The Constitution, by extending the judicial power of the United States to admiralty and maritime cases, impliedly empowered this Court to continue the development of maritime law "in the manner of a common law court." *Exxon Shipping Co.* v. *Baker*, 554 U. S. 471, 489–490 (2008); see also *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 360–361 (1959). In *Miles*, this Court explained how that authority should be exercised in an era in which statutory law has become dominant.

Miles presented two questions regarding the scope of relief permitted under general maritime law, the first of which was whether damages for loss of society may be recovered on a general maritime law wrongful-death claim. In order to answer this question, the Court looked to the Death on the High Seas Act, 46 U. S. C. § 30301 *et seq.*, and the Jones Act, 46 U. S. C. § 30101 *et seq.*, both of which created new statutory wrongful-death claims. Because the relief available on these statutory claims does not include damages for

loss of society, the Court concluded that it should not permit such damages on a wrongful-death claim brought under general maritime law. The Court explained:

> "We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. *In this era, an admiralty court should look primarily to these legislative enactments for policy guidance.*" 498 U. S., at 27 (emphasis added).

The Court took a similar approach in answering the second question in *Miles*—whether damages for loss of future income should be available in a general maritime law survival action. The Court noted that "[t]here are indeed strong policy arguments for allowing such recovery" and that "admiralty courts have always shown a special solicitude for the welfare of seamen and their families." *Id.*, at 35–36. But because the Jones Act survival provision "limits recovery to losses suffered during the decedent's lifetime," the Court held that a similar limitation should apply under general maritime law. *Id.*, at 36.

Miles thus instructs that, in exercising our authority to develop general maritime law, we should be guided primarily by the policy choices reflected in statutes creating closely related claims. Endorsing what has been termed a principle of uniformity, *Miles* teaches that if a form of relief is not available on a statutory claim, we should be reluctant to permit such relief on a similar claim brought under general maritime law.

II

A

The type of maintenance and cure claim that is most likely to include a request for punitive damages is a claim that a seaman suffered personal injury as a result of the willful refusal to provide maintenance and cure. Such a claim may

be brought under general maritime law. See *Cortes* v. *Baltimore Insular Line, Inc.*, 287 U. S. 367, 374 (1932) (recognizing that a seaman may sue under general maritime law to recover for personal injury resulting from the denial of maintenance and cure). And a similar claim may also be maintained under the Jones Act. See, *e. g.*, *Guevara* v. *Maritime Overseas Corp.*, 59 F. 3d 1496, 1499–1500 (CA5 1995) (en banc); G. Gilmore & C. Black, Law of Admiralty § 6–13, p. 311 (2d ed. 1975). To be sure, a seaman asserting a Jones Act claim must show that his employer was negligent, *ibid.*, while a seaman proceeding under general maritime law may recover compensatory damages without establishing fault, *id.*, at 310. But because the prevailing rule in American courts does not permit punitive damages without a showing of fault, see *Exxon Shipping*, *supra*, at 493, it appears that any personal injury maintenance and cure claim in which punitive damages might be awarded could be brought equally under either general maritime law or the Jones Act. The *Miles* uniformity therefore weighs strongly in favor of a rule that applies uniformly under general maritime law and the Jones Act. I therefore turn to the question whether punitive damages may be awarded under the Jones Act.

B

Enacted in 1920, the Jones Act, 46 U. S. C. §§ 30104–30105(b), makes applicable to seamen the substantive recovery provisions of the Federal Employers' Liability Act (FELA), 45 U. S. C. § 51 *et seq.*, which became law in 1908. FELA, in turn, "recites only that employers shall be liable in 'damages' for the injury or death of one protected under the Act." *Miles*, *supra*, at 32 (citing 45 U. S. C. § 51).

Prior to the enactment of the Jones Act, however, this Court had decided several cases that explored the damages allowed under FELA. In *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59 (1913), the Court dealt primarily with the damages that may be recovered under FELA's wrongful-

death provision, but the Court also discussed the damages available in the case of injury. The Court noted that if the worker in that case had not died from his injuries, "he might have recovered such damages as would have compensated him for his expense, loss of time, suffering and diminished earning power." *Id.*, at 65. Two years later, in *St. Louis, I. M. & S. R. Co.* v. *Craft*, 237 U. S. 648 (1915), the Court reiterated that an injured worker may recover only compensatory damages. Addressing the damages available to a party bringing a survival claim, the Court explained that the party may recover only those damages that had accrued to the worker at the time of his death and was thus limited to "such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived." *Id.*, at 658. See also *ibid.* (damages "confined to the [worker's] personal loss and suffering before he died"); *Miller* v. *American President Lines, Ltd.*, 989 F. 2d 1450, 1457 (CA6), cert. denied, 510 U. S. 915 (1993) ("It has been the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages are not recoverable under [FELA]").

When Congress incorporated FELA unaltered into the Jones Act, Congress must have intended to incorporate FELA's limitation on damages as well. *Miles*, 498 U. S., at 32. "We assume that Congress is aware of existing law when it passes legislation." *Ibid.* (citing *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–697 (1979)). It is therefore reasonable to assume that only compensatory damages may be recovered under the Jones Act. See *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130, 136–139 (1928) (under the Jones Act, a seaman may "recover compensatory damages for injuries caused by the negligence"). And under *Miles*' reasoning—at least in the absence of some exceptionally strong countervailing considerations—the rule should be the same when a seaman sues under general maritime law for personal injury resulting from the denial of maintenance and cure.

III

In reaching the opposite conclusion, the Court reasons: Punitive damages were available on maintenance and cure claims prior to the enactment of the Jones Act and that the Jones Act was not intended to trim the relief available on such general maritime law claims. This reasoning is flawed.

A

First, the Court proceeds as if the question here were whether the Jones Act was meant to preclude general maritime law claims and remedies. See *ante*, at 415 (Jones Act does not "overtur[n]" or "eliminate pre-existing remedies available to seamen"); *ante*, at 417 (Jones Act "preserves common-law causes of action"); *ante*, at 421 (*Miles* does not "preclud[e]" all claims and remedies beyond that made available under the Jones Act). *Miles* explicitly rejected that argument. See 498 U. S., at 29. But just because the Jones Act was not meant to preclude general maritime claims or remedies, it does not follow that the Jones Act was meant to stop the development of general maritime law by the courts. The Jones Act is significant because it created a statutory claim that is indistinguishable for present purposes from a general maritime law maintenance and cure claim based on personal injury and because this statutory claim does not permit the recovery of punitive damages. "Congress, in the exercise of its legislative powers, is free to say 'this much and no more,'" and "an admiralty court should look primarily to these legislative enactments for policy guidance." *Miles*, *supra*, at 24, 27. This policy embodied in the Jones Act thus constitutes a powerful argument in favor of the development of a similar rule under general maritime law.

B

That brings me to the Court's claim that the availability of punitive damages was established before the Jones Act was passed. If punitive damages were a widely recognized

and regularly employed feature of maintenance and cure claims during the pre-Jones Act era, I would not rule out the possibility that this history might be sufficient to outweigh the *Miles* uniformity principle. But a search for cases in which punitive damages were awarded for the willful denial of maintenance and cure—in an era when seamen were often treated with shocking callousness—yields very little. Although American courts have entertained maintenance and cure suits since the early 19th century, the Court points to only two reported cases—*The City of Carlisle*, 39 F. 807 (DC Ore. 1889), and *The Troop*, 118 F. 769 (DC Wash. 1902)—that, as the Court carefully puts it, "appear to contain at least some punitive element." *Ante*, at 414.

The Court's choice of words is well advised, for it is not even clear that punitive damages were recovered in these two obscure cases. In *The City of Carlisle*, a 16-year-old apprentice suffered a fractured skull. The captain refused to put ashore. Given little care, the apprentice spent the next six or seven weeks in his bunk, wracked with pain, and was then compelled to work 12 hours a day for the remaining three months of the voyage. Upon landing, the captain made no arrangements for care and did not pay for the apprentice's brain surgery. The apprentice received an award of $1,000; that may include some "punitive element," but it seems likely that much if not all of that sum represented compensation for the apprentice's months of agony and the lingering effects of his injury.

The Court's second case, *The Troop*, *supra*, involved similarly brutal treatment. The seaman fell from a mast and fractured an arm and a leg while his ship was six miles from its port of departure. Refusing to return to port, the captain subjected the seaman to maltreatment for the remainder of the 36-day voyage. As a result, he was required to undergo painful surgery, and his injuries permanently prevented him from returning to work as a mariner. He received an undifferentiated award of $4,000, and while the

court was sharply critical of the captain's conduct, it is far from clear that the award did not consist entirely of compensatory damages for medical expenses, lost future income, and pain and suffering.

In addition to the two cases cited by the Court, respondent and an *amicus* claim that punitive damages were awarded in a few additional cases. See Brief for Respondent 13; Brief for American Association for Justice as *Amicus Curiae* 10–11. Of these cases, *The Margharita*, 140 F. 820 (CA5 1905), is perhaps the most supportive. There, the court explained that its award of $1,500 would not only "compensate the seaman for his unnecessary and unmerited suffering" but would "emphasize the importance of humane and correct judgment under the circumstances on the part of the master." *Id.*, at 828. While the court's reference to the message that the award embodied suggests that the award was in part punitive, it is also possible that the reference simply represented a restatement of one of the traditional rationales for maintenance and cure, *i. e.*, that it served the economic interests of shipowners and the general interests of the country by making service as a seaman more attractive. See *Harden* v. *Gordon*, 11 F. Cas. 480, 485 (No. 6,047) (CC Me. 1823).

The remaining cases contain harsh criticism of the seamen's treatment but do not identify any portion of the award as punitive. See *The Rolph*, 293 F. 269 (ND Cal. 1923), aff'd, 299 F. 52 (CA9 1924) (undifferentiated award of $10,000 for a seaman rendered blind in both eyes); *Tomlinson* v. *Hewett*, 24 F. Cas. 29, 32 (No. 14,087) (DC Cal. 1872).

In sum, the search for maintenance and cure cases in which punitive damages were awarded yields strikingly slim results. The cases found are insufficient in number, clarity, and prominence to justify departure from the *Miles* uniformity principle.

IV

There is one remaining question in this case, namely, whether punitive damages are permitted when a seaman as-

serts a general maritime law maintenance and cure claim that is not based on personal injury. In *Cortes*, 287 U. S., at 371, the Court explained that the duty to furnish maintenance and cure is "one annexed to the employment. . . . Contractual it is in the sense that it has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident." The duty is thus essentially quasi-contractual, and therefore, in those instances in which the seaman does not suffer personal injury, recovery should be governed by the law of quasi-contract. See Restatement (Second) of Contracts § 4, Comment *b*, p. 15, § 12, Comment *f*, p. 32 (1979); Restatement of Restitution §§ 113–114 (1936); 1 D. Dobbs, Law of Remedies § 4.2(3), p. 580 (2d ed. 1993). Thus, an award of punitive damages is not appropriate. See also *Guevara*, 59 F. 3d, at 1513.

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For these reasons, I would hold that punitive damages are not available in a case such as this, and I would therefore reverse the decision of the Court of Appeals.

Syllabus

HORNE, SUPERINTENDENT, ARIZONA PUBLIC INSTRUCTION *v.* FLORES ET AL.

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

No. 08–289. Argued April 20, 2009—Decided June 25, 2009*

A group of English language-learner (ELL) students and their parents (plaintiffs) filed a class action, alleging that Arizona, its state board of education, and the superintendent of public instruction (defendants) were providing inadequate ELL instruction in the Nogales Unified School District (Nogales), in violation of the Equal Educational Opportunities Act of 1974 (EEOA), which requires States to take "appropriate action to overcome language barriers" in schools, 20 U. S. C. § 1703(f). In 2000, the Federal District Court entered a declaratory judgment, finding an EEOA violation in Nogales because the amount of funding the State allocated for the special needs of ELL students (ELL incremental funding) was arbitrary and not related to the actual costs of ELL instruction in Nogales. The District Court subsequently extended relief statewide and, in the years following, entered a series of additional orders and injunctions. The defendants did not appeal any of the District Court's orders. In 2006, the state legislature passed HB 2064, which, among other things, increased ELL incremental funding. The incremental funding increase required District Court approval, and the Governor asked the state attorney general to move for accelerated consideration of the bill. The state board of education, which joined the Governor in opposing HB 2064, the State, and the plaintiffs are respondents here. The Speaker of the State House of Representatives and the President of the State Senate (Legislators) intervened and, with the superintendent (collectively, petitioners), moved to purge the contempt order in light of HB 2064. In the alternative, they sought relief under Federal Rule of Civil Procedure 60(b)(5). The District Court denied their motion to purge the contempt order and declined to address the Rule 60(b)(5) claim. The Court of Appeals vacated and remanded for an evidentiary hearing on whether changed circumstances warranted Rule 60(b)(5). On remand, the District Court denied the Rule 60(b)(5) motion, holding that HB 2064 had not created an adequate funding sys-

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*Together with No. 08–294, *Speaker of the Arizona House of Representatives et al.* v. *Flores et al.*, also on certiorari to the same court.

tem. Affirming, the Court of Appeals concluded that Nogales had not made sufficient progress in its ELL programming to warrant relief.

Held:

1. The superintendent has standing. To establish Article III standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561. Here, the superintendent was a named defendant, the declaratory judgment held him in violation of the EEOA, and the injunction runs against him. Because the superintendent has standing, the Court need not consider whether the Legislators also have standing. Pp. 445–447.

2. The lower courts did not engage in the proper analysis under Rule 60(b)(5). Pp. 447–470.

(a) Rule 60(b)(5), which permits a party to seek relief from a judgment or order if "a significant change either in factual conditions or in law" renders continued enforcement "detrimental to the public interest," *Rufo* v. *Inmates of Suffolk County Jail*, 502 U. S. 367, 384, serves a particularly important function in "institutional reform litigation," *id.*, at 380. Injunctions in institutional reform cases often remain in force for many years, during which time changed circumstances may warrant reexamination of the original judgment. Injunctions of this sort may also raise sensitive federalism concerns, which are heightened when, as in these cases, a federal-court decree has the effect of dictating state or local budget priorities. Finally, institutional reform injunctions bind state and local officials to their predecessors' policy preferences and may thereby "improperly deprive future officials of their designated legislative and executive powers." *Frew* v. *Hawkins*, 540 U. S. 431, 441. Because of these features of institutional reform litigation, federal courts must take a "flexible approach" to Rule 60(b)(5) motions brought in this context, *Rufo*, *supra*, at 381, ensuring that "responsibility for discharging the State's obligations is returned promptly to the State and its officials" when circumstances warrant, *Frew*, *supra*, at 442. Courts must remain attentive to the fact that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or . . . flow from such a violation." *Milliken* v. *Bradley*, 433 U. S. 267, 282. Thus, a critical question in this Rule 60(b)(5) inquiry is whether the EEOA violation underlying the 2000 order has been remedied. If it has, the order's continued enforcement is unnecessary and improper. Pp. 447–450.

(b) The Court of Appeals did not engage in the Rule 60(b)(5) analysis just described. Pp. 450–455.

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(i) Its Rule 60(b)(5) standard was too strict. The Court of Appeals explained that situations in which changed circumstances warrant Rule 60(b)(5) relief are "likely rare," and that, to succeed, petitioners had to show that conditions in Nogales had so changed as to "sweep away" the District Court's incremental funding determination. The Court of Appeals also incorrectly reasoned that federalism concerns were substantially lessened here because the State and the state board of education wanted the injunction to remain in place. Pp. 450–452.

(ii) The Court of Appeals' inquiry was also too narrow, focusing almost exclusively on the sufficiency of ELL incremental funding. It attributed undue significance to petitioners' failure to appeal the District Court's 2000 order and in doing so, failed to engage in the flexible changed-circumstances inquiry prescribed by *Rufo*. The Court of Appeals' inquiry was, effectively, an inquiry into whether the 2000 order had been satisfied. But satisfaction of an earlier judgment is only one of Rule 60(b)(5)'s enumerated bases for relief. Petitioners could obtain relief on the independent basis that prospective enforcement of the order was "no longer equitable." To determine the merits of this claim, the Court of Appeals should have ascertained whether the 2000 order's ongoing enforcement was supported by an ongoing EEOA violation. Although the EEOA requires a State to take "appropriate action," it entrusts state and local authorities with choosing how to meet this obligation. By focusing solely on ELL incremental funding, the Court of Appeals misapprehended this mandate. And by requiring petitioners to demonstrate "appropriate action" through a particular funding mechanism, it improperly substituted its own policy judgments for those of the state and local officials entrusted with the decisions. Pp. 452–455.

(c) The District Court's opinion reveals similar errors. Rather than determining whether changed circumstances warranted relief from the 2000 order, it asked only whether petitioners had satisfied that order through increased ELL incremental funding. Pp. 455–456.

(d) Because the Court of Appeals and the District Court misperceived the obligation imposed by the EEOA and the breadth of the Rule 60(b)(5) inquiry, these cases must be remanded for a proper examination of at least four factual and legal changes that may warrant relief. Pp. 459–470.

(i) After the 2000 order was entered, Arizona moved from a "bilingual education" methodology of ELL instruction to "structured English immersion" (SEI). Research on ELL instruction and findings by the state department of education support the view that SEI is significantly more effective than bilingual education. A proper Rule 60(b)(5) analysis should entail further factual findings regarding whether No-

gales' implementation of SEI is a "changed circumstance" warranting relief. Pp. 459–461.

(ii) Congress passed the No Child Left Behind Act of 2001 (NCLB), which represents another potentially significant "changed circumstance." Although compliance with NCLB will not necessarily constitute "appropriate action" under the EEOA, NCLB is relevant to petitioners' Rule 60(b)(5) motion in four principal ways: It prompted the State to make significant structural and programming changes in its ELL programming; it significantly increased federal funding for education in general and ELL programming in particular; it provided evidence of the progress and achievement of Nogales' ELL students through its assessment and reporting requirements; and it marked a shift in federal education policy. Pp. 461–465.

(iii) Nogales' superintendent instituted significant structural and management reforms which, among other things, reduced class sizes, improved student/teacher ratios, and improved the quality of teachers. Entrenched in the incremental funding framework, the lower courts failed to recognize that these changes may have brought Nogales' ELL programming into compliance with the EEOA even without sufficient incremental funding to satisfy the 2000 order. This was error. Because the EEOA focuses on the quality of educational programming and services to students, not the amount of money spent, there is no statutory basis for precluding petitioners from showing that Nogales has achieved EEOA-compliant ELL programming in ways other than through increased incremental funding. A proper Rule 60(b)(5) inquiry should recognize this and should ask whether, as a result of structural and managerial improvements, Nogales is now providing equal educational opportunities to ELL students. Pp. 465–468.

(iv) There was an overall increase in education funding available in Nogales. The Court of Appeals foreclosed the possibility that petitioners could show that this overall increase was sufficient to support EEOA-compliant ELL programming. This was clear legal error. The EEOA's "appropriate action" requirement does not necessarily require a particular level of funding, and to the extent that funding is relevant, the EEOA does not require that the money come from a particular source. Thus, the District Court should evaluate whether the State's general education funding budget, in addition to local revenues, currently supports EEOA-compliant ELL programming in Nogales. Pp. 468–470.

3. On remand, if petitioners press their objection to the injunction as it extends beyond Nogales, the lower courts should consider whether

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the District Court erred in entering statewide relief. The record contains no factual findings or evidence that any school district other than Nogales failed to provide equal educational opportunities to ELL students, and respondents have not explained how the EEOA can justify a statewide injunction here. The state attorney general's concern that a "Nogales only" remedy would run afoul of the Arizona Constitution's equal funding requirement did not provide a valid basis for a statewide *federal* injunction, for it raises a state-law question to be determined by state authorities. Unless the District Court concludes that Arizona is violating the EEOA statewide, it should vacate the injunction insofar as it extends beyond Nogales. Pp. 470–472.

516 F. 3d 1140, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 472.

Kenneth W. Starr argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 08–294 were *Ashley C. Parrish*, *Rick Richmond*, *Steven A. Haskins*, *David J. Cantelme*, *David Aaron Brown*, and *Paul R. Neil.* *Eric J. Bistrow*, *Daryl Manhart*, and *Michael S. Dulberg* filed briefs for petitioner in No. 08–289.

Sri Srinivasan argued the cause for respondents in both cases. With him on the brief for respondents Miriam Flores et al. were *Irving L. Gornstein*, *Ryan W. Scott*, *Walter Dellinger*, *Timothy M. Hogan*, and *Joy E. Herr-Cardillo.* *Terry Goddard*, Attorney General of Arizona, *Mary O'Grady*, Solicitor General, *Susan P. Segal*, Assistant Attorney General, *Robert H. McKirgan*, *Lawrence A. Kasten*, and *Kimberly Anne Demarchi* filed a brief for respondents State of Arizona et al. in both cases.

Nicole A. Saharsky argued the cause for the United States as *amicus curiae* supporting respondents in both cases. With her on the brief were *Acting Solicitor General Katyal*, *Acting Assistant Attorneys General Hertz* and *King*, *Deputy Solicitor General Kneedler*, *Mark B. Stern*, *Dennis J. Dim-*

sey, *Angela M. Miller*, *Philip H. Rosenfelt*, and *Susan E. Craig.*†

JUSTICE ALITO delivered the opinion of the Court.

These consolidated cases arise from litigation that began in Arizona in 1992 when a group of English language-learner (ELL) students in the Nogales Unified School District (Nogales) and their parents filed a class action, alleging that the State was violating the Equal Educational Opportunities Act of 1974 (EEOA), § 204(f), 88 Stat. 515, 20 U. S. C. § 1703(f),

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†Briefs of *amici curiae* urging reversal in both cases were filed for the American Legislative Exchange Council et al. by *Robert C. O'Brien, Jr.*, *Jonathan E. Phillips*, and *Seth L. Cooper;* for the American Unity Legal Defense Fund et al. by *Barnaby W. Zall;* for Education-Policy Scholars by *Dan Himmelfarb* and *Stephen M. Shapiro;* for the Eagle Forum Education & Legal Defense Fund, Inc., by *Andrew L. Schlafly* and *Lawrence J. Joseph;* for the Pacific Legal Foundation et al. by *Sharon L. Browne*, *Steven Geoffrey Gieseler*, and *Michael J. Reitz;* and for the Washington Legal Foundation by *Gene C. Schaerr*, *Michael J. Friedman*, *Daniel J. Popeo*, *Richard A. Samp*, *Ross Sandler*, and *David S. Schoenbrod.*

J. Scott Detamore filed a brief for the Mountain States Legal Foundation as *amicus curiae* urging reversal in No. 08–289.

Briefs of *amici curiae* urging affirmance in both cases were filed for the Asian American Justice Center et al. by *Alan S. Gilbert*, *Richard M. Zuckerman*, *Katherine J. Evans*, *Karen K. Narasaki*, and *Vincent A. Eng;* for the Asian American Legal Defense and Education Fund et al. by *Robert A. Long, Jr.*, *Stanley Young*, *Deanna L. Kwong*, and *Kenneth Kimerling;* for Civil Rights Organizations by *Nina Perales*, *Diana Sen*, and *John T. Affeldt;* for Educational Policy and Finance Scholars by *Jonathan L. Marcus;* for the NAACP Legal Defense & Educational Fund, Inc., et al. by *John Payton*, *Jacqueline A. Berrien*, *Debo P. Adegbile*, *Anurima Bhargava*, *Holly A. Thomas*, and *Joshua Civin;* for the National School Boards Association et al. by *Francisco M. Negrón, Jr.*, *Naomi Gittins*, *Thomas Hutton*, *Lisa Soronen*, *Maree F. Sneed*, *John W. Borkowski*, and *Jessica Ellsworth;* for the Tucson Unified School District et al. by *John C. Richardson;* and for the Washington Lawyers' Committee for Civil Rights and Urban Affairs—Immigrant and Refugee Rights Project et al. by *Patrick F. Linehan.*

A. W. Phinney III filed a brief for 30 Recognized Leaders of Education Research as *amici curiae* in both cases.

which requires a State "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." In 2000, the District Court entered a declaratory judgment with respect to Nogales, and in 2001, the court extended the order to apply to the entire State. Over the next eight years, petitioners repeatedly sought relief from the District Court's orders, but to no avail. We granted certiorari after the Court of Appeals for the Ninth Circuit affirmed the denial of petitioners' motion for relief under Federal Rule of Civil Procedure 60(b)(5), and we now reverse the judgment of the Court of Appeals and remand for further proceedings.

As we explain, the District Court and the Court of Appeals misunderstood both the obligation that the EEOA imposes on States and the nature of the inquiry that is required when parties such as petitioners seek relief under Rule 60(b)(5) on the ground that enforcement of a judgment is "no longer equitable." Both of the lower courts focused excessively on the narrow question of the adequacy of the State's incremental funding for ELL instruction instead of fairly considering the broader question whether, as a result of important changes during the intervening years, the State was fulfilling its obligation under the EEOA by other means. The question at issue in these cases is not whether Arizona must take "appropriate action" to overcome the language barriers that impede ELL students. Of course it must. But petitioners argue that Arizona is now fulfilling its statutory obligation by new means that reflect new policy insights and other changed circumstances. Rule 60(b)(5) provides the vehicle for petitioners to bring such an argument.

I

A

In 1992, a group of students enrolled in the ELL program in Nogales and their parents (plaintiffs) filed suit in the District Court for the District of Arizona on behalf of "all minor-

ity 'at risk' and limited English proficient children . . . now or hereafter, enrolled in [the] Nogales Unified School District . . . as well as their parents and guardians." *Flores* v. *Arizona*, 172 F. Supp. 2d 1225, 1226 (2000). Plaintiffs sought a declaratory judgment holding that the State of Arizona, its board of education, and its superintendent of public instruction (defendants) were violating the EEOA by providing inadequate ELL instruction in Nogales.[1]

The relevant portion of the EEOA states:

> "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> . . . . . .
>
> "(f) the failure by an educational agency to take *appropriate action* to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U. S. C. § 1703 (emphasis added).

By simply requiring a State "to take appropriate action to overcome language barriers" without specifying particular actions that a State must take, "Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they

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[1] We have previously held that Congress may validly abrogate the States' sovereign immunity only by doing so (1) unequivocally and (2) pursuant to certain valid grants of constitutional authority. See, *e. g.*, *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 73 (2000). With respect to the second requirement, we have held that statutes enacted pursuant to § 5 of the Fourteenth Amendment must provide a remedy that is "congruent and proportional" to the injury that Congress intended to address. See *City of Boerne* v. *Flores*, 521 U. S. 507, 520 (1997). Prior to *City of Boerne*, the Court of Appeals for the Ninth Circuit held that the EEOA, which was enacted pursuant to § 5 of the Fourteenth Amendment, see 20 U. S. C. §§ 1702(a)(1), (b), validly abrogates the States' sovereign immunity. See *Los Angeles Branch NAACP* v. *Los Angeles Unified School Dist.*, 714 F. 2d 946, 950–951 (1983); see also *Flores* v. *Arizona*, 516 F. 3d 1140, 1146, n. 2 (CA9 2008) (relying on *Los Angeles NAACP*). That issue is not before us in these cases.

would use to meet their obligations under the EEOA." *Castaneda* v. *Pickard*, 648 F. 2d 989, 1009 (CA5 1981).

In August 1999, after seven years of pretrial proceedings and after settling various claims regarding the structure of Nogales' ELL curriculum, the evaluation and monitoring of Nogales' students, and the provision of tutoring and other compensatory instruction, the parties proceeded to trial. In January 2000, the District Court concluded that defendants were violating the EEOA because the amount of funding the State allocated for the special needs of ELL students (ELL incremental funding) was arbitrary and not related to the actual funding needed to cover the costs of ELL instruction in Nogales. 172 F. Supp. 2d, at 1239. Defendants did not appeal the District Court's order.

B

In the years following, the District Court entered a series of additional orders and injunctions. In October 2000, the court ordered the State to "prepare a cost study to establish the proper appropriation to effectively implement" ELL programs. *Flores* v. *Arizona*, 160 F. Supp. 2d 1043, 1047. In June 2001, the court applied the declaratory judgment order statewide and granted injunctive relief accordingly. No. CIV. 92–596TUCACM, 2001 WL 1028369, *2 (June 25, 2001). The court took this step even though the certified class included only Nogales students and parents and even though the court did not find that any districts other than Nogales were in violation of the EEOA. The court set a deadline of January 31, 2002, for the State to provide funding that "bear[s] a rational relationship to the actual funding needed." *Ibid.*

In January 2005, the court gave the State 90 days to "appropriately and constitutionally fun[d] the state's ELL programs taking into account the [Rule's] previous orders." No. CIV. 92–596–TUC–ACM, p. 5, App. 393. The State failed to meet this deadline, and in December 2005, the court

held the State in contempt. Although the legislature was not then a party to the suit, the court ordered that "the legislature has 15 calendar days after the beginning of the 2006 legislative session to comply with the January 28, 2005 Court order. Everyday thereafter . . . that the State fails to comply with this Order, [fines] will be imposed until the State is in compliance." *Flores* v. *Arizona*, 405 F. Supp. 2d 1112, 1120. The schedule of fines that the court imposed escalated from $500,000 to $2 million per day. *Id.*, at 1120–1121.

C

Defendants did not appeal any of the District Court's orders, and the record suggests that some state officials supported their continued enforcement. In June 2001, the state attorney general acquiesced in the statewide extension of the declaratory judgment order, a step that the State has explained by reference to the Arizona constitutional requirement of uniform statewide school funding. See Brief for Appellee State of Arizona et al. in No. 07–15603 etc. (CA9), p. 60 (citing Ariz. Const., Art. 11, § 1(A)). At a hearing in February 2006, a new attorney general opposed the superintendent's request for a stay of the December 2005 order imposing sanctions and fines, and filed a proposed distribution of the accrued fines.

In March 2006, after accruing over $20 million in fines, the state legislature passed HB 2064, which was designed to implement a permanent funding solution to the problems identified by the District Court in 2000. Among other things, HB 2064 increased ELL incremental funding (with a 2-year per-student limit on such funding) and created two new funds—a structured English immersion fund and a compensatory instruction fund—to cover additional costs of ELL programming. Moneys in both newly created funds were to be offset by available federal moneys. HB 2064 also instituted several programming and structural changes.

The Governor did not approve of HB 2064's funding provisions, but she allowed the bill to become law without her signature. Because HB 2064's incremental ELL funding increase required court approval to become effective, the Governor requested the attorney general to move for accelerated consideration by the District Court. In doing so, she explained: "'After nine months of meetings and three vetoes, it is time to take this matter to a federal judge. I am convinced that getting this bill into court now is the most expeditious way ultimately to bring the state into compliance with federal law.'" *Flores* v. *Arizona*, 516 F. 3d 1140, 1153, n. 16 (CA9 2008). The state board of education joined the Governor in opposing HB 2064. Together, the state board of education, the State of Arizona, and the plaintiffs are respondents here.

With the principal defendants in the action siding with the plaintiffs, the Speaker of the State House of Representatives and the President of the State Senate (Legislators) filed a motion to intervene as representatives of their respective legislative bodies. App. 55. In support of their motion, they stated that although the attorney general had a "legal duty" to defend HB 2064, the attorney general had shown "little enthusiasm" for advancing the legislature's interests. *Id.*, at 57. Among other things, the Legislators noted that the attorney general "failed to take an appeal of the judgment entered in this case in 2000 and has failed to appeal any of the injunctions and other orders issued in aid of the judgment." *Id.*, at 60. The District Court granted the Legislators' motion for permissive intervention, and the Legislators and superintendent (together, petitioners here) moved to purge the District Court's contempt order in light of HB 2064. Alternatively, they moved for relief under Federal Rule of Civil Procedure 60(b)(5) based on changed circumstances.

In April 2006, the District Court denied petitioners' motion, concluding that HB 2064 was fatally flawed in three

respects. First, while HB 2064 increased ELL incremental funding by approximately $80 per student, the court held that this increase was not rationally related to effective ELL programming. Second, the court concluded that imposing a 2-year limit on funding for each ELL student was irrational. Third, according to the court, HB 2064 violated federal law by using federal funds to "supplant" rather than "supplement" state funds. No. CV–92–596–TUC–RCC, pp. 4–8 (Apr. 25, 2006), App. to Pet. for Cert. in No. 08–294, pp. 176a, 181a–182a. The court did not address petitioners' Rule 60(b)(5) claim that changed circumstances rendered continued enforcement of the original declaratory judgment order inequitable. Petitioners appealed.

In an unpublished decision, the Court of Appeals for the Ninth Circuit vacated the District Court's April 2006 order, the sanctions, and the imposition of fines, and remanded for an evidentiary hearing to determine whether Rule 60(b)(5) relief was warranted. *Flores* v. *Rzeslawski*, 204 Fed. Appx. 580 (2006).

On remand, the District Court denied petitioners' Rule 60(b)(5) motion. *Flores* v. *Arizona*, 480 F. Supp. 2d 1157, 1167 (Ariz. 2007). Holding that HB 2064 did not establish "a funding system that rationally relates funding available to the actual costs of all elements of ELL instruction," *id.*, at 1165, the court gave the State until the end of the legislative session to comply with its orders. The State failed to do so, and the District Court again held the State in contempt. No. CV 92–596 TUC–RCC (Oct. 10, 2007), App. 86. Petitioners appealed.

The Court of Appeals affirmed. 516 F. 3d 1140. It acknowledged that Nogales had "made significant strides since 2000," *id.*, at 1156, but concluded that the progress did not warrant Rule 60(b)(5) relief. Emphasizing that Rule 60(b)(5) is not a substitute for a timely appeal, and characterizing the original declaratory judgment order as centering on the adequacy of ELL incremental funding, the Court of

Appeals explained that relief would be appropriate only if petitioners had shown "either that there are no longer incremental costs associated with ELL programs in Arizona" or that Arizona had altered its funding model. *Id.*, at 1169. The Court of Appeals concluded that petitioners had made neither showing, and it rejected petitioners' other arguments, including the claim that Congress' enactment of the No Child Left Behind Act of 2001 (NCLB), 115 Stat. 1425, codified in Title 20 U. S. C. § 6842, constituted a changed legal circumstance that warranted Rule 60(b)(5) relief.

We granted certiorari, 555 U. S. 1092 (2009), and now reverse.

II

Before addressing the merits of petitioners' Rule 60(b)(5) motion, we consider the threshold issue of standing—"an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992). To establish standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling. *Id.*, at 560–561. Here, as in all standing inquiries, the critical question is whether at least one petitioner has "alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." *Summers* v. *Earth Island Institute*, 555 U. S. 488, 493 (2009) (quoting *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975); internal quotation marks omitted).

We agree with the Court of Appeals that the superintendent has standing because he "is a named defendant in the case[,] the Declaratory Judgment held him to be in violation of the EEOA, and the current injunction runs against him." 516 F. 3d, at 1164 (citation omitted). For these reasons alone, he has alleged a sufficiently "'personal stake in the outcome of the controversy'" to support standing. *Warth*, *supra*, at 498; see also *United States* v. *Sweeney*, 914 F. 2d

1260, 1263 (CA9 1990) (rejecting as "frivolous" the argument that a party does not have "standing to object to orders specifically directing it to take or refrain from taking action").

Respondents' only argument to the contrary is that the superintendent answers to the state board of education, which in turn answers to the Governor, and that the Governor is the only Arizona official who "could have resolved the conflict within the Executive Branch by directing an appeal." Brief for Respondent Flores et al. 22. We need not consider whether respondents' chain-of-command argument has merit because the Governor has, in fact, directed an appeal. See App. to Reply Brief for Petitioner Superintendent 1 ("I hereby direct [the state attorney general] to file a brief at the [Supreme] Court on behalf of the State of Arizona adopting and joining in the positions taken by the Superintendent of Public Instruction, the Speaker of the Arizona House of Representatives, and the President of the Arizona Senate").

Because the superintendent clearly has standing to challenge the lower courts' decisions, we need not consider whether the Legislators also have standing to do so.[2] See, *e. g.*, *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 264, and n. 9 (1977) ("[W]e have at least one individual plaintiff who has demonstrated standing . . . . Because of the presence of this plaintiff, we need not consider whether the other individual and corporate

[2] We do not agree with the conclusion of the Court of Appeals that "the Superintendent's standing is limited" to seeking vacatur of the District Court's orders "only as they run against him." 516 F. 3d, at 1165. Had the superintendent sought relief based on satisfaction of the judgment, the Court of Appeals' conclusion might have been correct. But as discussed *infra*, at 453, petitioners' Rule 60(b)(5) claim is not based on satisfaction of the judgment. Their claim is that continued enforcement of the District Court's orders would be inequitable. This claim implicates the orders in their entirety, and not solely as they run against the superintendent.

plaintiffs have standing to maintain the suit"). Accordingly, we proceed to the merits of petitioners' Rule 60(b)(5) motion.

III

A

Federal Rule of Civil Procedure 60(b)(5) permits a party to obtain relief from a judgment or order if, among other things, "applying [the judgment or order] prospectively is no longer equitable." Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests, but the Rule provides a means by which a party can ask a court to modify or vacate a judgment or order if "a significant change either in factual conditions or in law" renders continued enforcement "detrimental to the public interest." *Rufo* v. *Inmates of Suffolk County Jail*, 502 U. S. 367, 384 (1992). The party seeking relief bears the burden of establishing that changed circumstances warrant relief, *id.*, at 383, but once a party carries this burden, a court abuses its discretion "when it refuses to modify an injunction or consent decree in light of such changes," *Agostini* v. *Felton*, 521 U. S. 203, 215 (1997).

Rule 60(b)(5) serves a particularly important function in what we have termed "institutional reform litigation."[3] *Rufo*, *supra*, at 380. For one thing, injunctions issued in

[3] The dissent is quite wrong in contending that these are not institutional reform cases because they involve a statutory, rather than a constitutional, claim and because the orders of the District Court do not micromanage the day-to-day operation of the schools. *Post*, at 496 (opinion of BREYER, J.). For nearly a decade, the orders of a Federal District Court have substantially restricted the ability of the State of Arizona to make basic decisions regarding educational policy, appropriations, and budget priorities. The record strongly suggests that some state officials have welcomed the involvement of the federal court as a means of achieving appropriations objectives that could not be achieved through the ordinary democratic process. See *supra*, at 443. Because of these features, these cases implicate all of the unique features and risks of institutional reform litigation.

such cases often remain in force for many years, and the passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment.

Second, institutional reform injunctions often raise sensitive federalism concerns. Such litigation commonly involves areas of core state responsibility, such as public education. See *Missouri* v. *Jenkins*, 515 U. S. 70, 99 (1995) ("[O]ur cases recognize that local autonomy of school districts is a vital national tradition, and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution" (citation omitted)); *United States* v. *Lopez*, 514 U. S. 549, 580 (1995) (KENNEDY, J., concurring).

Federalism concerns are heightened when, as in these cases, a federal-court decree has the effect of dictating state or local budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs. See *Jenkins*, *supra*, at 131 (THOMAS, J., concurring) ("A structural reform decree eviscerates a State's discretionary authority over its own program and budgets and forces state officials to reallocate state resources and funds").

Finally, the dynamics of institutional reform litigation differ from those of other cases. Scholars have noted that public officials sometimes consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law. See, *e. g.*, McConnell, Why Hold Elections? Using Consent Decrees To Insulate Policies From Political Change, 1987 U. Chi. Legal Forum 295, 317 (noting that government officials may try to use consent decrees to "block ordinary avenues of political change" or to "sidestep political constraints"); Horowitz, Decreeing Organizational Change:

Judicial Supervision of Public Institutions, 1983 Duke L. J. 1265, 1294–1295 ("Nominal defendants [in institutional reform cases] are sometimes happy to be sued and happier still to lose"); R. Sandler & D. Schoenbrod, Democracy by Decree: What Happens When Courts Run Government 170 (2003) ("Government officials, who always operate under fiscal and political constraints, 'frequently win by losing'" in institutional reform litigation).

Injunctions of this sort bind state and local officials to the policy preferences of their predecessors and may thereby "improperly deprive future officials of their designated legislative and executive powers." *Frew* v. *Hawkins*, 540 U. S. 431, 441 (2004). See also *Northwest Environment Advocates* v. *EPA*, 340 F. 3d 853, 855 (CA9 2003) (Kleinfeld, J., dissenting) (noting that consent decrees present a risk of collusion between advocacy groups and executive officials who want to bind the hands of future policymakers); *Ragsdale* v. *Turnock*, 941 F. 2d 501, 517 (CA7 1991) (Flaum, J., concurring in part and dissenting in part) ("[I]t is not uncommon for consent decrees to be entered into on terms favorable to those challenging governmental action because of rifts within the bureaucracy or between the executive and legislative branches"); Easterbrook, Justice and Contract in Consent Judgments, 1987 U. Chi. Legal Forum 19, 40 ("Tomorrow's officeholder may conclude that today's is wrong, and there is no reason why embedding the regulation in a consent decree should immunize it from reexamination").

States and localities "depen[d] upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources." *Frew*, *supra*, at 442. Where "state and local officials . . . inherit overbroad or outdated consent decrees that limit their ability [to] respond to the priorities and concerns of their constituents," they are constrained in their ability to fulfill their duties as democratically elected officials. American Legislative Exchange Council, Resolution on the Federal

Consent Decree Fairness Act (2006), App. to Brief for American Legislative Exchange Council et al. as *Amici Curiae* 1a–4a.

It goes without saying that federal courts must vigilantly enforce federal law and must not hesitate in awarding necessary relief. But in recognition of the features of institutional reform decrees, we have held that courts must take a "flexible approach" to Rule 60(b)(5) motions addressing such decrees. *Rufo*, 502 U. S., at 381. A flexible approach allows courts to ensure that "responsibility for discharging the State's obligations is returned promptly to the State and its officials" when the circumstances warrant. *Frew*, *supra*, at 442. In applying this flexible approach, courts must remain attentive to the fact that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation." *Milliken* v. *Bradley*, 433 U. S. 267, 282 (1977). "If [a federal consent decree is] not limited to reasonable and necessary implementations of federal law," it may "improperly deprive future officials of their designated legislative and executive powers." *Frew*, 540 U. S., at 441.

For these reasons, a critical question in this Rule 60(b)(5) inquiry is whether the objective of the District Court's 2000 declaratory judgment order—*i. e.*, satisfaction of the EEOA's "appropriate action" standard—has been achieved. See *id.*, at 442. If a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper. See *Milliken*, *supra*, at 282. We note that the EEOA itself limits court-ordered remedies to those that "are *essential* to correct particular denials of equal educational opportunity or equal protection of the laws." 20 U. S. C. § 1712 (emphasis added).

B

The Court of Appeals did not engage in the Rule 60(b)(5) analysis just described. Rather than applying a flexible

standard that seeks to return control to state and local officials as soon as a violation of federal law has been remedied, the Court of Appeals used a heightened standard that paid insufficient attention to federalism concerns. And rather than inquiring broadly into whether changed conditions in Nogales provided evidence of an ELL program that complied with the EEOA, the Court of Appeals concerned itself only with determining whether increased ELL funding complied with the original declaratory judgment order. The court erred on both counts.

1

The Court of Appeals began its Rule 60(b)(5) discussion by citing the correct legal standard, see 516 F. 3d, at 1163 (noting that relief is appropriate upon a showing of "'a significant change either in factual conditions or in law'"), but it quickly strayed. It referred to the situations in which changed circumstances warrant Rule 60(b)(5) relief as "likely rare," *id.*, at 1167, and explained that, to succeed on these grounds, petitioners would have to make a showing that conditions in Nogales had so changed as to "sweep away" the District Court's incremental funding determination, *id.*, at 1168. The Court of Appeals concluded that the District Court had not erred in determining that "the landscape was not so *radically* changed as to justify relief from judgment without compliance." *Id.*, at 1172 (emphasis added).[4]

Moreover, after recognizing that review of the denial of Rule 60(b)(5) relief should generally be "somewhat closer in the context of institutional injunctions against states 'due to federalism concerns,'" the Court of Appeals incorrectly

[4] The dissent conveniently dismisses the Court of Appeals' statements by characterizing any error that exists as "one of tone, not of law," and by characterizing our discussion as reading them out of context. *Post*, at 510–511. But we do read these statements in context—in the context of the Court of Appeals' overall treatment of petitioners' Rule 60(b)(5) arguments—and it is apparent that they accurately reflect the Court of Appeals' excessively narrow understanding of the role of Rule 60(b)(5).

reasoned that "federalism concerns are substantially lessened here, as the state of Arizona and the state Board of Education wish the injunction to remain in place." *Id.*, at 1164. This statement is flatly incorrect, as even respondents acknowledge. Brief for Respondent State of Arizona et al. 20–21. Precisely because different state actors have taken contrary positions in this litigation, federalism concerns are elevated. And precisely because federalism concerns are heightened, a flexible approach to Rule 60(b)(5) relief is critical. "[W]hen the objects of the decree have been attained"—namely, when EEOA compliance has been achieved—"responsibility for discharging the State's obligations [must be] returned promptly to the State and its officials." *Frew, supra*, at 442.

2

In addition to applying a Rule 60(b)(5) standard that was too strict, the Court of Appeals framed a Rule 60(b)(5) inquiry that was too narrow—one that focused almost exclusively on the sufficiency of incremental funding. In large part, this was driven by the significance the Court of Appeals attributed to petitioners' failure to appeal the District Court's original order. The Court of Appeals explained that "the central idea" of that order was that without sufficient ELL incremental funds, "ELL programs would necessarily be inadequate." 516 F. 3d, at 1167–1168. It felt bound by this conclusion, lest it allow petitioners to "reopen matters made final when the Declaratory Judgment was not appealed." *Id.*, at 1170. It repeated this refrain throughout its opinion, emphasizing that the "'interest in finality must be given great weight,'" *id.*, at 1163, and explaining that petitioners could not now ask for relief "on grounds that could have been raised on appeal from the Declaratory Judgment and from earlier injunctive orders but were not," *id.*, at 1167. "If [petitioners] believed that the district court erred and should have looked at all funding sources differ-

ently in its EEOA inquiry," the court wrote, "they should have appealed the Declaratory Judgment." *Id.*, at 1171.

In attributing such significance to the defendants' failure to appeal the District Court's original order, the Court of Appeals turned the risks of institutional reform litigation into reality. By confining the scope of its analysis to that of the original order, it insulated the policies embedded in the order—specifically, its incremental funding requirement—from challenge and amendment.[5] But those policies were supported by the very officials who could have appealed them—the state defendants—and, as a result, were never subject to true challenge.

Instead of focusing on the failure to appeal, the Court of Appeals should have conducted the type of Rule 60(b)(5) inquiry prescribed in *Rufo*. This inquiry makes no reference to the presence or absence of a timely appeal. It takes the original judgment as a given and asks only whether "a significant change either in factual conditions or in law" renders continued enforcement of the judgment "detrimental to the public interest." *Rufo*, 502 U. S., at 384. It allows a court to recognize that the longer an injunction or consent decree stays in place, the greater the risk that it will improperly interfere with a State's democratic processes.

The Court of Appeals purported to engage in a "changed circumstances" inquiry, but it asked only whether changed circumstances affected ELL funding and, more specifically, ELL incremental funding. Relief was appropriate, in the court's view, only if petitioners "demonstrate[d] either that

[5] This does not mean, as the dissent misleadingly suggests, see *post*, at 492–493, that we are faulting the Court of Appeals for declining to decide whether the District Court's original order was correct in the first place. On the contrary, as we state explicitly in the paragraph following this statement, our criticism is that the Court of Appeals did not engage in the changed-circumstances inquiry prescribed by *Rufo* v. *Inmates of Suffolk County Jail*, 502 U. S. 367 (1992). By focusing excessively on the issue of incremental funding, the Court of Appeals was not true to the *Rufo* standard.

there [we]re no longer incremental costs associated with ELL programs in Arizona or that Arizona's 'base plus incremental costs' educational funding model was so altered that focusing on ELL-specific incremental costs funding has become irrelevant and inequitable." 516 F. 3d, at 1169.

This was a Rule 60(b)(5) "changed circumstances" inquiry in name only. In reality, it was an inquiry into whether the deficiency in ELL incremental funding that the District Court identified in 2000 had been remedied. And this, effectively, was an inquiry into whether the original order had been satisfied. Satisfaction of an earlier judgment is *one* of the enumerated bases for Rule 60(b)(5) relief—but it is not the only basis for such relief.

Rule 60(b)(5) permits relief from a judgment where "[i] the judgment has been satisfied, released or discharged; [ii] it is based on an earlier judgment that has been reversed or vacated; *or* [iii] applying it prospectively is no longer equitable." (Emphasis added.) Use of the disjunctive "or" makes it clear that each of the provision's three grounds for relief is independently sufficient and therefore that relief may be warranted even if petitioners have not "satisfied" the original order. As petitioners argue, they may obtain relief if prospective enforcement of that order "is no longer equitable."

To determine the merits of this claim, the Court of Appeals needed to ascertain whether ongoing enforcement of the original order was supported by an ongoing violation of federal law (here, the EEOA). See *Milliken*, 433 U. S., at 282. It failed to do so.

As previously noted, the EEOA, while requiring a State to take "appropriate action to overcome language barriers," 20 U. S. C. § 1703(f), "leave[s] state and local educational authorities a substantial amount of latitude in choosing" how this obligation is met. *Castaneda*, 648 F. 2d, at 1009. Of course, any educational program, including the "appropriate action" mandated by the EEOA, requires funding, but fund-

ing is simply a means, not the end. By focusing so intensively on Arizona's incremental ELL funding, the Court of Appeals misapprehended the EEOA's mandate. And by requiring petitioners to demonstrate "appropriate action" through a particular funding mechanism, the Court of Appeals improperly substituted its own educational and budgetary policy judgments for those of the state and local officials to whom such decisions are properly entrusted. Cf. *Jenkins*, 515 U. S., at 131 (THOMAS, J., concurring) ("Federal courts do not possess the capabilities of state and local governments in addressing difficult educational problems").

C

The underlying District Court opinion reveals similar errors. In an August 2006 remand order, a different Ninth Circuit panel had instructed the District Court to hold an evidentiary hearing "regarding whether changed circumstances required modification of the original court order or otherwise had a bearing on the appropriate remedy." 204 Fed. Appx., at 582. The Ninth Circuit panel observed that "federal courts must be sensitive to the need for modification [of permanent injunctive relief] when circumstances change." *Ibid.* (internal quotation marks omitted).

The District Court failed to follow these instructions. Instead of determining whether changed circumstances warranted modification of the original order, the District Court asked only whether petitioners had satisfied the original declaratory judgment order through increased incremental funding. See 480 F. Supp. 2d, at 1165 (explaining that a showing of "mere amelioration" of the specific deficiencies noted in the District Court's original order was "inadequate" and that "*compliance* would require a funding system that rationally relates funding available to the actual costs of all elements of ELL instruction" (emphasis added)). The District Court stated: "It should be noted that the Court finds the same problems today that it saw last year, because HB

2064 is the same, the problems themselves are the same."[6] *Id.*, at 1161. The District Court thus rested its postremand decision on its preremand analysis of HB 2064. It disregarded the remand instructions to engage in a broad and flexible Rule 60(b)(5) analysis as to whether changed circumstances warranted relief. In taking this approach, the District Court abused its discretion.

D

The dissent defends the narrow approach of the lower courts with four principal conclusions that it draws from the record. All of these conclusions, however, are incorrect and mirror the fundamental error of the lower courts—a fixation on the issue of incremental funding and a failure to recognize the proper scope of a Rule 60(b)(5) inquiry.

First, the dissent concludes that "the Rule 60(b)(5) 'changes' upon which the District Court focused" were not

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[6] In addition to concluding that the law's increase in incremental funding was insufficient and that 2-year cutoff was irrational, both the District Court and the Court of Appeals held that HB 2064's funding mechanism violates NCLB, which provides in relevant part: "A State shall not take into consideration payments under this chapter . . . in determining the eligibility of any local educational agency in that State for State aid, or the amount of State aid, with respect to free public education of children." 20 U. S. C. § 7902. See 480 F. Supp. 2d, at 1166 (HB 2064's funding mechanism is "absolutely forbidden" by § 7902); 516 F. 3d, at 1178 ("HB 2064 . . . violates [§ 7902] on its face"). Whether or not HB 2064 violates § 7902, see Brief for United States as *Amicus Curiae* 31–32, and n. 8 (suggesting it does), neither court below was empowered to decide the issue. As the Court of Appeals itself recognized, NCLB does not provide a private right of action. See 516 F. 3d, at 1175. "Without [statutory intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander* v. *Sandoval*, 532 U. S. 275, 286–287 (2001). Thus, NCLB is enforceable only by the agency charged with administering it. See *id.*, at 289–290; see also App. to Brief for Respondent State of Arizona et al. 1–4 (letter from U. S. Department of Education to petitioner superintendent concerning the legality *vel non* of HB 2064).

limited to changes in funding, and included "'changed teaching methods'" and "'changed administrative systems.'" *Post*, at 483. The District Court did note a range of changed circumstances, concluding that as a result of these changes, Nogales was "doing substantially better." 480 F. Supp. 2d, at 1160. But it neither focused on these changes nor made up-to-date factual findings. To the contrary, the District Court explained that "it would be premature to make an assessment of some of these changes." *Ibid.* Accordingly, of the 28 findings of fact that the court proceeded to make, the first 20 addressed funding directly and exclusively. See *id.*, at 1161–1163. The last eight addressed funding indirectly—discussing reclassification rates because of their relevance to HB 2064's funding restrictions for ELL and reclassified students. See *id.*, at 1163–1165. None of the District Court's findings of fact addressed either "'changed teaching methods'" or "'changed administrative systems.'"

The dissent's second conclusion is that "'incremental funding' costs . . . [were] the basic contested issue at the 2000 trial and the sole basis for the District Court's finding of a statutory violation." *Post*, at 483. We fail to see this conclusion's relevance to this Rule 60(b)(5) motion, where the question is whether any change in factual or legal circumstances renders continued enforcement of the original order inequitable. As the dissent itself acknowledges, petitioners "pointed to three sets of changed circumstances [in their Rule 60(b)(5) motion] which, in their view, showed that the judgment and the related orders were no longer necessary." *Post*, at 482. In addition to "increases in the amount of funding available to Arizona school districts," these included "changes in the method of English-learning instruction," and "changes in the administration of the Nogales school district." *Ibid.*

Third, the dissent concludes that "the type of issue upon which the District Court and Court of Appeals focused"—the incremental funding issue—"lies at the heart of the statutory

demand for equal educational opportunity." *Post*, at 484. In what we interpret to be a restatement of this point, the dissent also concludes that sufficient funding *("the 'resource' issue")* and the presence or absence of an EEOA violation *("the statutory subsection (f) issue")* "*are one and the same.*" *Post*, at 485 (emphasis in original). "In focusing upon the one," the dissent asserts, "the District Court and Court of Appeals were focusing upon the other." *Ibid.*

Contrary to the dissent's assertion, these two issues are decidedly not "*one and the same.*"[7] *Ibid.* Nor is it the case, as the dissent suggests, that the EEOA targets States' provision of resources for ELL programming.[8] *Post*, at 484.

[7] The extent to which the dissent repeats the errors of the courts below is evident in its statement that "[t]he question here is whether the State has shown that its new *funding program* amounts to a 'change' that satisfies subsection (f)'s requirement." *Post*, at 510 (emphasis added). The proper inquiry is not limited to the issue of funding. Rather, it encompasses the question whether the State has shown any factual or legal changes that establish compliance with the EEOA.

[8] The dissent cites two sources for this proposition. The first—*Castaneda* v. *Pickard*, 648 F. 2d 989 (CA5 1981)—sets out a three-part test for "appropriate action." Under that test, a State must (1) formulate a sound English language instruction educational plan, (2) implement that plan, and (3) achieve adequate results. See *id.*, at 1009–1010. Whether or not this test provides much concrete guidance regarding the meaning of "appropriate action," the test does not focus on incremental funding or on the provision of resources more generally.

The second source cited by the dissent—curiously—is a speech given by President Nixon in which he urged prompt action by Congress on legislation imposing a moratorium on new busing orders and on the Equal Educational Opportunities Act of 1972. See *post*, at 484 (citing Address to the Nation on Equal Educational Opportunity and Busing, 8 Weekly Comp. of Pres. Doc. 590, 591 (1972)). In the speech, President Nixon said that schools in poor neighborhoods should receive the "financial support . . . that we know can make all the difference." *Id.*, at 593. It is likely that this statement had nothing to do with the interpretation of the EEOA's "appropriate action" requirement and instead referred to his proposal to "direc[t] over $2½ billion in the next year mainly towards improving the education of children from poor families." *Id.*, at 591. But in any event, this general statement, made in a Presidential speech two years prior

What the statute forbids is a failure to take "appropriate action to overcome language barriers." 20 U. S. C. § 1703(f). Funding is merely one tool that may be employed to achieve the statutory objective.

Fourth, the dissent concludes that the District Court did not order increased ELL incremental funding and did not dictate state and local budget priorities. *Post*, at 486. The dissent's point—and it is a very small one—is that the District Court did not set a specific amount that the legislature was required to appropriate. The District Court did, however, hold the State in contempt and impose heavy fines because the legislature did not provide sufficient funding. These orders unquestionably imposed important restrictions on the legislature's ability to set budget priorities.

E

Because the lower courts—like the dissent—misperceived both the nature of the obligation imposed by the EEOA and the breadth of the inquiry called for under Rule 60(b)(5), these cases must be remanded for a proper examination of at least four important factual and legal changes that may warrant the granting of relief from the judgment: the State's adoption of a new ELL instructional methodology, Congress' enactment of NCLB, structural and management reforms in Nogales, and increased overall education funding.

1

At the time of the District Court's original declaratory judgment order, ELL instruction in Nogales was based primarily on "bilingual education," which teaches core content areas in a student's native language while providing English instruction in separate language classes. In November 2000, Arizona voters passed Proposition 203, which man-

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to the enactment of the EEOA, surely sheds little light on the proper interpretation of the statute.

dated statewide implementation of a "structured English immersion" (SEI) approach. See App. to Pet. for Cert. in No. 08–294, at 369a. Proposition 203 defines this methodology as follows:

> "'Sheltered English immersion' or 'structured English immersion' means an English language acquisition process for young children in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language. . . . Although teachers may use a minimal amount of the child's native language when necessary, no subject matter shall be taught in any language other than English, and children in this program learn to read and write solely in English." Ariz. Rev. Stat. Ann. § 15–751(5) (West 2009).

In HB 2064, the state legislature attended to the successful and uniform implementation of SEI in a variety of ways.[9] It created an "Arizona English language learners task force" within the state department of education to "develop and adopt research based models of structured English immersion programs for use by school districts and charter schools." § 15–756.01(C). It required that all school districts and charter schools select one of the adopted SEI models, § 15–756.02(A), and it created an "Office of English language acquisition services" to aid school districts in implementation of the models, § 15–756.07(1). It also required the state board of education to institute a uniform and mandatory training program for all SEI instructors. § 15–756.09.

Research on ELL instruction indicates there is documented, academic support for the view that SEI is signifi-

[9] By focusing on the adequacy of HB 2064's funding provisions, the courts below neglected to address adequately the potential relevance of these programming provisions, which became effective immediately upon enactment of the law.

cantly more effective than bilingual education.[10] Findings of the Arizona State Department of Education in 2004 strongly support this conclusion.[11] In light of this, a proper analysis of petitioners' Rule 60(b)(5) motion should include further factual findings regarding whether Nogales' implementation of SEI methodology—completed in all of its schools by 2005—constitutes a "significantly changed circumstance" that warrants relief.

2

Congress' enactment of NCLB represents another potentially significant "changed circumstance." NCLB marked a dramatic shift in federal education policy. It reflects Congress' judgment that the best way to raise the level of education nationwide is by granting state and local officials flexibility to develop and implement educational programs that address local needs, while holding them accountable for the results. NCLB implements this approach by requiring States receiving federal funds to define performance standards and to make regular assessments of progress toward the attainment of those standards. 20 U. S. C. § 6311(b)(2). NCLB conditions the continued receipt of funds on demonstrations of "adequate yearly progress." *Ibid.*

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[10] See Brief for American Unity Legal Defense Fund et al. as *Amici Curiae* 10–12 (citing sources, including New York City Board of Education, Educational Progress of Students in Bilingual and ESL Programs: a Longitudinal Study, 1990–1994 (1994); 2 K. Torrance, Immersion Not Submersion: Lessons From Three California Districts' Switch From Bilingual Education to Structured Immersion 4 (2006)).

[11] See Ariz. Dept. of Ed., The Effects of Bilingual Education Programs and Structured English Immersion Programs on Student Achievement: A Large-Scale Comparison 3 (Draft July 2004) ("In the general statewide comparison of bilingual and SEI programs [in 2002–2003], those students in SEI programs significantly outperformed bilingual students in 24 out of 24 comparisons . . . . Though students in SEI and bilingual programs are no more than three months apart in the primary grades, bilingual students are more than a year behind their SEI counterparts in seventh and eighth grade").

As relevant here, Title III (which includes the English Language Acquisition, Language Enhancement, and Academic Achievement Act) requires States to ensure that ELL students "attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." § 6812(1). It requires States to set annual objective achievement goals for the number of students who will annually progress toward proficiency, achieve proficiency, and make "adequate yearly progress" with respect to academic achievement, § 6842(a), and it holds local schools and agencies accountable for meeting these objectives, § 6842(b).

Petitioners argue that through compliance with NCLB, the State has established compliance with the EEOA. They note that when a State adopts a compliance plan under NCLB—as the State of Arizona has—it must provide adequate assurances that ELL students will receive assistance "to achieve at high levels in the core academic subjects so that those children can meet the same . . . standards as all children are expected to meet." § 6812(2). They argue that when the Federal Department of Education approves a State's plan—as it has with respect to Arizona's—it offers definitive evidence that the State has taken "appropriate action to overcome language barriers" within the meaning of the EEOA. § 1703(f).

The Court of Appeals concluded, and we agree, that because of significant differences in the two statutory schemes, compliance with NCLB will not necessarily constitute "appropriate action" under the EEOA. 516 F. 3d, at 1172–1176. Approval of an NCLB plan does not entail substantive review of a State's ELL programming or a determination that the programming results in equal educational opportunity for ELL students. See § 6823. Moreover, NCLB contains a saving clause, which provides that "[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." § 6847.

This does not mean, however, that NCLB is not relevant to petitioners' Rule 60(b)(5) motion. To the contrary, we think it is probative in four principal ways.[12] First, it prompted the State to institute significant structural and programming changes in its delivery of ELL education,[13] leading the Court of Appeals to observe that "Arizona has significantly improved its ELL infrastructure." 516 F. 3d, at 1154. These changes should not be discounted in the Rule 60(b)(5) analysis solely because they do not require or result from increased funding. Second, NCLB significantly increased federal funding for education in general and ELL programming in particular.[14] These funds should not be disregarded just because they are not state funds. Third, through its assessment and reporting requirements, NCLB

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[12] Although the dissent contends that the sole argument raised below regarding NCLB was that compliance with that Act necessarily constituted compliance with the EEOA, the Court of Appeals recognized that NCLB is a relevant factor that should be considered under Rule 60(b)(5). It acknowledged that compliance with NCLB is at least "somewhat probative" of compliance with the EEOA. 516 F. 3d, at 1175, n. 46. The United States, in its brief as *amicus curiae* supporting respondents, similarly observed that, "[e]ven though Title III participation is not a complete defense under the EEOA, whether a State is reaching its own goals under Title III may be relevant in an EEOA suit." Brief for United States 24. And the District Court noted that, "[b]y increasing the standards of accountability, [NCLB] has to some extent significantly changed State educators approach to educating students in Arizona." *Flores* v. *Arizona*, 480 F. Supp. 2d 1157, 1160–1161 (Ariz. 2007).

[13] Among other things, the state department of education formulated a compliance plan, approved by the U. S. Department of Education. The state board of education promulgated statewide ELL proficiency standards, adopted uniform assessment standards, and initiated programs for monitoring school districts and training structured English immersion teachers. See 516 F. 3d, at 1154; see also Reply Brief for Petitioner Superintendent 29–31.

[14] See Brief for Petitioner Superintendent 22, n. 13 ("At [Nogales], Title I monies increased from $1,644,029.00 in 2000 to $3,074,587.00 in 2006, Title II monies increased from $216,000.00 in 2000 to $466,996.00 in 2006, and Title III monies, which did not exist in 2000, increased from $261,818.00 in 2003 to $322,900.00 in 2006").

provides evidence of the progress and achievement of Nogales' ELL students.[15] This evidence could provide persuasive evidence of the current effectiveness of Nogales' ELL programming.[16]

Fourth and finally, NCLB marks a shift in federal education policy. See Brief for Petitioner Speaker of the Arizona House of Representatives et al. 7–16. NCLB grants States "flexibility" to adopt ELL programs they believe are "most effective for teaching English." § 6812(9). Reflecting a growing consensus in education research that increased funding alone does not improve student achievement,[17]

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[15] See, *e. g.*, App. to Pet. for Cert. in No. 08–289, pp. 310–311 (2005–2006 testing data for ELL students, reclassified ELL students, and non-ELL students on statewide achievement tests); *id.*, at 312 (2005–2006 data regarding Nogales' achievement of the State's annual measurable accountability objectives for ELL students).

[16] The Court of Appeals interpreted the testing data in the record to weigh against a finding of effective programming in Nogales. See 516 F. 3d, at 1157 (noting that "[t]he limits of [Nogales'] progress . . . are apparent in the AIMS test results and reclassification test results"); *id.*, at 1169–1170 (citing "the persistent achievement gaps documented in [Nogales'] AIMS test data" between ELL students and native speakers). We do not think the District Court made sufficient factual findings to support its conclusions about the effectiveness of Nogales' ELL programming, and we question the Court of Appeals' interpretation of the data for three reasons. First, as the Court of Appeals recognized, the absence of longitudinal data in the record precludes useful comparisons. See *id.*, at 1155. Second, the AIMS tests—the statewide achievement tests on which the Court of Appeals primarily relied and to which the dissent cites in Appendix A of its opinion—are administered in English. It is inevitable that ELL students (who, by definition, are not yet proficient in English) will underperform as compared to native speakers. Third, the negative data that the Court of Appeals highlights is balanced by positive data. See, *e. g.*, App. 97 (reporting that for the 2005–2006 school year, on average, reclassified students did as well as, if not better than, native English speakers on the AIMS tests).

[17] See, *e. g.*, Hanushek, The Failure of Input-Based Schooling Policies, 113 Economic J. F64, F69 (Feb. 2003) (reviewing U. S. data regarding "input policies" and concluding that although such policies "have been vigorously pursued over a long period of time," there is "no evidence that

NCLB expressly refrains from dictating funding levels. Instead, it focuses on the demonstrated progress of students through accountability reforms.[18] The original declaratory judgment order, in contrast, withdraws the authority of state and local officials to fund and implement ELL programs that best suit Nogales' needs, and measures effective programming solely in terms of adequate incremental funding. This conflict with Congress' determination of federal policy may constitute a significantly changed circumstance, warranting relief. See *Railway Employees* v. *Wright*, 364 U. S. 642, 651 (1961) (noting that a court decree should be modified when "a change in law brings [the decree] in conflict with statutory objectives").

3

Structural and management reforms in Nogales constitute another relevant change in circumstances. These reforms

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the added resources have improved student performance"); A. LeFevre, American Legislative Exchange Council, Report Card on American Education: A State-by-State Analysis 132–133 (15th ed. 2008) (concluding that spending levels alone do not explain differences in student achievement); G. Burtless, Introduction and Summary, in Does Money Matter? The Effect of School Resources on Student Achievement and Adult Success 1, 5 (1996) (noting that "[i]ncreased spending on school inputs has not led to notable gains in school performance").

[18] Education literature overwhelmingly supports reliance on accountability-based reforms as opposed to pure increases in spending. See, *e. g.*, Hanushek & Raymond, Does School Accountability Lead to Improved Student Performance? 24 J. Pol'y Analysis & Mgmt. 297, 298 (2005) (concluding that "the introduction of accountability systems into a state tends to lead to larger achievement growth than would have occurred without accountability"); U. S. Chamber of Commerce, Leaders and Laggards: A State-by-State Report Card on Educational Effectiveness 6, 7–10 (Feb. 2007) (discussing various factors other than inputs—such as a focus on academic standards and accountability—that have a significant impact on student achievement); S. Fuhrman, Introduction, in Redesigning Accountability Systems for Education 1, 3–9 (S. Fuhrman & R. Elmore eds. 2004); E. Hanushek et al., Making Schools Work: Improving Performance and Controlling Costs 151–176 (1994).

were led by Kelt Cooper, the Nogales superintendent from 2000 to 2005, who "adopted policies that ameliorated or eliminated many of the most glaring inadequacies discussed by the district court." 516 F. 3d, at 1156. Among other things, Cooper "reduce[d] class sizes," "significantly improv[ed] student/teacher ratios," "improved teacher quality," "pioneered a uniform system of textbook and curriculum planning," and "largely eliminated what had been a severe shortage of instructional materials." *Id.*, at 1156–1157. The Court of Appeals recognized that by "[u]sing careful financial management and applying for 'all funds available,' Cooper was able to achieve his reforms with limited resources." *Id.*, at 1157. But the Court of Appeals missed the legal import of this observation—that these reforms might have brought Nogales' ELL programming into compliance with the EEOA even without sufficient ELL incremental funding to satisfy the District Court's original order. Instead, the Court of Appeals concluded that to credit Cooper's reforms would "penaliz[e]" Nogales "for doing its best to make do, despite Arizona's failure to comply with the terms of the judgment," and would "absolve the state from providing adequate ELL incremental funding as required by the judgment." *Id.*, at 1168. The District Court similarly discounted Cooper's achievements, acknowledging that Nogales was "doing substantially better than it was in 2000," but concluding that because the progress resulted from management efforts rather than increased funding, its progress was "fleeting at best." 480 F. Supp. 2d, at 1160.

Entrenched in the framework of incremental funding, both courts refused to consider that Nogales could be taking "appropriate action" to address language barriers even without having satisfied the original order. This was error. The EEOA seeks to provide "equal educational opportunity" to "all children enrolled in public schools." § 1701(a). Its ultimate focus is on the quality of educational programming and

services provided to students, not the amount of money spent on them. Accordingly, there is no statutory basis for precluding petitioners from showing that Nogales has achieved EEOA-compliant programming by means other than increased funding—for example, through Cooper's structural, curricular, and accountability-based reforms. The weight of research suggests that these types of local reforms, much more than court-imposed funding mandates, lead to improved educational opportunities.[19] Cooper even testified that, without the structural changes he imposed, "additional money" would not "have made any difference to th[e] students" in Nogales. Addendum to Reply Brief for Petitioner Speaker of the Arizona House of Representatives et al. 15.

The Court of Appeals discounted Cooper's reforms for other reasons as well. It explained that while they "did ameliorate many of the specific examples of resource shortages that the district court identified in 2000," they did not "result in such success as to call into serious question [Nogales'] need for increased incremental funds." 516 F. 3d, at 1169. Among other things, the Court of Appeals referred to "the persistent achievement gaps documented in [Nogales'] AIMS test data" between ELL students and native speakers, *id.*, at 1170, but any such comparison must take into account other variables that may explain the gap. In any event, the EEOA requires "appropriate action" to remove language barriers, § 1703(f), not the equalization of results between native and nonnative speakers on tests administered in English—a worthy goal, to be sure, but one that may be exceedingly difficult to achieve, especially for older ELL students.

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[19] See, *e. g.*, Springer & Guthrie, Politicization of the School Finance Legal Process, in School Money Trials 102, 121 (M. West & P. Peterson eds. 2007); E. Hanushek & A. Lindseth, Schoolhouses, Courthouses, and Statehouses: Solving the Funding-Achievement Puzzle in America's Public Schools 146 (2009).

The Court of Appeals also referred to the subpar performance of Nogales' high schools. There is no doubt that Nogales' high schools represent an area of weakness, but the District Court made insufficient factual findings to support a conclusion that the high schools' problems stem from a failure to take "appropriate action," and constitute a violation of the EEOA.[20]

The EEOA's "appropriate action" requirement grants States broad latitude to design, fund, and implement ELL programs that suit local needs and account for local conditions. A proper Rule 60(b)(5) inquiry should recognize this and should ask whether, as a result of structural and managerial improvements, Nogales is now providing equal educational opportunities to ELL students.

4

A fourth potentially important change is an overall increase in the education funding available in Nogales. The original declaratory judgment order noted five sources of funding that collectively financed education in the State: (1) the State's "base level" funding, (2) ELL incremental funding, (3) federal grants, (4) regular district and county taxes, and (5) special voter-approved district and county taxes called "overrides." 172 F. Supp. 2d, at 1227. All five sources have notably increased since 2000.[21] Notwithstand-

[20] There are many possible causes for the performance of students in Nogales' high school ELL programs. These include the difficulty of teaching English to older students (many of whom, presumably, were not in English-speaking schools as younger students) and problems such as drug use and the prevalence of gangs. See Reply Brief for Petitioner Speaker of the Arizona House of Representatives et al. 14–15; Reply Brief for Petitioner Superintendent 16–17; App. 116–118. We note that no court has made particularized findings as to the effectiveness of ELL programming offered at Nogales' high schools.

[21] The Court of Appeals reported, and it is not disputed, that "[o]n an inflation-adjusted statewide basis, including all sources of funding, support for education has increased from $3,139 per pupil in 2000 to an estimated

ing these increases, the Court of Appeals rejected petitioners' claim that overall education funds were sufficient to support EEOA-compliant programming in Nogales. The court reasoned that diverting base-level education funds would necessarily hurt other state educational programs, and was not, therefore, an "'appropriate' step." 516 F. 3d, at 1171. In so doing, it foreclosed the possibility that petitioners could establish changed circumstances warranting relief through an overall increase in education funding available in Nogales.

This was clear legal error. As we have noted, the EEOA's "appropriate action" requirement does not necessarily require any particular level of funding, and to the extent that funding is relevant, the EEOA certainly does not require that the money come from any particular source. In addition, the EEOA plainly does not give the federal courts the authority to judge whether a State or a school district is providing "appropriate" instruction in other subjects. That remains the province of the States and the local schools. It is unfortunate if a school, in order to fund ELL programs, must divert money from other worthwhile programs, but such decisions fall outside the scope of the EEOA. Accordingly, the analysis of petitioners' Rule 60(b)(5) motion should evaluate whether the State's budget for general education funding, in addition to any local revenues,[22] is currently supporting EEOA-compliant ELL programming in Nogales.

Because the lower courts engaged in an inadequate Rule 60(b)(5) analysis, and because the District Court failed to make up-to-date factual findings, the analysis of the lower

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$3,570 per pupil in 2006. Adding in all county and local sources, funding has gone from $5,677 per pupil in 2000 to an estimated $6,412 per pupil in 2006. Finally, federal funding has increased. In 2000, the federal government provided an additional $526 per pupil; in 2006, it provided an estimated $953." 516 F. 3d, at 1155.

[22] Each year since 2000, Nogales voters have passed an override. Revenues from Nogales' override have increased from $895,891 in 2001 to $1,674,407 in 2007. App. to Pet. for Cert. in No. 08–294, p. 431a.

courts was incomplete and inadequate with respect to all of the changed circumstances just noted. These changes are critical to a proper Rule 60(b)(5) analysis, however, as they may establish that Nogales is no longer in violation of the EEOA and, to the contrary, is taking "appropriate action" to remove language barriers in its schools. If this is the case, continued enforcement of the District Court's original order is inequitable within the meaning of Rule 60(b)(5), and relief is warranted.

IV

We turn, finally, to the District Court's entry of statewide relief.[23] The Nogales district, which is situated along the Mexican border, is one of 239 school districts in the State of Arizona. Nogales students make up about one-half of 1 percent of the entire State's school population.[24] The record contains no factual findings or evidence that any school district other than Nogales failed (much less continues to fail) to provide equal educational opportunities to ELL students. See App. to Pet. for Cert. in No. 08–294, at 177a–178a. Nor have respondents explained how the EEOA could justify a statewide injunction when the only violation claimed or

[23] The dissent contends that this issue was not raised below, but what is important for present purposes is that, for the reasons explained in the previous parts of this opinion, these cases must be remanded to the District Court for a proper Rule 60(b)(5) analysis. Petitioners made it clear at oral argument that they wish to argue that the extension of the remedy to districts other than Nogales should be vacated. See Tr. of Oral Arg. 63 ("Here the EEOA has been transmogrified to apply statewide. That has not been done before. It should not have been done in the first instance but certainly in light of the changed circumstances"); see also *id.*, at 17–18, 21, 26. Accordingly, *if* petitioners raise that argument on remand, the District Court must consider whether there is any legal or factual basis for denying that relief.

[24] See Ariz. Dept. of Ed., Research and Evaluation Section, 2008–2009 October Enrollment by School, District and Grade 1, 17, http://www.ade.state.az.us/researchpolicy/AZEnroll/2008-2009/Octenroll2009schoolbygrade.pdf (as visited June 18, 2009, and available in Clerk of Court's case file).

proved was limited to a single district. See *Jenkins,* 515 U. S., at 89–90; *Milliken,* 433 U. S., at 280. It is not even clear that the District Court had jurisdiction to issue a statewide injunction when it is not apparent that plaintiffs—a class of Nogales students and their parents—had standing to seek such relief.

The only explanation proffered for the entry of statewide relief was based on an interpretation of the Arizona Constitution. We are told that the former attorney general "affirmatively urged a statewide remedy because a 'Nogales only' remedy would run afoul of the Arizona Constitution's requirement of 'a general and uniform public school system.'" Brief for Respondent Flores et al. 38 (quoting Ariz. Const., Art. 11, § 1(A); some internal quotation marks omitted).

This concern did not provide a valid basis for a statewide *federal* injunction. If the state attorney general believed that a federal injunction requiring increased ELL spending in one district necessitated, as a matter of state law, a similar increase in every other district in the State, the attorney general could have taken the matter to the state legislature or the state courts. But the attorney general did not do so. Even if she had, it is not clear what the result would have been. It is a question of state law, to be determined by state authorities, whether the equal funding provision of the Arizona Constitution would require a statewide funding increase to match Nogales' ELL funding, or would leave Nogales as a federally compelled exception. By failing to recognize this, and by entering a statewide injunction that intruded deeply into the State's budgetary processes based solely on the attorney general's interpretation of state law, the District Court obscured accountability for the drastic remedy that it entered.

When it is unclear whether an onerous obligation is the work of the Federal or State Government, accountability is diminished. See *New York* v. *United States,* 505 U. S. 144,

169 (1992). Here, the District Court "improperly prevent[ed] the citizens of the State from addressing the issue [of statewide relief] through the processes provided by the State's constitution." *Hawaii* v. *Office of Hawaiian Affairs*, 556 U. S. 163, 176–177 (2009). Assuming that petitioners, on remand, press their objection to the statewide extension of the remedy, the District Court should vacate the injunction insofar as it extends beyond Nogales unless the court concludes that Arizona is violating the EEOA on a statewide basis.

There is no question that the goal of the EEOA—overcoming language barriers—is a vitally important one, and our decision will not in any way undermine efforts to achieve that goal. If petitioners are ultimately granted relief from the judgment, it will be because they have shown that the Nogales School District is doing exactly what this statute requires—taking "appropriate action" to teach English to students who grew up speaking another language.

* * *

We reverse the judgment of the Court of Appeals and remand the cases for the District Court to determine whether, in accordance with the standards set out in this opinion, petitioners should be granted relief from the judgment.

It is so ordered.

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

The Arizona Superintendent of Public Instruction, the President of the Arizona Senate, and the Speaker of the Arizona House of Representatives (the petitioners here) brought a Federal Rule of Civil Procedure 60(b)(5) motion in a Federal District Court asking the court to set aside a judgment (and accompanying orders) that the court had entered in the year 2000. The judgment held that the State of Arizona's plan for funding its English Language Learner program was

arbitrary, and therefore the State had failed to take "appropriate action to overcome language barriers that impede equal participation by its" Spanish-speaking public school students "in its instructional programs." 20 U. S. C. § 1703(f); *Castaneda* v. *Pickard*, 648 F. 2d 989, 1010 (CA5 1981) (interpreting "appropriate action" to include the provision of "necessary" financial and other "resources"). The moving parties argued that "significant change[s] either in factual conditions or in law," *Rufo* v. *Inmates of Suffolk County Jail*, 502 U. S. 367, 384 (1992), entitled them to relief. The State of Arizona, the Arizona Board of Education, and the original plaintiffs in the case (representing students from Nogales, Arizona) opposed the superintendent's Rule 60(b)(5) motion. They are respondents here.

The District Court, after taking evidence and holding eight days of hearings, considered all the changed circumstances that the parties called to its attention. The court concluded that some relevant "changes" had taken place. But the court ultimately found those changes insufficient to warrant setting aside the original judgment. The Court of Appeals, in a carefully reasoned 41-page opinion, affirmed that district court determination. This Court now sets the Court of Appeals' decision aside. And it does so, it says, because "the lower courts focused excessively on the narrow question of the adequacy of the State's incremental funding for [English-learning] instruction instead of *fairly considering* the broader question, whether, as a result of important changes during the intervening years, the State was fulfilling its obligation" under the Act "by other means." *Ante*, at 439 (emphasis added).

The Court reaches its ultimate conclusion—that the lower courts did not "*fairly consider*" the changed circumstances—in a complicated way. It begins by placing these cases in a category it calls "institutional reform litigation." *Ante*, at 447. It then sets forth special "institutional reform litigation" standards applicable when courts are asked to modify

judgments and decrees entered in such cases. It applies those standards, and finds that the lower courts committed error.

I disagree with the Court for several reasons. For one thing, the "institutional reform" label does not easily fit these cases. For another, the review standards the Court enunciates for "institutional reform" cases are incomplete and, insofar as the Court applies those standards here, they effectively distort Rule 60(b)(5)'s objectives. Finally, my own review of the record convinces me that the Court is wrong regardless. *The lower courts did "fairly consider" every change in circumstances that the parties called to their attention.* The record more than adequately supports this conclusion. In a word, I fear that the Court misapplies an inappropriate procedural framework, reaching a result that neither the record nor the law adequately supports. In doing so, it risks denying schoolchildren the English-learning instruction necessary "to overcome language barriers that impede" their "equal participation." 20 U. S. C. § 1703(f).

I

A

To understand my disagreement with the Court, it is unfortunately necessary to examine the record at length and in detail. I must initially focus upon the Court's basic criticism of the lower courts' analysis, namely, that the lower courts somehow lost sight of the forest for the trees. In the majority's view, those courts—as well as this dissent—wrongly focused upon a subsidiary matter, "incremental" English-learning program "funding," rather than the basic matter, whether "changes" had cured, or had come close to curing, the violation of federal law that underlay the original judgment. *Ante,* at 439. In the Court's view, it is as if a district court, faced with a motion to dissolve a school desegregation decree, focused only upon the school district's failure to pur-

chase 50 decree-required school buses, instead of discussing the basic question, whether the schools had become integrated without need for those 50 buses.

Thus the Court writes that the lower courts focused so heavily on the original decree's "incremental funding" requirement that they failed to ask whether "the State was fulfilling its obligation under" federal law "by other means." *Ibid.* And the Court frequently criticizes the Court of Appeals for having "focused almost exclusively on the sufficiency of incremental funding," *ante*, at 452; for "confining the scope of its analysis to" the "incremental funding requirement," *ante*, at 453; for having "asked only whether changed circumstances affected [English-learning] funding and, more specifically . . . incremental funding," *ibid.;* for inquiring only "into whether the deficiency in . . . incremental funding that the District Court identified in 2000 had been remedied," *ante*, at 454; and (in case the reader has not yet gotten the point) for "focusing so intensively on Arizona's incremental . . . funding," *ante*, at 455. The Court adds that the District Court too was wrong to have "asked only whether petitioners had satisfied the original declaratory judgment order through increased incremental funding." *Ibid.*

The problem with this basic criticism is that the State's provision of adequate resources to its English-learning students, *i. e.*, what the Court refers to as "incremental funding," has always been the basic contested issue in these cases. That is why the lower courts continuously focused attention directly upon it. In the context of these cases they looked directly at the forest, not the trees. To return to the school desegregation example, the court focused upon the heart of the matter, the degree of integration, and not upon the number of buses the school district had purchased. A description of the statutory context and the history of these cases makes clear that the Court cannot sensibly drive a

wedge (as it wishes to do) between what it calls the "incremental funding" issue and the uncured failure to comply with the requirements of federal law.

1

The lawsuit filed in these cases charged a violation of subsection (f) of § 204 of the Equal Educational Opportunities Act of 1974, 88 Stat. 515, 20 U. S. C. § 1703(f). Subsection (f) provides:

> "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by—
>
> . . . . . .
>
> "(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

The provision is part of a broader Act that embodies principles that President Nixon set forth in 1972, when he called upon the Nation to provide "equal educational opportunity to every person," including the many "poor" and minority children long "doomed to inferior education" as well as those "*who start their education under language handicaps.*" See Address to the Nation on Equal Educational Opportunity and Busing, 8 Weekly Comp. of Pres. Doc. 590, 591 (emphasis added) (hereinafter Nixon Address).

In 1974, this Court wrote that to provide all students "with the same facilities, textbooks, teachers, and curriculum" will "effectively *foreclos[e]" those "students who do not understand English . . . from any meaningful education,*" making a "mockery of public education." *Lau* v. *Nichols*, 414 U. S. 563, 566 (emphasis added). The same year Congress, reflecting these concerns, enacted subsection (f) of the Act—a subsection that seeks to "remove language . . . barri-

ers" that impede "true equality of educational opportunity." H. R. Rep. No. 92–1335, p. 6 (1972).

2

In 1981, in *Castaneda* v. *Pickard*, 648 F. 2d 989, the Court of Appeals for the Fifth Circuit interpreted subsection (f). It sought to construe the statutory word "appropriate" so as to recognize both the obligation to take account of "the need of limited English speaking children for language assistance" and the fact that the "governance" of primary and secondary education ordinarily "is properly reserved to . . . state and local educational agencies." *Id.*, at 1008, 1009.

The court concluded that a court applying subsection (f) should engage in three inquiries. *First*, the court should "ascertain" whether the school system, in respect to students who are not yet proficient in English, "is pursuing" an English-learning program that is "informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy." *Ibid.* *Second*, that court should determine "whether the programs and practices actually used by [the] school system are reasonably calculated to implement effectively the educational theory adopted by the school," which is to say that the school system must "*follow through with practices, resources and personnel necessary to transform*" its chosen educational theory "*into reality.*" *Id.*, at 1010 (emphasis added). *Third*, if practices, resources, and personnel are adequate, the court should go on to ascertain whether there is some indication that the programs produce "results," *i. e.*, that "the language barriers confronting students are actually being overcome." *Ibid.*

Courts in other Circuits have followed *Castaneda*'s approach. See, *e. g.*, *Gomez* v. *Illinois State Bd. of Educ.*, 811 F. 2d 1030, 1041 (CA7 1987); *United States* v. *Texas*, 680 F. 2d 356, 371 (CA5 1982); *Valeria G.* v. *Wilson*, 12 F. Supp. 2d

1007, 1017–1018 (ND Cal. 1998). No Circuit has denied its validity. And no party in these cases contests the District Court's decision to use *Castaneda*'s three-part standard in these cases before us.

3

The plaintiffs in these cases are a class of English language learner students, *i. e.*, students with limited proficiency in English, who are enrolled in the school district in Nogales, a small city along the Mexican border in Arizona in which the vast majority of students come from homes where Spanish is the primary language. In 1992, they filed the present lawsuit against the State of Arizona, its board of education, and the superintendent, claiming that the State had violated subsection (f), not by failing to adopt proper English-learning programs, but by failing "to provide *financial and other resources* necessary" to make those programs a practical reality for Spanish-speaking students. App. 7, ¶ 20 (emphasis added); see *Castaneda*, *supra*, at 1010 (second, *i. e.*, "resource," requirement). In particular, they said, "[t]he cost" of programs that would allow those students to learn effectively, say, to read English at a proficient level, "far exceeds the only financial assistance the State theoretically provides." App. 7, ¶ 20(a).

The students sought a declaration that the State had "systematically . . . failed or refused to provide fiscal as well as other resources sufficient to enable" the Nogales Unified School District and other "similarly situated [school] districts" to "establish and maintain" successful programs for English learners. *Id.*, at 10, ¶ 28. And they sought an appropriate injunction requiring the provision of such resources. The state defendants answered the complaint. And after resolving disagreements on various subsidiary issues, see *id.*, at 19–30, the parties proceeded to trial on the remaining disputed issue in the case, namely, whether the State and its education authorities "*adequately fund and oversee*" their English-learning program. *Flores* v. *Ari-*

zona, 172 F. Supp. 2d 1225, 1226 (Ariz. 2000) (emphasis added).

In January 2000, after a 3-day bench trial, the District Court made 64 specific factual findings, including the following:

(1) The State assumes that its school districts need (and will obtain from local and statewide sources) funding equal to a designated "base level amount" per child—reflecting the funding required to educate a "typical" student, *Flores* v. *Arizona*, 516 F. 3d 1140, 1147 (CA9 2008)—along with an additional amount needed to educate each child with special educational needs, including those children who are not yet proficient in English. 172 F. Supp. 2d, at 1227–1228.

(2) In the year 2000, the "base level amount" the State assumed necessary to educate a typical child amounted to roughly $3,174 (in year 2000 dollars). *Id.*, at 1227.

(3) A cost study conducted by the State in 1988 showed that, at that time, English-learning programming cost school districts an additional $424 per English-learning child. *Id.*, at 1228. Adjusted for inflation to the year 2000, the extra cost per student of the State's English-learning program was $617 per English-learning child.

(4) In the year 2000, the State's funding formula provided school districts with only $150 to pay for the $617 in extra costs per child that the State assumed were needed to pay for its English-learning program. *Id.*, at 1229.

The record contains no suggestion that Nogales, or any other school district, could readily turn anywhere but to the State to find the $467 per-student difference between the amount the State assumed was needed and the amount that it made available. See *id.*, at 1230. Nor does the record contain any suggestion that Nogales or any other school district could have covered additional costs by redistributing "base level," typical-child funding it received. (In the year 2000, Arizona, compared with other States, provided the third-lowest amount of funding per child. U. S. Dept. of Ed-

ucation, Institute of Education Sciences, National Center for Education Statistics, T. Snyder, S. Dillow, & C. Hoffman, Digest of Education Statistics 2008, Ch. 2, Revenues and Expenditures, Table 184, http://nces.ed.gov/pubs2009/2009020.pdf (hereinafter 2008 Digest) (all Internet materials as visited June 23, 2009, and available in Clerk of Court's case file).)

Based on these and related findings, the District Court concluded that the State's method of paying for the additional costs associated with English-learning education was "arbitrary and capricious and [bore] no relation to the actual funding needed." 172 F. Supp. 2d, at 1239. The court added that the State's provision of financial resources was "not reasonably calculated to effectively implement" the English-learning program chosen by the State. *Ibid.* Hence, the State had failed to take "appropriate action" to teach English to non-English-speaking students, in that it had failed (in *Castaneda*'s words) to provide the "practices, resources, and personnel" necessary to make its chosen educational theory a "reality." 172 F. Supp. 2d, at 1238–1239; see also § 1703(f); *Castaneda*, 648 F. 2d, at 1010.

The District Court consequently entered judgment in the students' favor. The court later entered injunctions (1) requiring the State to "prepare a cost study to establish the proper appropriation to effectively implement" the State's own English-learning program, and (2) requiring the State to develop a funding mechanism that would bear *some* "*reasonabl[e]*" or "*rational* relatio[n] to the actual funding needed" to ensure that non-English-speaking students would "achieve mastery" of the English language. See, *e. g.*, *Flores* v. *Arizona*, 160 F. Supp. 2d 1043, 1045, 1047 (Ariz. 2000); No. CV–92–596–TUCACM, 2001 WL 1028369, *2 (D. Ariz., June 25, 2001) (emphasis added).

The State neither appealed nor complied with the 2000 declaratory judgment or any of the injunctive orders. When, during the next few years, the State failed to produce either a study of the type ordered or a funding program rationally related to need for financial resources, the court imposed a

series of fines upon the State designed to lead the State to comply with its orders. *Flores* v. *Arizona*, 405 F. Supp. 2d 1112, 1120 (Ariz. 2005).

In early 2006, the state legislature began to consider HB 2064, a bill that, among other things, provided for the creation of a "Task Force" charged to develop "cost-efficient" methods for teaching English. The bill would also increase the appropriation for teaching English to students who needed to learn it (though it prohibited the spending of any increase upon any particular student for more than two years). In March 2006, the petitioners here (the Arizona Superintendent of Public Instruction, the President of Arizona's Senate, and the Speaker of its House of Representatives) asked the District Court (1) to consider whether HB 2064, as enacted, would satisfy its judgment and injunctive orders, (2) to forgive the contempt fine liability that the State had accrued, and (3) to dissolve the injunctive orders and grant relief from the 2000 judgment. Motion of Intervenors To Purge Contempt, Dissolve Injunctions, Declare the Judgment and Orders Satisfied, and Set Aside Injunctions as Void in No. CV–92–596–TUC–RCC (D. Ariz., Mar. 24, 2006), Dkt. No. 422, pp. 1–2 (hereinafter Motion To Purge).

The dissolution request, brought under Rule 60(b)(5), sought relief in light of changed circumstances. *The "significant changed circumstances" identified amounted to changes in the very circumstances that underlay the initial finding of violation, namely, Arizona's funding-based failure to provide adequate English-learning educational resources.* The moving parties asserted that "Arizona has poured money" into Nogales as a result of various funding changes, *id.*, at 5. They pointed to a 0.6% addition to the state sales tax; to the dedication of a portion of the State's share of Indian gaming proceeds to Arizona school districts; to the increase in federal funding since 2001; and to HB 2064's increase in state-provided funding. *Id.*, at 5–8. The parties said that, in light of these "dramatic" additions to the funding available for education in Arizona, the court should

"declare the judgment and orders satisfied, and . . . relieve defendants from the judgment and orders under Rule 60(b)(5)." *Id.*, at 8.

In April 2006, the District Court held that HB 2064 by itself did not adequately satisfy the court's orders; it denied the request to forgive the fines; but it did not decide the petitioners' Rule 60(b)(5) motion. In August 2006, the Court of Appeals ordered the District Court to decide that motion, and, in particular, to consider whether changes to "the landscape of educational funding . . . required modification of the original court order or otherwise had a bearing on the appropriate remedy." *Flores* v. *Rzeslawski*, 204 Fed. Appx. 580, 582 (CA9 2006) (memorandum).

In January 2007, the District Court held a hearing that lasted eight days and produced an evidentiary transcript of 1,684 pages. The hearing focused on the changes that the petitioners said had occurred and justified setting aside the original judgment. The petitioners pointed to three sets of changed circumstances—all related to "practices, resources, and personnel"—which, in their view, showed that the judgment and the related orders were no longer necessary. They argued that the changes had brought the State into compliance with the Act's requirements. The three sets of changes consisted of (1) increases in the amount of funding available to Arizona school districts; (2) changes in the method of English-learning instruction; and (3) changes in the administration of the Nogales school district. These changes, the petitioners said, had cured the resource-linked deficiencies that were noted in the District Court's 2000 judgment, 172 F. Supp. 2d, at 1239, and rendered enforcement of the judgment and related orders unnecessary.

Based on the hearing and the briefs, the District Court again found that HB 2064 by itself did not cure the "resource" problem; it found that all of the changes, resource-related and otherwise, including the new teaching and administrative methods, taken together, were not sufficient

to warrant setting aside the judgment or the injunctive orders; and it denied the Rule 60(b)(5) motion for relief. *Flores* v. *Arizona*, 480 F. Supp. 2d 1157, 1164–1167 (Ariz. 2007). The Court of Appeals affirmed the District Court's conclusions, setting forth its reasons, as I have said, in a lengthy and detailed opinion. The state superintendent, along with the Speaker of the Arizona House of Representatives and the President of the Arizona Senate, sought certiorari, and we granted the petition.

B

Five conclusions follow from the description of these cases I have just set forth. First, the Rule 60(b)(5) "changes" upon which the District Court focused included the "changed teaching methods" and the "changed administrative systems" that the Court criticizes the District Court for ignoring. Compare *ante*, at 459–461, 465–467, with Parts III–A, III–C, *infra*. Those changes were, in the petitioners' view, related to the "funding" issue, for those changes reduced the need for increased funding. See Motion To Purge 7. I concede that the majority of the District Court's factual findings focused on funding, see *ante*, at 455–456. But where is the *legal error*, given that the opinion clearly shows that the District Court considered, "'focus[ed]'" upon, and wrote about *all* the matters the petitioners raised? *Ante*, at 456–457; 480 F. Supp. 2d, at 1160–1161.

Second, the District Court and the Court of Appeals focused more heavily upon "incremental funding" costs, see *ante*, at 452–456, for the *reason* that the State's provision for those costs—*i. e.*, its provision of the resources necessary to run an adequate English-learning program—was the basic contested issue at the 2000 trial and the sole basis for the District Court's finding of a statutory violation. 172 F. Supp. 2d, at 1226. That is, the sole subsection (f) dispute in the cases originally was whether the State provides the "practices, resources and personnel necessary" to implement its English-learning program. *Castaneda*, 648 F. 2d, at 1010.

To be sure, as the Court points out, changes other than to the State's funding system could demonstrate that Nogales was receiving the necessary resources. See, *e. g.*, *ante*, at 459–461. But given the centrality of "resources" to these cases, it is hardly surprising that the courts below scrutinized the State's provision of "incremental funding," *but without ignoring* the other related changes to which the petitioners pointed, such as changes in teaching methods and administration (all of which the District Court rejected as insufficient). See Part III, *infra*.

Third, the type of issue upon which the District Court and Court of Appeals focused lies at the heart of the statutory demand for equal educational opportunity. A State's failure to provide the "practices, resources and personnel necessary" to eliminate the educational burden that accompanies a child's inability to speak English is precisely what the statute forbids. See *Castaneda*, *supra*, at 1010 (emphasizing the importance of providing "resources"); Nixon Address 593 (referring to the importance of providing "financial support"). And no one in these cases suggests there is no need for those resources, *e. g.*, that there are no extra costs associated with English-learning education irrespective of the teaching method used. English-learning students, after all, not only require the instruction in "academic content areas" like math and science that "typical" students require, but they also need to increase their proficiency in speaking, reading, and writing English. This language-acquisition instruction requires particular textbooks and other instructional materials, teachers trained in the school's chosen method for teaching English, special assessment tests, and tutoring and other individualized instruction—all of which resources cost money. Brief for Tucson Unified School District et al. as *Amici Curiae* 10–13; Structured English Immersion Models of the Arizona English Language Learners Task Force, http://www.ade.state.az.us/ELLTaskForce/2008/SEIModels 05–14–08.pdf (describing Arizona's requirement that

English-learning students receive four hours of language-acquisition instruction per day from specially trained teachers using designated English-learning materials); Imazeki, Assessing the Costs of Adequacy in California Public Schools, 3 Educ. Fin. & Pol'y 90, 100 (2008) (estimating that English-learning students require 74% more resources than typical students). That is why the petitioners, opposed as they are to the District Court's judgment and orders, admitted to the District Court that English learners "need extra help and that costs extra money." See 480 F. Supp. 2d, at 1161.

Fourth, *the "resource" issue* that the District Court focused upon when it decided the Rule 60(b)(5) motion and *the statutory subsection (f) issue* that lies at the heart of the court's original judgment (and the plaintiffs' original complaint) are not *different* issues, as the Court claims. See *ante,* at 457–459. Rather, in all essential respects *they are one and the same issue.* In focusing upon the one, the District Court and Court of Appeals were focusing upon the other. For all practical purposes, changes that would have proved sufficient to show the statutory violation cured would have proved sufficient to warrant setting aside the original judgment and decrees, and vice versa. And in context, judges and parties alike were fully aware of the modification/violation relationship. See, *e. g.,* Intervenor-Defendants' Closing Argument Memorandum, No. CV–92–596–TUC–RCC (D. Ariz., Mar. 13, 2007), Dkt. No. 631, p. 1 (arguing that factual changes had led to "satisf[action]" of the judgment).

To say, as the Court does, that "[f]unding is merely one tool that may be employed to achieve the statutory objective," *ante,* at 459, while true, is beside the point. Of course, a State might violate the Act in other ways. But one way in which a State can violate the Act is to fail to provide necessary "practices, resources and personnel." And that is the way the District Court found that the State had violated the Act here. Thus, whatever might be true of some other

case, in these cases the failure to provide adequate resources and the underlying subsection (f) violation were one and the same thing.

Fifth, the Court is wrong when it suggests that the District Court ordered "increased incremental funding," *ante*, at 455; when it faults the District Court for effectively "dictating state or local budget priorities," *ante*, at 448; when it claims that state officials welcomed the result "as a means of achieving appropriations objectives," *ante*, at 447, n. 3; and when it implies that the District Court's orders required the State to provide a "particular level of funding," *ante*, at 469. The District Court ordered the State to produce a plan that set forth a "reasonable" or "rational" relationship between the needs of English-learning students and the resources provided to them. The orders expressed no view about what *kind* of English-learning program the State should use. Nor did the orders say anything about the *amount* of "appropriations" that the State must provide, *ante*, at 447, n. 3, or about any "particular funding mechanism," *ante*, at 455, that the State was obligated to create. Rather, the District Court left it up to the State "to recommend [to the legislature] the level of funding necessary to support the programs that it determined to be the most effective." 160 F. Supp. 2d, at 1044. It ordered no more than that the State (*whatever* kind of program it decided to use) must see that the chosen program benefits from a funding system that is not "arbitrary and capricious," but instead "bear[s] a rational relationship" to the resources needed to implement the State's method. No. CV–92–596–TUCACM, 2001 WL 1028369, *2.

II

Part I shows that there is nothing suspicious or unusual or unlawful about the lower courts having focused primarily upon changes related to the resources Arizona would devote to English-learning education (while also taking account of *all* the changes the petitioners raised). Thus the Court's

basic criticism of the lower court decisions is without foundation. I turn next to the Court's discussion of the standards of review the Court finds applicable to "institutional reform" litigation.

To understand my concern about the Court's discussion of standards, it is important to keep in mind the well-known standards that ordinarily govern the evaluation of Rule 60(b)(5) motions. The Rule by its terms permits modification of a judgment or order (1) when "the judgment has been satisfied," (2) "released," or (3) "discharged"; when the judgment or order (4) "is based on an earlier judgment that has been reversed or vacated"; or (5) "applying [the judgment] prospectively is no longer equitable." No one can claim that the second, third, or fourth grounds are applicable here. The relevant judgment and orders have not been released or discharged; nor is there any relevant earlier judgment that has been reversed or vacated. Thus the only Rule 60(b)(5) questions are whether the judgment and orders have been satisfied, or, if not, whether their continued application is "equitable." And, as I have explained, in context these come down to the same question: Is continued enforcement inequitable because the defendants have satisfied the 2000 declaratory judgment or at least have come close to doing so, and, given that degree of satisfaction, would it work unnecessary harm to continue the judgment in effect? See *supra*, at 485–486.

To show sufficient inequity to warrant Rule 60(b)(5) relief, a party must show that "a significant change either in factual conditions or in law" renders continued enforcement of the judgment or order "detrimental to the public interest." *Rufo*, 502 U. S., at 384. The party can claim that "the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Id.*, at 388; see also *Railway Employees* v. *Wright*, 364 U. S. 642, 651 (1961). Or the party can claim that relevant facts have changed to the point where continued enforcement of the judgment, order, or de-

cree as written would work, say, disproportionately serious harm. See *Rufo*, *supra*, at 384 (modification may be appropriate when changed circumstances make enforcement "substantially more onerous" or "unworkable because of unforeseen obstacles").

The Court acknowledges, as do I, as did the lower courts, that *Rufo*'s "flexible standard" for relief applies. The Court also acknowledges, as do I, as did the lower courts, that this "flexible standard" does not itself define the inquiry a court passing on a Rule 60(b)(5) motion must make. To give content to this standard, the Court refers to *Milliken* v. *Bradley*, 433 U. S. 267, 282 (1977), in which this Court said that a decree cannot seek to "eliminat[e] a condition that does not violate" federal law or "flow from such a violation," *ante*, at 450 (internal quotation marks omitted), and to *Frew* v. *Hawkins*, 540 U. S. 431, 441 (2004), in which this Court said that a "*consent decree*" must be "limited to reasonable and necessary implementations of federal law," *ante*, at 450 (emphasis added; internal quotation marks omitted). The Court adds that in an "institutional reform litigation" case, a court must also take account of the need not to maintain decrees in effect for too long a time, *ante*, at 448–450, the need to take account of "sensitive federalism concerns," *ante*, at 448, and the need to take care lest "consent decrees" reflect collusion between the private plaintiffs and the state defendants at the expense of the legislative process, *ante*, at 449.

Taking these cases and considerations together, the majority says the critical question for the lower courts is "whether ongoing enforcement of the original order was supported by an ongoing violation of federal law (here [subsection (f)])." *Ante*, at 454. If not—*i. e.*, if a current violation of federal law cannot be detected—then "'responsibility for discharging the State's obligations [must be] returned promptly to the State.'" *Ante*, at 452.

One problem with the Court's discussion of its standards is that insofar as the considerations it mentions are widely

accepted, the lower courts fully acknowledged and followed them. The decisions below, like most Rule 60(b)(5) decisions, reflect the basic factors the Court mentions. The lower court opinions indicate an awareness of the fact that equitable decrees are subject to a "flexible standard" permitting modification when circumstances, factual or legal, change significantly. 516 F. 3d, at 1163; 480 F. Supp. 2d, at 1165 (citing *Rufo*, *supra*, at 383). The District Court's application of *Castaneda*'s interpretation of subsection (f), 648 F. 2d, at 1009, along with its efforts to provide state officials wide discretionary authority (about the level of funding and the kind of funding plan), shows considerable sensitivity to "federalism concerns." And given the many years (at least seven) of state noncompliance, it is difficult to see how the decree can have remained in place too long.

Nor is the decree at issue here a "consent decree" as that term is normally understood in the institutional litigation context. See *ante*, at 447–450. The State did consent to a few peripheral matters that have nothing to do with the present appeal. App. 19–30. But the State vigorously contested the plaintiffs' basic original claim, namely, that the State failed to take resource-related "appropriate action" within the terms of subsection (f). The State presented proofs and evidence to the District Court designed to show that no violation of federal law had occurred, and it opposed entry of the original judgment and every subsequent injunctive order, save the relief sought by the petitioners here. I can find no evidence, beyond the Court's speculation, showing that some state officials have "welcomed" the District Court's decision "as a means of achieving appropriations objectives that could not [otherwise] be achieved." *Ante*, at 447, n. 3. But even were that so, why would such a fact matter here more than in any other case in which some state employees believe a litigant who sues the State is right? I concede that the State did not appeal the District Court's original order or the ensuing injunctions. But the fact that

litigants refrain from appealing does not turn a litigated judgment into a "consent decree." At least, I have never before heard that term so used.

Regardless, the Court's discussion of standards raises a far more serious problem. In addition to the standards I have discussed, *supra*, at 487–488, our precedents recognize *other*, here outcome-determinative, hornbook principles that apply when a court evaluates a Rule 60(b)(5) motion. The Court omits some of them. It mentions but fails to apply others. As a result, I am uncertain, and perhaps others will be uncertain, whether the Court has set forth a correct and workable method for analyzing a Rule 60(b)(5) motion.

First, a basic principle of law that the Court does not mention—a principle applicable in these cases as in others—is that, in the absence of special circumstances (*e. g.*, plain error), a judge need not consider issues or factors that the parties themselves do not raise. That principle of law is longstanding, it is reflected in Blackstone, and it perhaps comes from yet an earlier age. 3 Commentaries on the Laws of England 455 (1768) ("[I]t is a practice unknown to our law," when examining the decree of an inferior court, "to examine the justice of the . . . decree by evidence that was never produced below"); *Clements* v. *Macheboeuf*, 92 U. S. 418, 425 (1876) ("Matters not assigned for error will not be examined"); see also *Savage* v. *United States*, 92 U. S. 382, 388 (1876) (where a party with the "burden . . . to establish" a "charge . . . fails to introduce any . . . evidence to support it, the presumption is that the charge is without any foundation"); *McCoy* v. *Massachusetts Inst. of Technology*, 950 F. 2d 13, 22 (CA1 1991) ("It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal" for "[o]verburdened trial judges cannot be expected to be mind readers"). As we have recognized, it would be difficult to operate an adversary system of justice without applying such a principle. See *Duignan* v. *United States*, 274 U. S. 195, 200 (1927). But the majority

repeatedly considers precisely such claims. See, *e. g.*, *ante*, at 463–465 (considering significant matters not raised below); *ante*, at 470–472 (same).

Second, a hornbook Rule 60(b)(5) principle, which the Court mentions, *ante*, at 447, is that the party seeking relief from a judgment or order "*bears the burden* of establishing that a significant change in circumstances warrants" that relief. *Rufo*, 502 U. S., at 383 (emphasis added); cf. *Board of Ed. of Oklahoma City Public Schools* v. *Dowell*, 498 U. S. 237, 249 (1991) (party moving for relief from judgment must make a "sufficient showing" of change in circumstances). But the Court does not apply that principle. See, *e. g.*, *ante*, at 466–468, and n. 20 (holding that movants potentially *win* because of *failure* of record to show that English-learning problems do *not* stem from causes other than funding); see also *ante*, at 463–464 (criticizing lower courts for failing to consider argument not made).

Third, the Court ignores the well-established distinction between a Rule 60(b)(5) request to *modify* an order and a request to set an unsatisfied judgment entirely aside—a distinction that this Court has previously emphasized. Cf. *Rufo*, *supra*, at 389, n. 12 (emphasizing that "we do not have before us the question whether the entire decree should be vacated"). Courts normally do the latter only if the "party" seeking "to have" the "decree set aside entirely" shows "that the decree has served its purpose, and there is no longer any need for the injunction." 12 J. Moore et al., Moore's Federal Practice § 60.47[2][c] (3d ed. 2009) (hereinafter Moore). Instead of applying the distinction, the majority says that the Court of Appeals "strayed" when it referred to situations in which changes justified setting an unsatisfied judgment entirely aside as "'likely rare.'" *Ante*, at 451.

Fourth, the Court says nothing about the well-established principle that a party moving under Rule 60(b)(5) for relief that amounts to having a "decree set aside entirely" must

show *both* (1) that the decree's objects have been "attained," *Frew*, 540 U. S., at 442, *and* (2) that it is unlikely, in the absence of the decree, that the unlawful acts it prohibited will again occur. This Court so held in *Dowell*, a case in which state defendants sought relief from a school desegregation decree on the ground that the district was presently operating in compliance with the Equal Protection Clause. The Court agreed with the defendants that "a finding by the District Court that the Oklahoma City School District was being operated in compliance with . . . the Equal Protection Clause" was indeed relevant to the question whether relief was appropriate. 498 U. S., at 247. But the Court added that, to show entitlement to relief, the defendants must *also* show that "it was unlikely that the [school board] would return to its former ways." *Ibid.* Only then would the "purposes of the desegregation litigation ha[ve] been fully achieved." *Ibid.* The principle, as applicable here, simply underscores the petitioners' failure to show that the "changes" to which they pointed were sufficient to warrant entirely setting aside the original court judgment.

Fifth, the majority mentions, but fails to apply, the basic Rule 60(b)(5) principle that a party cannot dispute the legal conclusions of the judgment from which relief is sought. A party cannot use a Rule 60(b)(5) motion as a substitute for an appeal, say, by attacking the legal reasoning underlying the original judgment or by trying to show that the facts, as they were originally, did not then justify the order's issuance. *Browder* v. *Director, Dept. of Corrections of Ill.*, 434 U. S. 257, 263, n. 7 (1978); *United States* v. *Swift & Co.*, 286 U. S. 106, 119 (1932) (party cannot claim that injunction could not lawfully have been applied "to the conditions that existed at its making"). Nor can a party require a court to retrace old legal ground, say, by remaking or rejustifying its original "constitutional decision every time an effort [is] made either to enforce or modify" an order. *Rufo*, *supra*, at 389–390 (internal quotation marks omitted); see also *Frew*, *supra*, at 438

(rejecting argument that federal court lacks power to enforce an order "unless the court first identifies, at the enforcement stage, a violation of federal law").

Here, the original judgment rested upon a finding that the State had failed to provide Nogales with adequate *funding* "resources," *Castaneda*, 648 F. 2d, at 1010, in violation of subsection (f)'s "appropriate action" requirement. How then can the Court fault the lower courts for first and foremost seeking to determine whether Arizona had developed a plan that would provide Nogales with adequate *funding* resources? How can it criticize the lower courts for having "insulated the policies embedded in the order . . . from challenge and amendment," *ante*, at 453, for having failed to appreciate that "funding is simply a means, not the end" of the statutory requirement, *ante*, at 454–455, and for having misperceived "the nature of the obligation imposed by the" Act, *ante*, at 459? When the Court criticizes the Court of Appeals for "misperceiv[ing] . . . the nature of the obligation imposed" by the Act, *ibid.*, when it second-guesses finding after finding of the District Court, see Part III, *infra*, when it early and often suggests that Arizona may well comply despite lack of a rational funding plan (and without discussing how the changes it mentions could show compliance), see *ante*, at 452, 454–455, what else is it doing but putting "the plaintiff [or] the court . . . to the unnecessary burden of reestablishing what has once been decided"? *Railway Employees*, 364 U. S., at 647.

Sixth, the Court mentions, but fails to apply, the well-settled legal principle that appellate courts, including this Court, review district court denials of Rule 60(b) motions (of the kind before us) for abuse of discretion. See *Browder*, *supra*, at 263, n. 7; *Railway Employees*, *supra*, at 648–650. A reviewing court must not substitute its judgment for that of the district court. See *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U. S. 639, 642 (1976) *(per curiam);* see also *Calderon* v. *Thompson*, 523 U. S. 538, 567–568

(1998) (SOUTER, J., dissenting) ("[A] high degree of deference to the court exercising discretionary authority is the hallmark of [abuse of discretion] review"). Particularly where, as here, entitlement to relief depends heavily upon fact-related determinations, the power to review the district court's decision "ought seldom to be called into action," namely, only in the rare instance where the Rule 60(b) standard "appears to have been misapprehended or grossly misapplied." Cf. *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 490–491 (1951). The Court's bare assertion that a court abuses its discretion when it fails to order warranted relief, *ante*, at 447, fails to account for the deference due to the District Court's decision.

I have just described Rule 60(b)(5) standards that concern (1) the obligation (or lack of obligation) upon a court to take account of considerations the parties do not raise; (2) burdens of proof; (3) the distinction between setting aside and modifying a judgment; (4) the need to show that a decree's basic objectives have been attained; (5) the importance of not requiring relitigation of previously litigated matters; and (6) abuse of discretion review. Does the Court intend to ignore one or more of these standards or to apply them differently in cases involving what it calls "institutional reform litigation"?

If so, the Court will find no support for its approach in the cases to which it refers, namely, *Rufo*, *Milliken*, and *Frew*. *Rufo* involved a motion to modify a complex court-monitor-supervised decree designed to prevent overcrowding in a local jail. The Court stressed the fact that the modification did not involve setting aside the entire decree. 502 U. S., at 389, n. 12. It made clear that the party seeking relief from an institutional injunction "bears the burden of establishing that a significant change in circumstances warrants" that relief. *Id.*, at 383. And it rejected the argument that a reviewing court must determine, in every case, whether an ongoing violation of federal law exists. *Id.*, at 389, 390, and

n. 12 (*refusing to require a new "'constitutional decision every time an effort [is] made either to enforce or modify'" a judgment or decree* (emphasis added)).

Frew addressed the question whether the Eleventh Amendment permits a federal district court to enforce a *consent* decree against state officials seeking to bring the State into compliance with federal law. 540 U. S., at 434–435. The Court unanimously held that it does; and in doing so, the Court rejected the State's alternative argument that a federal court may only enforce such an order if it "first identifies . . . a violation of federal law" existing at the time that enforcement is sought. *Id.*, at 438. Rather, the Court explained that "'federal courts are not reduced to'" entering judgments or orders "'and hoping for compliance,'" *id.*, at 440, but rather retain the power to enforce judgments in order "to ensure that . . . the objects" of the court order are met, *id.*, at 442. It also emphasized, like *Dowell*, that relief is warranted only when "the objects of the decree have been attained." 540 U. S., at 442.

What of *Milliken? Milliken* involved direct review (rather than a motion for relief) of a district court's order requiring the Detroit school system to implement a host of remedial programs, including counseling and special reading instruction, aimed at schoolchildren previously required to attend segregated schools. 433 U. S., at 269, 272. The Court said that a court decree must aim at "eliminating a condition" that violates federal law or which "flow[s] from" such a "violation." *Id.*, at 282. And it unanimously found that the remedy at issue *was lawful.*

These cases confirm the unfortunate fact that the Court has failed fully to apply the six essential principles that I have mentioned. If the Court does not intend any such modifications of these traditional standards, then, as I shall show, it must affirm the Court of Appeals' decision. But if it does intend to modify them, as stated or in application, it now applies a new set of new rules that are *not* faithful to

our cases and which will create the dangerous possibility that orders, judgments, and decrees long final or acquiesced in, will be unwarrantedly subject to perpetual challenge, offering the defendants unjustifiable opportunities endlessly to relitigate underlying violations with the burden of proof imposed once again upon the plaintiffs.

I recognize that the Court's decision, to a degree, reflects one side of a scholarly debate about how courts should properly handle decrees in "institutional reform litigation." Compare, in general, R. Sandler & D. Schoenbrod, Democracy by Decree: What Happens When Courts Run Government (2003), with, *e. g.*, Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1307–1309 (1976). But whatever the merits of that debate, these cases do not involve the kind of "institutional litigation" that most commonly lies at its heart. See, *e. g.*, M. Feeley & E. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons (1998); but see *ante*, at 447, n. 3.

These cases do not involve schools, prisons, or mental hospitals that have failed to meet basic constitutional standards. See, *e. g.*, *Dowell*, 498 U. S., at 240–241. They do not involve a comprehensive judicial decree that governs the running of a major institution. See, *e. g.*, *Hutto* v. *Finney*, 437 U. S. 678, 683–684 (1978). They do not involve a highly detailed set of orders. See, *e. g.*, *Ramos* v. *Lamm*, 639 F. 2d 559, 585–586 (CA10 1980). They do not involve a special master charged with the task of supervising a complex decree that will gradually bring a large institution into compliance with the law. See, *e. g.*, *Ruiz* v. *Estelle*, 679 F. 2d 1115, 1160–1161 (CA5 1982). Rather, they involve the more common complaint that a state or local government has failed to meet a federal statutory requirement. See, *e. g.*, *Concilio de Salud Integral de Loiza, Inc.* v. *Pérez-Perdomo*, 551 F. 3d 10, 16 (CA1 2008); *Association of Community Orgs. for Reform Now* v. *Edgar*, 56 F. 3d 791, 797–798 (CA7 1995); *John B.* v.

Menke, 176 F. Supp. 2d 786, 813–814 (MD Tenn. 2001). They involve a court imposition of a fine upon the State due to its lengthy failure to take steps to comply. See, *e. g.*, *Hook* v. *Arizona Dept. of Corrections*, 107 F. 3d 1397, 1404 (CA9 1997); *Alberti* v. *Klevenhagen*, 46 F. 3d 1347, 1360 (CA5 1995). And they involve court orders that leave the State free to pursue the English-learning program of its choice while insisting only that the State come up with a funding plan that is rationally related to the program it chooses. These cases are more closely akin to *Goldberg* v. *Kelly*, 397 U. S. 254 (1970) (in effect requiring legislation to fund welfare-related "due process" hearings); cf. *id.*, at 277–279 (Black, J., dissenting), than they are to the school busing cases that followed *Brown* v. *Board of Education*, 347 U. S. 483 (1954).

As I have said, *supra*, at 487–489, the framework that I have just described, filling in those principles the Court neglects, is precisely the framework that the lower courts applied. 516 F. 3d, at 1163; 480 F. Supp. 2d, at 1165. In the opinions below, I can find no misapplication of the legal standards relevant to these cases. To the contrary, the Court of Appeals' opinion is true to the record and fair to the decision of the District Court. And the majority is wrong to conclude otherwise.

III

If the Court's criticism of the lower courts cannot rest upon what they did do, namely, examine directly whether Arizona had produced a rational funding program, it must rest upon what it believes they did not do, namely, adequately consider the other changes in English-learning instruction, administration, and the like to which the petitioners referred. Indeed, the Court must believe this, for it orders the lower courts, on remand, to conduct a "proper examination" of "four important factual and legal changes that may warrant the granting of relief from the judgment:" (1) the "adoption of a new . . . instructional methodology" for teaching English; (2) "Congress' enactment" of the No Child

Left Behind Act of 2001, codified in Title 20; (3) "structural and management reforms in Nogales," and (4) "increased overall education funding." *Ante*, at 459.

The Court cannot accurately hold, however, that the lower courts failed to conduct a "proper examination" of these claims, *ibid.*, for the District Court considered three of them, in detail and at length, while the petitioners *nowhere raised* the remaining argument, which has sprung full grown from the Court's own brow, like Athena from the brow of Zeus.

A

The first "change" that the Court says the lower courts must properly "examin[e]" consists of the "change" of instructional methodology, from a method of "bilingual education" (teaching at least some classes in Spanish, while providing separate instruction in English) to a method of "'structured English immersion'" (teaching all or nearly all classes in English but with a specially designed curriculum and materials). *Ante*, at 459–461. How can the majority suggest that the lower courts failed properly to "examine" this matter?

First, more than 2 days of the District Court's 8-day evidentiary hearing were devoted to precisely this matter, namely, the claim pressed below by the petitioners that "[t]he adoption of English Immersion" constitutes a "substantial advancemen[t] in assisting" English learners "to become English proficient." Hearing Memorandum in No. CV–92–596–TUC–RCC (D. Ariz., Jan. 4, 2007), Dkt. No. 588, pp. 4–5. The State's director of English acquisition, Irene Moreno, described the new method as "the most effective" way to teach English. Tr. 19 (Jan. 9, 2007). An educational consultant, Rosalie Porter, agreed. *Id.*, at 95–96. The petitioners' witnesses also described a new assessment test, the Arizona English Language Learner Assessment, *id.*, at 50–51; they described new curricular models that would systematize instructional methods, *id.*, at 78; they explained that all teachers would eventually be required to obtain an "endorsement"

demonstrating their expertise in the chosen instructional method, see Proposed Findings of Fact and Conclusions of Law in No. CV–92–596–TUC–RCC (D. Ariz., Jan 4, 2007), Dkt. No. 593, p. 7; and they pointed to data showing that the percentage of Nogales' English learners successfully completing the program had recently jumped from 1% of such students in 2004 to 35% in 2006, App. to Pet. for Cert. in No. 08–289, p. 309.

The District Court in its opinion, referring to the several days of hearings, recognized the advances and acknowledged that the State had formulated new systems with new "standards, norms and oversight for Arizona's public schools and students with regard to" English-learning programs. 480 F. Supp. 2d, at 1160. It also indicated that it expected the orders would soon prove unnecessary as the State had taken "step[s] towards" developing an "appropriate" funding mechanism, App. to Pet. for Cert. in No. 08–289, at 125—a view it later reaffirmed, Order in No. CV–92–596–TUC–RCC (D. Ariz., Oct. 10, 2007), Dkt. No. 703, p. 4. The Court of Appeals, too, in its opinion acknowledged that the dispute "may finally be nearing resolution." 516 F. 3d, at 1180.

But, at the same time, the District Court noted that "many of the new standards are still evolving." 480 F. Supp. 2d, at 1160. It found that "it would be premature to make an assessment of some of these changes." *Ibid.* And it held that, all in all, the changes were not yet sufficient to warrant relief. *Id.*, at 1167. The Court of Appeals upheld the findings and conclusions as within the discretionary powers of the District Court, adding that the evidence showing that significantly more students were completing the program was "not reliable." 516 F. 3d, at 1157. What "further factual findings," *ante*, at 461, are needed? As I have explained, the District Court was not obligated to relitigate the case. See *supra*, at 492–493. And it *did* find that "the State has changed its primary model" of English-learning instruction "to structured English immersion." 480 F.

Supp. 2d, at 1161. How can the majority conclude that "further factual findings" are necessary?

Perhaps the majority does not mean to suggest that the lower courts failed properly to examine these changes in teaching methods. Perhaps it means to express its belief that the lower courts reached the wrong conclusion. After all, the Court refers to a "documented, academic support for the view that" structured English immersion "is significantly more effective than bilingual education." *Ante*, at 460–461.

It is difficult to see how the majority can substitute its judgment for the District Court's judgment on this question, however, for that judgment includes a host of subsidiary fact-related determinations that warrant deference. *Railway Employees*, 364 U. S., at 647–648 ("Where there is . . . a balance of imponderables there must be wide discretion in the District Court"). And, despite considerable evidence showing improvement, there was also considerable evidence the other way, evidence that supported the District Court's view that it would be "premature" to set aside the judgment of violation.

The methodological change was introduced in Arizona in late 2000, and in Nogales it was a work in progress, "[t]o one degree or another," as of June 2005. Tr. 10 (Jan. 12, 2007); *ante*, at 459–461. As of 2006, the State's newest structured English immersion models had not yet taken effect. Tr. 138 (Jan. 17, 2007) ("We're getting ready to hopefully put down some models for districts to choose from"). The State had adopted its new assessment test only the previous year. App. 164–165. The testimony about the extent to which Nogales had adopted the new teaching system was unclear and conflicting. Compare Tr. 96 (Jan. 9, 2007) with *id.*, at 10 (Jan. 12, 2007). And, most importantly, there was evidence that the optimistic improvement in the number of students completing the English-learning program was considerably overstated. See *id.*, at 37 (Jan. 18, 2007) (stating that the *assessment test* used in 2005 and 2006, when dramatic im-

provements had been reported, *was significantly less "rigorous" and consequently had been replaced*). The State's own witnesses were unable firmly to conclude that the new system had so far produced significantly improved results. *Id.*, at 112–113 (Jan. 11, 2007) (stating that "*at some point*" it would be possible to tell how quickly the new system leads to English proficiency (emphasis added)).

Faced with this conflicting evidence, the District Court concluded that it was "premature" to dissolve the decree on the basis of changes in teaching (and related standards and assessment) methodology. Given the underlying factual disputes (about, *e. g.*, the reliability of the testing method), how can this Court now hold that the District Court and the appellate court that affirmed its conclusions were legally wrong?

B

The second change that the Court says the lower courts should properly "examine" is the "enactment" of the No Child Left Behind Act. *Ante*, at 461. The Court concedes, however, that both courts did address the only argument about that "enactment" that the petitioners made, namely, that "compliance" with that new law automatically constitutes compliance with subsection (f)'s "'appropriate action'" requirement. *Ante*, at 462; see also, *e. g.*, App. 73 (arguing that the new law "preempts" subsection (f)). And the Court today agrees (as do I) that the lower courts properly rejected that argument. *Ante*, at 462.

Instead, the Court suggests that the lower courts wrongly failed to take account of four other ways in which the new Act is "probative," namely, (1) its prompting "significant structural and programming" changes, (2) its increases in "federal funding," (3) "its assessment and reporting requirements," and (4) its "shift in federal education policy." *Ante*, at 463–464. In fact, the lower courts did take account of the changes in structure, programming, and funding (including federal funding) relevant to the English-learning program in

Nogales and elsewhere in the State. See Part III–A, *supra;* Parts III–C and III–D, *infra.* But, I agree with the Court that the District Court did not explicitly relate its discussion to the new Act nor did it take account of what the majority calls a "shift in federal education policy." *Ante,* at 464.

The District Court failed to do what the Court now demands for one simple reason. No one (with the possible exception of the legislators, who hint at the matter in their reply brief filed in this Court) has ever argued that the District Court should take account of any such "change." But see *ante,* at 463, and n. 12.

As I have explained, see *supra,* at 490–491, it is well established that a district court rarely commits legal error when it fails to take account of a "change" that no one called to its attention or fails to reply to an argument that no one made. See, *e. g., Dowell,* 498 U. S., at 249 (party seeking relief from judgment must make a "sufficient showing"). A district court must construe fairly the arguments made to it; but it is not required to conjure up questions never squarely presented. That the *Court of Appeals* referred to an argument resembling the Court's new assertion does not change the underlying legal fact. The District Court committed no legal error in failing to consider it. The Court of Appeals could properly reach the same conclusion. And the Government, referring to the argument here, does not ask for reversal or remand on that, or on any other, basis.

That is not surprising, since the lower courts have consistently and explicitly held that "flexibility cannot be used to relieve the moving party of its burden to establish that" dissolution is warranted. *Thompson* v. *United States Dept. of Housing and Urban Development,* 220 F. 3d 241, 248 (CA4 2000); *Marshall* v. *Board of Ed., Bergenfield, N. J.,* 575 F. 2d 417, 423–424 (CA3 1978). There is no basis for treating these cases in this respect as somehow exceptional, particularly since publicly available documents indicate that, in any

event, Nogales is not "'reaching its own goals under Title III'" of the Act. *Ante*, at 463, n. 12; FY 2008 Statewide District/Charter Determinations for the Title III AMAOs (rev. Oct. 2008), http://www.azed.gov/oelas/downloads/T3Determinations2008.pdf (showing that Nogales failed to meet the Act's "Annual Measurable Achievement Objectives," which track the progress of English-learning students).

C

The third "change" that the Court suggests the lower courts failed properly to "examine" consists of "[s]tructural and management reforms in Nogales." *Ante*, at 465. Again, the Court cannot mean that the lower courts failed to "examine" these arguments, for the District Court heard extensive evidence on the matter. The Court itself refers to some (but only *some*) of the evidence introduced on this point, namely, the testimony of Kelt Cooper, the former Nogales district superintendent, who said that his administrative policies had "'ameliorated or eliminated many of the most glaring inadequacies'" in Nogales' program. *Ante*, at 466. The Court also refers to the District Court's and Court of Appeals' conclusions about the matter. 480 F. Supp. 2d, at 1160 ("The success or failure of the children of" Nogales "should not depend on" "one person"); 516 F. 3d, at 1156–1157 (recognizing that Nogales had achieved "reforms with limited resources" but also pointing to evidence showing that "there are still significant resource constraints," and affirming the District Court's similar conclusion).

Rather, the Court claims that the lower courts improperly "discounted" this evidence. *Ante*, at 466. But what does the Court mean by "discount"? It cannot mean that the lower courts failed to take account of the possibility that these changes "might have brought Nogales[']" program into "compliance" with subsection (f). After all, that is precisely what the petitioners below argued. Intervenor-Defendants' Closing Argument Memorandum in No. CV–92–596–TUC–

RCC (D. Ariz., Mar. 13, 2007), Dkt. No. 631, pp. 7–18. Instead the Court must mean that the lower courts should have given significantly more weight to the changes, *i. e.*, the Court disagrees with the lower courts' conclusion about the likely effect these changes will have on the success of Nogales' English-learning programs (hence, on the need for the judgment and orders to remain in effect).

It is difficult to understand the legal basis for the Court's disagreement about this fact-related matter. The evidence before the District Court was mixed. It consisted of some evidence showing administrative reform and managerial improvement in Nogales. *Ante*, at 465–466. At the same time other evidence, to which the Court does not refer, shows that these reforms did not come close to curing the problem. The record shows, for example, that the graduation rate in 2005 for English-learning students (59%) was significantly below the average for all students (75%). App. 195. It shows poor performance by English-learning students, compared with English-speaking students, on Arizona's content-based standardized tests. See Appendix A, *infra*. This was particularly true at Nogales' sole high school—which Arizona ranked 575th out of its 629 schools on an educational department survey, 516 F. 3d, at 1159—where only 28% of English-learning students passed those standardized tests. *Ibid.*

The record also contains testimony from Guillermo Zamudio, who in 2005 succeeded Cooper as Nogales' superintendent, and who described numerous relevant "resource-related" deficiencies: Lack of funding meant that Nogales had to rely upon long-term substitute and "emergency certified" teachers without necessary training and experience. Tr. 45 (Jan. 18, 2007). Nogales needed additional funding to hire trained teachers' aides—a "strong component" of its English-learning program, *id.*, at 47. And Nogales' funding needs forced it to pay a starting base salary to its teachers about 14% below the state average, making it difficult to re-

cruit qualified teachers. *Id.*, at 48. Finally, Zamudio said that Nogales' lack of resources would likely lead in the near future to the cancellation of certain programs, including a remedial reading program, *id.*, at 56, and would prevent the school district from providing appropriate class sizes and tutoring, which he characterized as "essential and necessary for us to be able to have our students learn English," *id.*, at 75–78.

The District Court, faced with all this evidence, found the management and structural "change" insufficient to warrant dissolution of its decree. How can the Court say that this conclusion is unreasonable? What is the legal basis for concluding that the District Court acted beyond the scope of its lawful authority?

In fact, the Court does not even try to claim that the District Court's conclusion is unreasonable. Rather, it enigmatically says that the District Court made "insufficient factual findings" to support the conclusion that an ongoing violation of law exists. *Ante,* at 468. By "insufficient," the Court does not mean nonexistent. See 480 F. Supp. 2d, at 1163–1164. Nor can it mean that the District Court's findings were skimpy or unreasonable. That court simply drew conclusions on the basis of evidence it acknowledged was mixed. *Id.*, at 1160–1161. What is wrong with those findings, particularly if viewed with appropriate deference?

At one point the Court says that there "are many possible causes" of Nogales' difficulties and that the lower courts failed to "take into account other variables that may explain" the ongoing deficiencies. *Ante,* at 467, 468, n. 20. But to find a flaw here is to claim that the plaintiffs have failed to negate the possibility that these other causes, not the State's resource failures, explain Nogales' poor performance. To say this is to ignore well-established law that accords deference to the District Court's fact-related judgments. See *supra,* at 493–494. The Court's statements reflect the acknowledgment that the evidence below was mixed. Given

that acknowledgment, it is clear that the District Court did not abuse its discretion in finding that the petitioners had not shown sufficient "changed circumstances." And it was the petitioners' job, as the moving party, to show that compliance with federal law has been achieved. Where "other variables" make it difficult to conclude that a present violation does or does not exist, what error does the District Court commit if it concludes that the moving party has failed to satisfy that burden?

D

The fourth "change" that the Court suggests the lower courts did not properly "examine" consists of an "overall increase in the education funding available in Nogales." *Ante*, at 468. Again, the Court is wrong to suggest that the District Court failed fully to examine the matter, for despite the Court's assertions to the contrary, it made a number of "up-to-date factual findings," *ante*, at 469, on the matter, see 480 F. Supp. 2d, at 1161–1164. Those findings reflect that the State had developed an educational plan that raised the "base level amount" for the typical student from $3,139 per pupil in 2000 to $3,570 in 2006 (in constant 2006 dollars), *ante*, at 468–469, n. 21; and that plan increased the additional (*i. e.*, "weighted") amount that would be available per English-learning student from $182 to $349 (in 2006 dollars). The State contended that this new plan, with its explanation of how the money needed would be forthcoming from federal, as well as from state, sources, met subsection (f)'s requirement for "appropriate action" (as related to "resources") and the District Court's own insistence upon a mechanism that rationally funded those resources. See Appendix B, *infra*.

Once again the Court's "factual-finding" criticism seems, in context, to indicate its disagreement with the lower courts' resolution of this argument. That is to say, the Court seems to disagree with the District Court's conclusion that, even with the new funding, the State failed to show that adequate

resources for English-learning programs would likely be forthcoming; hence the new plan was not "rationally related" to the underlying resource problem.

The record, however, adequately supports the District Court's conclusion. For one thing, the funding plan demonstrates that, in 2006, 69% of the available funding was targeted at "base level" education, see Appendix B, *infra*, *i. e.*, it was funding available to provide students with basic educational services like instruction in mathematics, science, and so forth. See Tr. 110 (Jan. 12, 2007). The District Court found that this funding likely would not become available for English-learning programs.

How is that conclusion unreasonable? If these funds are provided for the provision of only basic services, how can the majority now decide that a school district—particularly a poor school district like Nogales—would be able to cover the additional expenses associated with English-learning education while simultaneously managing to provide for its students' basic educational needs? Indeed, the idea is particularly impractical when applied to a district like Nogales, which has a high percentage of students who need extra resources. See 516 F. 3d, at 1145 (approximately 90% of Nogales' students were, or had been, enrolled in the English-learning program in 2006). Where the vast majority of students in a district are those who "need extra help" which "costs extra money," it is difficult to imagine where one could find an untapped stream of funding that could cover those additional costs.

For another thing, the petitioners' witnesses conceded that the State had not yet determined the likely costs to school districts of teaching English learners using the structured English immersion method. See, *e. g.*, Tr. 199–200 (Jan. 17, 2007). The legislators reported that the State had recently asked a task force to "determine" the extra costs associated with implementing the structured English immersion model. Speaker's Opening Appellate Brief in No. 07–15603 etc.

(CA9), p. 31. But that task force had not yet concluded its work.

Further, the District Court doubted that the federal portion of the funding identified by the petitioners would be available for English-learning programs. It characterized certain federal grant money, included in the petitioners' calculus of available funds, as providing only "short-term" assistance, 480 F. Supp. 2d, at 1161. And testimony at the evidentiary hearing indicated that some of the funds identified by the petitioners might not in fact be available to Nogales' schools. See Tr. 59–61 (Jan. 10, 2007). It also noted that certain funds were restricted, meaning that no particular English-learning child could benefit from them for more than two years—despite the fact that English-learning students in Nogales on average spend four to five years in that program. 480 F. Supp. 2d, at 1163–1164 (Nogales will have to "dilute" the funds provided to cover students who remain English learners for more than two years).

Finally, the court pointed to federal law, which imposes a restriction forbidding the State to use a large portion of (what the State's plan considered to be) available funds in the manner the State proposed, *i. e.*, to "supplant," or substitute for, the funds the State would otherwise have spent on the program. *Id.*, at 1162; see also 20 U. S. C. §§ 6314(a)(2)(B), 6315(b)(3), 6613(f), 6825(g). The District Court concluded that the State's funding plan was in large part unworkable in light of this restriction. In reaching this conclusion, the District Court relied in part upon the testimony of Thomas Fagan, a former United States Department of Education employee and an "expert" on this type of federal funding. Fagan testified that Arizona's plan was a " 'blatant violation' " of the relevant laws, which could result in a loss to the State of over $600 million in federal funds—including those federal funds the State's plan would provide for English learners. 480 F. Supp. 2d, at 1163.

The Court says that the analysis I have just described, and in which the court engaged, amounts to "clear legal error." *Ante*, at 469. What error? Where is the error? The Court does say earlier in its opinion that the lower courts "should not" have "disregarded" the relevant federal (*i. e.*, No Child Left Behind Act) funds "just because they are not state funds." *Ante*, at 463. But the District Court did *not* disregard those funds "just because they are not state funds." Nor did it "foreclos[e] the possibility that petitioners could" show entitlement to relief by pointing to "an overall increase in education funding." *Ante*, at 469. Rather, the District Court treated those increased funds as potentially unavailable, primarily because their use as planned would violate federal law and would thereby threaten the State with total loss of the stream of federal funding it planned to use. It concluded that the State's plan amounted to " 'a blatant violation' " of federal law, and remarked that "the potential loss of federal funds is substantial." 480 F. Supp. 2d, at 1163. Is there a better reason for "disregard[ing]" those funds?

The Court may have other "errors" in mind as well. It does say, earlier in its opinion, that some believe that "increased funding *alone* does not improve student achievement," *ante*, at 464 (emphasis added), and it refers to nine studies that suggest that increased funding does not always help, see *ante*, at 464–465, 467, nn. 17–19; see also Brief for Educational-Policy Scholars as *Amici Curiae* 7–11 (discussing such scholarship). I do not know what this has to do with the matter. But if it is relevant to today's decision, the Court should also refer to the many studies that cast doubt upon the results of the studies it cites. See, *e. g.*, H. Ladd & J. Hansen, Making Money Matter: Financing America's Schools 140–147 (1999); Hess, Understanding Achievement (and Other) Changes Under Chicago School Reform, 21 Educ. Eval. & Pol'y Analysis 67, 78 (1999); Card & Payne, School Finance Reform, The Distribution of School Spending, and

the Distribution of Student Test Scores, 83 J. Pub. Econ. 49, 67 (2002); see also Rebell, Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts, 85 N. C. L. Rev. 1467, 1480 (2007); R. Greenwald, L. Hedges, & R. Laine, The Effect of School Resources on Student Achievement, 66 Rev. Educ. Res. 361, 362 (1996).

Regardless, the relation of a funding plan to improved performance is not an issue for this Court to decide through footnote references to the writings of one side of a complex expert debate. The question here is whether the State has shown that its new funding program amounts to a "change" that satisfies subsection (f)'s requirement. The District Court found it did not. Nothing this Court says casts doubt on the legal validity of that conclusion.

IV

The Court's remaining criticisms are not well founded. The Court, for example, criticizes the Court of Appeals for having referred to the "circumstances" that "warrant Rule 60(b)(5) relief as '*likely rare*,'" for having said the petitioners would have to "*sweep away*" the District Court's "funding determination" in order to prevail, for having spoken of the "landscape" as not being "so *radically changed* as to justify relief from judgment without compliance," and for having somewhat diminished the "close[ness]" of its review for "federalism concerns" because the State and its board of education "wish the injunction to remain in place." *Ante*, at 451–452 (first, second, and fourth emphases added; internal quotation marks omitted).

The Court, however, does not explain the context in which the Court of Appeals' statements appeared. That court used its first phrase ("likely rare") to refer to the *particular kind* of modification that the State sought, namely, complete relief from the original judgment, even if the judgment's objective was not yet fully achieved. 516 F. 3d, at 1167;

cf. Moore § 60.47[2][c]. As far as I know it is indeed "rare" that "a prior judgment is so undermined by later circumstances as to render its continued enforcement inequitable" even though compliance with the judgment's legal determination has not occurred. 516 F. 3d, at 1167. At least, the Court does not point to other instances that make it common. Uses of the words "sweeping" and "radica[l] change" in context refer to the deference owed to the District Court's 2000 legal determination. See *id.*, at 1168 (describing the 2000 order's "basic determination" that English-learning "programs require substantial state funding in addition to that spent on basic educational programming"). If there is an error (which I doubt, see *supra*, at 492–494), the error is one of tone, not of law.

Nor do I see any legal error that could have made a difference when the Court of Appeals said it should downplay the importance of federalism concerns because some elements of Arizona's state government support the judgment. I do not know the legal basis for the majority's reference to this recalibration of judicial distance as "flatly incorrect," but, if it is wrong, I still do not see how recalibrating the recalibration could matter.

In sum, the majority's decision to set aside the lower court decisions rests upon (1) a mistaken effort to drive a wedge between (a) review of funding plan changes and (b) review of changes that would bring the State into compliance with federal law, Part I, *supra;* (2) a misguided attempt to show that the lower courts applied the wrong legal standards, Part II, *supra;* (3) a mistaken belief that the lower courts made four specific fact-based errors, Part III, *supra;* and (4) a handful of minor criticisms, Part IV, *supra* and this page. By tracing each of these criticisms to its source in the record, I have tried to show that each is unjustified. Whether taken separately or together, they cannot warrant setting aside the Court of Appeals' decision.

V

As a totally separate matter, the Court says it is "unclear" whether the District Court improperly ordered statewide injunctive relief instead of confining that relief to Nogales. And it orders the District Court to vacate the injunction "insofar as it extends beyond Nogales" unless the court finds that "Arizona is violating" subsection (f) "on a statewide basis." *Ante*, at 472.

What is the legal support for this part of the majority's opinion? Prior to the appearance of these cases in this Court, no one asked for that modification. Nothing in the law, as far as I know, makes the relief somehow clearly erroneous. Indeed, as the majority recognizes, the reason that the injunction runs statewide is that the State of Arizona, the defendant in the litigation, *asked the Court to enter that relief.* The State pointed in support to a state constitutional provision requiring educational uniformity. See *ante*, at 471. There is no indication that anyone disputed whether the injunction should have statewide scope. A statewide program harmed Nogales' students, App. 13–14, ¶¶ 40, 42; and the State wanted statewide relief. What in the law makes this relief erroneous?

The majority says that the District Court must consider this matter because the "[p]etitioners made it clear at oral argument that they wish to argue that the extension of the remedy to districts other than Nogales should be vacated." *Ante*, at 470, n. 23. I find the matter less clear. I would direct the reader to the oral argument transcript, which reads in part:

> "MR. STARR: . . . What was entered here in this order, which makes it so extraordinary, is that the entire State funding mechanism has been interfered with by the order. This case started out in Nogales. . . .
>
> "JUSTICE SCALIA: Well, I—I agree with that. I think it was a vast mistake to extend a lawsuit that

applied only to Nogales to the whole State, but the State attorney general wanted that done.

"MR. STARR: But we should be able now to—

"JUSTICE SCALIA: But that's—that's water over the dam. That's not what this suit is about now." Tr. of Oral Arg. 26.

Regardless, what is the legal basis for the Court's order telling the District Court it *must* reconsider the matter? There is no clear error. No one has asked the District Court for modification. And the scope of relief is primarily a question for the District Court. *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies").

VI

As the length of the opinions indicates, these cases require us to read a highly detailed record. Members of this Court have reached different conclusions about what that record says. But there is more to the case than that.

First, even if one sees these cases as simply a technical record-reading case, the disagreement among us shows why this Court should ordinarily hesitate to hear cases that require us to do no more than to review a lengthy record simply to determine whether a lower court's fact-based determinations are correct. Cf. *Universal Camera*, 340 U. S., at 488 ("[A] court may [not] displace" a "choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*"); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949) (noting the well-settled rule that this Court will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"). In such cases, appellate

courts are closer to the fray, better able to reach conclusions that are true to the record, and are more likely to treat trial court determinations fairly and with respect—as is clearly so here.

Second, insofar as the Court goes beyond the technical record-based aspects of these cases and applies a new review framework, it risks problems in future cases. The framework it applies is incomplete and lacks clear legal support or explanation. And it will be difficult for lower courts to understand and to apply that framework, particularly if it rests on a distinction between "institutional reform litigation" and other forms of litigation. Does the Court mean to say, for example, that courts must, on their own, go beyond a party's own demands and relitigate an underlying legal violation whenever that party asks for modification of an injunction? How could such a rule work in practice? See *supra*, at 492–494. Does the Court mean to suggest that there are other special, strict prodefendant rules that govern review of district court decisions in "institutional reform cases"? What precisely are those rules? And when is a case an "institutional reform" case? After all, as I have tried to show, see *supra*, at 489–490, the cases before us cannot easily be fitted onto the Court's Procrustean "institutional reform" bed.

Third, the Court may mean its opinion to express an attitude, cautioning judges to take care when the enforcement of federal statutes will impose significant financial burdens upon States. An attitude, however, is not a rule of law. Nor does any such attitude point toward vacating the Court of Appeals' opinion here. The record makes clear that the District Court did take care. See *supra*, at 486. And the Court of Appeals too proceeded with care, producing a detailed opinion that is both true to the record and fair to the lower court and to the parties' submissions as well. I do not see how this Court can now require lower court judges to take yet greater care, to proceed with even greater caution,

while at the same time expecting those courts to enforce the statute as Congress intended.

Finally, we cannot and should not fail to acknowledge the underlying subject matter of this proceeding. These cases concern the rights of Spanish-speaking students, attending public school near the Mexican border, to learn English in order to live their lives in a country where English is the predominant language. In a Nation where nearly 47 million people (18% of the population) speak a language other than English at home, U. S. Dept. of Commerce, Economics and Statistics Admin., Census Bureau, Census 2000 Brief: Language Use and English-Speaking Ability 2 (Oct. 2003), it is important to ensure that those children, without losing the cultural heritage embodied in the language of their birth, nonetheless receive the English-language tools they need to participate in a society where that second language "serves as the fundamental medium of social interaction" and democratic participation. Rodríguez, Language and Participation, 94 Cal. L. Rev. 687, 693 (2006). In that way linguistic diversity can complement and support, rather than undermine, our democratic institutions. *Id.*, at 688.

At least, that is what Congress decided when it set federal standards that state officials must meet. In doing so, without denying the importance of the role of state and local officials, it also created a role for federal judges, including judges who must see that the States comply with those federal standards. Unfortunately, for reasons I have set forth, see Part II, *supra*, the Court's opinion will make it more difficult for federal courts to enforce those federal standards. Three decades ago, Congress put this statutory provision in place to ensure that our Nation's school systems will help non-English-speaking schoolchildren overcome the language barriers that might hinder their participation in our country's schools, workplaces, and the institutions of everyday politics and government, *i. e.*, the "arenas through which

most citizens live their daily lives." Rodríguez, *supra*, at 694. I fear that the Court's decision will increase the difficulty of overcoming barriers that threaten to divide us.

For the reasons set forth in this opinion, I respectfully dissent.

Appendix A to opinion of BREYER, J.

APPENDIXES

A

PERFORMANCE ON CONTENT-BASED ASSESSMENT TESTS—SPRING 2006*

MATH

GRADE	ELL STUDENTS PASSING EXAM	NON-ELL AND RECLASSIFIED STUDENTS PASSING EXAM
3	54%	94%
4	44%	91%
5	53%	88%
6	23%	82%
7	40%	82%
8	28%	70%

READING

GRADE	ELL STUDENTS PASSING EXAM	NON-ELL AND RECLASSIFIED STUDENTS PASSING EXAM
3	40%	92%
4	19%	83%
5	22%	81%
6	14%	76%
7	13%	74%
8	31%	73%

WRITING

GRADE	ELL STUDENTS PASSING EXAM	NON-ELL AND RECLASSIFIED STUDENTS PASSING EXAM
3	52%	82%
4	52%	87%
5	34%	80%
6	71%	97%
7	66%	98%
8	49%	94%

*App. to Pet. for Cert. in No. 08–289, p. 311.

Appendix B to opinion of BREYER, J.

B

FUNDING AVAILABLE TO NOGALES UNIFIED SCHOOL DISTRICT, PER STUDENT*

TYPE	1999–2000	2000–2001	2001–2002	2002–2003	2003–2004	2004–2005	2005–2006	2006–2007
Base level	$2,592	$2,618	$2,721	$2,788	$2,858	$2,929	$3,039	$3,173
ELL funds	$156	$157	$163	$321	$329	$337	$349	$365
Other state ELL funds	$0	$0	$0	$126	$83	$64	$0	$74
Federal Title I funds	$439	$448	$467	$449	$487	$638	$603	$597
Federal Title II funds	$58	$63	$74	$101	$109	$91	$92	$87
Federal Title III (ELL) funds	$0	$0	$0	$67	$89	$114	$118	$121
State and federal grants	$58	$56	$59	$47	$207	$214	$205	$109
TOTAL[1]	**$3,302**	**$3,342**	**$3,484**	**$3,899**	**$4,162**	**$4,387**	**$4,406**	**$4,605**[2]
Constant dollars (2006)[3]	**$3,866**	**$3,804**	**$3,904**	**$4,272**	**$4,442**	**$4,529**	**$4,406**	**$4,477**
Total ELL funds	**$156**	**$157**	**$163**	**$514**	**$501**	**$515**	**$467**	**$639**

*516 F. 3d 1140, 1159–1160 (CA9 2008); App. to Pet. for Cert. in No. 08–289, pp. 42–43.

[1] Nogales received less per-pupil funding in 2006 than the average provided by every State in the Nation. New Jersey provided the highest, at $14,954; Arizona the third-lowest, at $6,515. 2008 Digest.

[2] As of 2007, county override funds provided an additional $43.43 per student. See 516 F. 3d, at 1158.

[3] Constant dollars based on the Consumer Price Index.

Syllabus

CUOMO, ATTORNEY GENERAL OF NEW YORK *v.* CLEARING HOUSE ASSOCIATION, L. L. C., ET AL.

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

No. 08–453. Argued April 28, 2009—Decided June 29, 2009

To determine whether various national banks had violated New York's fair-lending laws, the State's Attorney General, whose successor in office is the petitioner here, sent them letters in 2005 requesting "in lieu of subpoena" that they provide certain nonpublic information about their lending practices. Respondents, the federal Office of the Comptroller of the Currency (Comptroller or OCC) and a banking trade group, brought suit to enjoin the information request, claiming that the Comptroller's regulation promulgated under the National Bank Act (NBA) prohibits that form of state law enforcement against national banks. The District Court entered an injunction prohibiting the Attorney General from enforcing state fair-lending laws through demands for records or judicial proceedings. The Second Circuit affirmed.

Held: The Comptroller's regulation purporting to pre-empt state law enforcement is not a reasonable interpretation of the NBA. Pp. 524–536.

(a) Evidence from the time of the NBA's enactment, this Court's cases, and application of normal construction principles make clear that the NBA does not prohibit ordinary enforcement of state law. Pp. 524–531.

(i) The NBA provides: "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts . . . , or . . . directed by Congress." 12 U. S. C. § 484(a). Among other things, the Comptroller's regulation implementing § 484(a) forbids States to "exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records," or, as here pertinent, "prosecuting enforcement actions" "except in limited circumstances authorized by federal law." 12 CFR § 7.4000(a)(1). There is some ambiguity in the NBA's term "visitorial powers," and the Comptroller can give authoritative meaning to the term within the bounds of that uncertainty. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837. However, the presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of the NBA. Pp. 524–525.

(ii) When the NBA was enacted in 1864, scholars and courts understood "visitation" to refer to the sovereign's supervisory power over the

manner in which corporations conducted business, see, *e. g.*, *Guthrie* v. *Harkness*, 199 U. S. 148, 157. That power allowed the States to use the prerogative writs to exercise control if a corporation abused its lawful power, acted adversely to the public, or created a nuisance. Pp. 525–526.

(iii) This Court's consistent teaching, both before and after the NBA's enactment, is that a sovereign's "visitorial powers" and its power to enforce the law are two different things. See, *e. g.*, *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 676, 681; *Guthrie*, *supra*, at 159, 157; *First Nat. Bank in St. Louis* v. *Missouri*, 263 U. S. 640, 660. *Watters* v. *Wachovia Bank, N. A.*, 550 U. S. 1, 21, distinguished. And contrary to the Comptroller's regulation, the NBA pre-empts only the former. Pp. 526–529.

(iv) The regulation's consequences also cast its validity into doubt: Even the OCC acknowledges that the NBA leaves in place some state substantive laws affecting banks, yet the Comptroller's rule says that the State may not *enforce* its valid, non-pre-empted laws against national banks. "To demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law." *St. Louis*, *supra*, at 660. In contrast, channeling state attorneys general into judicial law-enforcement proceedings (rather than allowing them to exercise "visitorial" oversight) would preserve a regime of exclusive administrative oversight by the Comptroller while honoring in fact rather than merely in theory Congress's decision not to pre-empt substantive state law. This reading is also suggested by § 484(a)'s otherwise inexplicable reservation of state powers "vested in the courts of justice." And on a pragmatic level, the difference between visitation and law enforcement is clear: If a State chooses to pursue enforcement of its laws in court, its targets are protected by discovery and procedural rules. Pp. 529–531.

(b) The Comptroller's interpretation of the regulation demonstrates its own flaw: The Comptroller is forced to limit the regulation's sweep in areas such as contract enforcement and debt collection, but those exceptions rest upon neither the regulation's nor the NBA's text. Pp. 531–533.

(c) The dissent's objections are addressed and rejected. Pp. 533–535.

(d) Under the foregoing principles, the Comptroller reasonably interpreted the NBA's "visitorial powers" term to include "conducting examinations [and] inspecting or requiring the production of books or records of national banks," when the State conducts those activities as supervisor of corporations. When, however, a state attorney general brings suit to enforce state law against a national bank, he is not acting in the role of sovereign-as-supervisor, but rather sovereign-as-law-enforcer.

Syllabus

Because such a lawsuit is not an exercise of "visitorial powers," the Comptroller erred by extending that term to include "prosecuting enforcement actions" in state courts. In this case, the Attorney General's threatened action was not the bringing of a civil suit, or the obtaining of a judicial search warrant based on probable cause, but the issuance of subpoena on his own authority if his request for information was not voluntarily honored. That is not the exercise of the law-enforcement power "vested in the courts of justice," which the NBA exempts from the ban on the exercise of supervisory power. Accordingly, the injunction below is affirmed as applied to the Attorney General's threatened issuance of executive subpoenas, but vacated insofar as it prohibits the Attorney General from bringing judicial enforcement actions. Pp. 535–536.

510 F. 3d 105, affirmed in part and reversed in part.

SCALIA, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which ROBERTS, C. J., and KENNEDY and ALITO, JJ., joined, *post,* p. 537.

Barbara D. Underwood, Solicitor General of New York, argued the cause for petitioner. With her on the briefs were *Andrew M. Cuomo*, Attorney General, *pro se*, *Michelle Aronowitz*, Deputy Solicitor General, and *Richard Dearing*, Assistant Solicitor General.

Deputy Solicitor General Stewart argued the cause for the federal respondent. With him on the brief were *Solicitor General Kagan*, *Matthew D. Roberts*, *Julie L. Williams*, *Daniel P. Stipano*, *Horace G. Sneed*, and *Douglas B. Jordan*. *Seth P. Waxman* argued the cause for respondent Clearing House Association, L. L. C. With him on the brief were *Edward C. DuMont*, *Catherine M. A. Carroll*, *Christopher R. Lipsett*, *Noah A. Levine*, *Anne K. Small*, *H. Rodgin Cohen*, *Robinson B. Lacy*, and *Michael M. Wiseman*.*

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*Briefs of *amici curiae* urging reversal were filed for Members of Congress by *Linda Singer* and *David Reiser;* for the State of North Carolina et al. by *Roy Cooper*, Attorney General of North Carolina, *Christopher G. Browning, Jr.*, Solicitor General, *Gary R. Govert*, Special Deputy Attorney General, and *Philip A. Lehman*, Assistant Attorney General, and by the Attorneys General and other officials for their respective jurisdictions as follows: *Troy King*, Attorney General of Alabama, *Richard A. Svobodny*,

JUSTICE SCALIA delivered the opinion of the Court.

In 2005, Eliot Spitzer, Attorney General for the State of New York, sent letters to several national banks making a

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Acting Attorney General of Alaska, *Terry Goddard*, Attorney General of Arizona, *Dustin McDaniel*, Attorney General of Arkansas, *Edmund G. Brown, Jr.*, Attorney General of California, *John W. Suthers*, Attorney General of Colorado, *Richard Blumenthal*, Attorney General of Connecticut, *Richard S. Gebelein*, Chief Deputy Attorney General of Delaware, *Peter J. Nickles*, Attorney General of the District of Columbia, *Bill McCollum*, Attorney General of Florida, *Thurbert E. Baker*, Attorney General of Georgia, *Mark J. Bennett*, Attorney General of Hawaii, *Lawrence Wasden*, Attorney General of Idaho, *Lisa Madigan*, Attorney General of Illinois, *Gregory F. Zoeller*, Attorney General of Indiana, *Tom Miller*, Attorney General of Iowa, *Steve Six*, Attorney General of Kansas, *Jack Conway*, Attorney General of Kentucky, *James D. Caldwell*, Attorney General of Louisiana, *Janet T. Mills*, Attorney General of Maine, *Douglas F. Gansler*, Attorney General of Maryland, *Martha Coakley*, Attorney General of Massachusetts, *Michael A. Cox*, Attorney General of Michigan, *Lori Swanson*, Attorney General of Minnesota, *Jim Hood*, Attorney General of Mississippi, *Chris Koster*, Attorney General of Missouri, *Steve Bullock*, Attorney General of Montana, *Jon Bruning*, Attorney General of Nebraska, *Catherine C. Masto*, Attorney General of Nevada, *Kelly A. Ayotte*, Attorney General of New Hampshire, *Anne Milgram*, Attorney General of New Jersey, *Gary K. King*, Attorney General of New Mexico, *Wayne Stenehjem*, Attorney General of North Dakota, *Richard Cordray*, Attorney General of Ohio, *W. A. Drew Edmondson*, Attorney General of Oklahoma, *John R. Kroger*, Attorney General of Oregon, *Thomas W. Corbett, Jr.*, Attorney General of Pennsylvania, *Patrick C. Lynch*, Attorney General of Rhode Island, *Henry McMaster*, Attorney General of South Carolina, *Lawrence E. Long*, Attorney General of South Dakota, *Robert E. Cooper, Jr.*, Attorney General of Tennessee, *Greg Abbott*, Attorney General of Texas, *Mark L. Shurtleff*, Attorney General of Utah, *William H. Sorrell*, Attorney General of Vermont, *William C. Mims*, Attorney General of Virginia, *Rob McKenna*, Attorney General of Washington, *Darrell V. McGraw, Jr.*, Attorney General of West Virginia, *J. B. Van Hollen*, Attorney General of Wisconsin, and *Bruce A. Salzburg*, Attorney General of Wyoming; for the American Association of Residential Mortgage Regulators by *Stefan L. Jouret, John Foskett*, and *Arthur E. Wilmarth, Jr.;* for the Center for Responsible Lending et al. by *Eric Halperin, Jean Constantine-Davis, Nina F. Simon*, and *Michael Schuster;* for the Comptroller of the City of New York by *Lewis S. Finkelman;* for the Conference

request "in lieu of subpoena" that they provide certain nonpublic information about their lending practices. He sought this information to determine whether the banks had violated the State's fair-lending laws. Spitzer's successor in office, Andrew Cuomo, is the petitioner here. Respondents, the federal Office of the Comptroller of the Currency (Comptroller or OCC) and the Clearing House Association, a banking trade group, brought suit to enjoin the information request, claiming that the Comptroller's regulation promulgated under the National Bank Act prohibits that form of state law enforcement against national banks.

The United States District Court for the Southern District of New York entered an injunction in favor of respondents, prohibiting the Attorney General from enforcing state fair-lending laws through demands for records or judicial proceedings. The United States Court of Appeals for the Second Circuit affirmed. 510 F. 3d 105 (2007). We granted certiorari. 555 U. S. 1130 (2009). The question presented is whether the Comptroller's regulation purporting to pre-

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of State Bank Supervisors by *David T. Goldberg*, *Sean H. Donahue*, and *John Gorman;* for the Connecticut Fair Housing Center by *Jonathan R. Macey;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Amy Howe*, *Kevin K. Russell*, *Pamela S. Karlan*, *Jeffrey Fisher*, *Joshua Civin*, *John Payton*, *Jacqueline A. Berrien*, and *Debo P. Adegbile;* for the National Association of Realtors by *David C. Frederick*, *Scott H. Angstreich*, *Laurene K. Janik*, and *Ralph W. Holmen;* for the National Governors Association et al. by *Richard Ruda* and *Thomas W. Merrill;* and for the North American Securities Administrators Association, Inc., by *Keith R. Fisher.*

Briefs of *amici curiae* urging affirmance were filed for All Former Comptrollers of the Currency Since 1973 by *Drew S. Days III*, *L. Richard Fischer*, *Seth M. Galanter*, *Howard N. Cayne*, *Laurence J. Hutt*, and *Nancy L. Perkins;* for the American Bankers Association et al. by *Theodore B. Olson*, *Mark A. Perry*, and *Amir C. Tayrani;* for the Chamber of Commerce of the United States of America by *Sri Srinivasan*, *Robin S. Conrad*, and *Amar D. Sarwal;* and for the Financial Services Roundtable by *Robert A. Long, Jr.*, *Stuart C. Stock*, *Keith A. Noreika*, and *Hal S. Scott.*

empt state law enforcement can be upheld as a reasonable interpretation of the National Bank Act.

I

Section 484(a) of Title 12 U. S. C., a provision of the National Bank Act, 13 Stat. 99, reads as follows:

> "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized."

The Comptroller, charged with administering the National Bank Act, adopted, through notice-and-comment rulemaking, the regulation at issue here designed to implement the statutory provision. Its principal provisions read as follows:

> "§ 7.4000 Visitorial powers.
>
> "(a) *General rule.* (1) Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law. However, production of a bank's records (other than nonpublic OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.
>
> "(2) For purposes of this section, visitorial powers include:
>
> "(i) Examination of a bank;
>
> "(ii) Inspection of a bank's books and records;
>
> "(iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and

> "(iv) Enforcing compliance with any applicable federal or state laws concerning those activities." 12 CFR § 7.4000 (2009).

By its clear text, this regulation prohibits the States from "prosecuting enforcement actions" except in "limited circumstances authorized by federal law."

Under the familiar *Chevron* framework, we defer to an agency's reasonable interpretation of a statute it is charged with administering. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). There is necessarily some ambiguity as to the meaning of the statutory term "visitorial powers," especially since we are working in an era when the prerogative writs—through which visitorial powers were traditionally enforced—are not in vogue. The Comptroller can give authoritative meaning to the statute within the bounds of that uncertainty. But the presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of the National Bank Act. We can discern the outer limits of the term "visitorial powers" even through the clouded lens of history. They do not include, as the Comptroller's expansive regulation would provide, ordinary enforcement of the law. Evidence from the time of the statute's enactment, a long line of our own cases, and application of normal principles of construction to the National Bank Act make that clear.

A

Historically, the sovereign's right of visitation over corporations paralleled the right of the church to supervise its institutions and the right of the founder of a charitable institution "to see that [his] property [was] rightly employed," 1 W. Blackstone, Commentaries on the Laws of England 469 (1765). By extension of this principle, "[t]he king [was] by law the visitor of all civil corporations," *ibid.* A visitor could inspect and control the visited institution at will.

When the National Bank Act was enacted in 1864, "visitation" was accordingly understood as "[t]he act of examining into the affairs of a corporation" by "the government itself." 2 J. Bouvier, A Law Dictionary 790 (15th ed. 1883). Lower courts understood "visitation" to mean "the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations." *First Nat. Bank of Youngstown* v. *Hughes*, 6 F. 737, 740 (CC ND Ohio 1881). A State was the "visitor" of all companies incorporated in the State, simply by virtue of the State's role as sovereign: The "legislature is the visitor of all corporations founded by it." *Guthrie* v. *Harkness*, 199 U. S. 148, 157 (1905) (internal quotation marks omitted).

This relationship between sovereign and corporation was understood to allow the States to use prerogative writs—such as mandamus and *quo warranto*—to exercise control "whenever a corporation [wa]s abusing the power given it . . . or acting adversely to the public, or creating a nuisance." H. Wilgus, Private Corporations, in 8 American Law and Procedure § 157, pp. 224–225 (J. Hall ed. 1910). State visitorial commissions were authorized to "exercise a general supervision" over companies in the State. I. Wormser, Private Corporations § 80, pp. 100, 101, in 4 Modern American Law (1921).

B

Our cases have always understood "visitation" as this right to oversee corporate affairs, quite separate from the power to enforce the law. In the famous *Dartmouth College* case, Justice Story, describing visitation of a charitable corporation, wrote that Dartmouth was "subject to the controling authority of its legal visitor, who . . . may amend and repeal its statutes, remove its officers, correct abuses, and generally superintend the management of [its] trusts," and who is "liable to no supervision or control." *Trustees of*

Dartmouth College v. *Woodward*, 4 Wheat. 518, 676, 681 (1819) (concurring opinion). This power of "genera[l] superintend[ence]" stood in contrast to action by the court of chancery, which acted "not as itself possessing a visitorial power . . . but as possessing a general jurisdiction . . . to redress grievances, and frauds." *Id.*, at 676.[1]

In *Guthrie*, *supra*, we held that a shareholder acting in his role as a private individual was not exercising a "visitorial power" under the National Bank Act when he petitioned a court to force the production of corporate records, *id.*, at 159. "[C]ontrol in the courts of justice," we said, is not visitorial, and we drew a contrast between the nonvisitorial act of "su[ing] in the courts of the State" and the visitorial "supervision of the Comptroller of the Currency," *id.*, at 159, 157.

In *First Nat. Bank in St. Louis* v. *Missouri*, 263 U. S. 640 (1924), we upheld the right of the Attorney General of Missouri to bring suit to enforce a state anti-bank-branching law against a national bank. We said that only the United States may perform visitorial administrative oversight, such as "inquir[ing] by *quo warranto* whether a national bank is acting in excess of its charter powers." *Id.*, at 660. But if a state statute of general applicability is not substantively

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[1] JUSTICE THOMAS's opinion concurring in part and dissenting in part (hereinafter the dissent) attempts to distinguish *Dartmouth College* on the ground that the college was a charitable corporation, whose visitors (unlike the State as visitor of for-profit corporations) had no law-enforcement power. See *post*, at 543, n. 1. We doubt that was so. As Justice Story's opinion in *Dartmouth College* stated, visitors of charitable corporations had "power to . . . correct all irregularities and abuses," 4 Wheat., at 673, which would surely include operations in violation of law. But whether or not visitors of charitable corporations had law-enforcement powers, the powers that they *did* possess demonstrate that visitation is different from ordinary law enforcement. Indeed, if those powers did not include the power to assure compliance with law that demonstration would be all the more forceful.

pre-empted, then "the power of enforcement must rest with the [State] and not with" the National Government, *ibid.*[2]

Our most recent decision, *Watters* v. *Wachovia Bank, N. A.*, 550 U. S. 1 (2007), does not, as the dissent contends, *post*, at 552, "suppor[t] OCC's construction of the statute." To the contrary, it is fully in accord with the well established distinction between supervision and law enforcement. *Watters* held that a State may not exercise "'general supervision and control'" over a subsidiary of a national bank, 550 U. S., at 8, because "multiple audits and surveillance under rival oversight regimes" would cause uncertainty, *id.*, at 21. "[G]eneral supervision and control" and "oversight" are worlds apart from law enforcement. All parties to the case agreed that Michigan's general oversight regime could not be imposed on national banks; the sole question was whether operating subsidiaries of national banks enjoyed the same immunity from state visitation. The opinion addresses and answers no other question.

The foregoing cases all involve enforcement of state law. But if the Comptroller's exclusive exercise of visitorial powers precluded law enforcement by the States, it would also preclude law enforcement by federal agencies. Of course it does not. See, *e. g.*, *Bank of America Nat. Trust & Sav. Assn.* v. *Douglas*, 105 F. 2d 100, 105–106 (CADC 1939) (Secu-

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[2] The dissent attempts to distinguish *St. Louis* by invoking the principle that an agency is free to depart from a court's interpretation of the law. *Post*, at 550–551 (citing *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 983 (2005)). This again misses the point. *St. Louis* is relevant to proper interpretation of 12 U. S. C. § 484(a) not because it is authoritative on the question whether States can enforce their banking laws, but because it is one in a long and unbroken line of cases distinguishing visitation from law enforcement. Respondents contend that *St. Louis* holds only that States can enforce their law when federal law grants the national bank no authority to engage in the activity at issue. Even if that were true it would make no difference. The case would still stand for the proposition that the exclusive federal power of visitation does not prevent States from enforcing their law.

rities Exchange Commission investigation of bank fraud is not an exercise of "visitorial powers"); *Peoples Bank of Danville* v. *Williams*, 449 F. Supp. 254, 260 (WD Va. 1978) (same).

In sum, the unmistakable and utterly consistent teaching of our jurisprudence, both before and after enactment of the National Bank Act, is that a sovereign's "visitorial powers" and its power to enforce the law are two different things. There is not a credible argument to the contrary. And contrary to what the Comptroller's regulation says, the National Bank Act pre-empts only the former.

C

The consequences of the regulation also cast doubt upon its validity. No one denies that the National Bank Act leaves in place some state substantive laws affecting banks. See Brief for Federal Respondent 20; Brief for Respondent Clearing House Association, L. L. C. 29; *post*, at 552. But the Comptroller's rule says that the State may not *enforce* its valid, non-pre-empted laws against national banks. *Post*, at 552–553. The bark remains, but the bite does not.

The dissent admits, with considerable understatement, that such a result is "unusual," *post*, at 556. "Bizarre" would be more apt. As the Court said in *St. Louis:*

> "To demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law." 263 U. S., at 660.

In sharp contrast to the "unusual" reading propounded by the Comptroller's regulation, reading "visitorial powers" as limiting only sovereign oversight and supervision would produce an entirely commonplace result—the precise result contemplated by our opinion in *St. Louis*, which said that if a state statute is valid as to national banks, "the corollary that it is obligatory *and enforceable* necessarily results."

Id., at 659–660 (emphasis added). Channeling state attorneys general into judicial law-enforcement proceedings (rather than allowing them to exercise "visitorial" oversight) would preserve a regime of exclusive administrative oversight by the Comptroller while honoring in fact rather than merely in theory Congress's decision not to pre-empt substantive state law. This system echoes many other mixed state/federal regimes in which the Federal Government exercises general oversight while leaving state substantive law in place. See, *e. g.*, *Wyeth* v. *Levine*, 555 U. S. 555 (2009).

This reading is also suggested by § 484(a)'s otherwise inexplicable reservation of state powers "vested in the courts of justice." As described earlier, visitation was normally conducted through use of the prerogative writs of mandamus and *quo warranto*. The exception could not possibly exempt that manner of exercising visitation, or else the exception would swallow the rule. Its only conceivable purpose is to preserve normal civil and criminal lawsuits. To be sure, the reservation of powers "vested in the courts of justice" is phrased as an exception from the prohibition of visitorial powers. But as we have just discussed, it cannot possibly be that, and it is explicable only as an attempt to make clear that the courts' ordinary powers of enforcing the law are not affected.[3]

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[3] We reject respondents' contention that the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, § 102(f)(1)(B), 108 Stat. 2349, 12 U. S. C. § 36(f)(1)(B), establishes that the Comptroller's visitorial power pre-empts state law enforcement. That provision states that some state laws respecting bank branching "shall be enforced" by the Comptroller. We need not decide here whether converting the Comptroller's visitorial *power* to assure compliance with all applicable laws, see *infra*, at 534, into an *obligation* to assure compliance with certain state laws pre-empts state enforcement of those particular laws. Even if it had that effect it would shed no light on the meaning of "visitorial powers" in the National Bank Act, a statute that it does not refer to and that was enacted more than a century earlier.

On a pragmatic level, the difference between visitation and law enforcement is clear. If a State chooses to pursue enforcement of its laws in court, then it is not exercising its power of visitation and will be treated like a litigant. An attorney general acting as a civil litigant must file a lawsuit, survive a motion to dismiss, endure the rules of procedure and discovery, and risk sanctions if his claim is frivolous or his discovery tactics abusive. Judges are trusted to prevent "fishing expeditions" or an undirected rummaging through bank books and records for evidence of some unknown wrongdoing. In New York, civil discovery is far more limited than the full range of "visitorial powers" that may be exercised by a sovereign. Courts may enter protective orders to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice," N. Y. Civ. Prac. Law Ann. § 3103(a) (West 2005), and may supervise discovery *sua sponte*, § 3104(a). A visitor, by contrast, may inspect books and records at any time for any or no reason.

II

The Comptroller's regulation, therefore, does not comport with the statute. Neither does the Comptroller's *interpretation* of its regulation, which differs from the text and must be discussed separately.

Evidently realizing that exclusion of state enforcement of *all* state laws against national banks is too extreme to be contemplated, the Comptroller sought to limit the sweep of its regulation by the following passage set forth in the agency's statement of basis and purpose in the Federal Register:

> "What the case law *does* recognize is that 'states retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law.' [citing a Ninth Circuit case.] Application of these laws to national banks and their implementation by state

> authorities typically does not affect the content or extent of the Federally-authorized business of banking . . . but rather establishes the legal infrastructure that surrounds and supports the ability of national banks . . . to do business." 69 Fed. Reg. 1896 (2004) (footnote omitted).

This cannot be reconciled with the regulation's almost categorical prohibition in 12 CFR § 7.4000(a)(1) of "prosecuting enforcement actions."[4] Nor can it be justified by the provision in subsection (a)(2)(iv) which defines visitorial powers to include "[e]nforcing compliance with any applicable . . . state laws concerning" "activities authorized or permitted pursuant to federal banking law," § 7.4000(a)(2)(iii). The latter phrase cannot be interpreted to include only distinctively banking activities (leaving the States free to enforce nonbanking state laws), because if it were so interpreted subsection (a)(2)(iii), which uses the same terminology, would limit the Comptroller's exclusive visitorial power of "[r]egulation and supervision" to distinctively banking activities—which no one thinks is the case. Anyway, the National Bank Act *does* specifically authorize and permit activities that fall within what the statement of basis and purpose calls "the legal infrastructure that surrounds and supports the ability

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[4] The prohibition is not entirely categorical only because it is subject to the phrase at the end of the sentence (applicable to all of the regulation's enumerated "visitorial powers" forbidden to the States): "except in limited circumstances authorized by federal law." This replicates a similar exception contained in 12 U. S. C. § 484(a) itself ("No national bank shall be subject to any visitorial powers except as authorized by Federal law"), and certainly does not refer to case law finding state action non-pre-empted. If it meant that, § 484(a)'s apparent limitation of visitorial powers would be illusory—saying, in effect, that national banks are subject to only those visitorial powers that the courts say they are subject to. Cases that find state action non-pre-empted might perhaps be described as "permitting" the state action in question, but hardly as "authorizing" it. In both the statutory and regulation context, "federal law" obviously means federal statutes.

of national banks . . . to do business." See, *e. g.*, 12 U. S. C. § 24 Third (power to make contracts); § 24 Seventh ("all such incidental powers as shall be necessary to carry on the business of banking"). And of course a distinction between "implementation" of "infrastructure" and judicial enforcement of other laws can be found nowhere within the text of the statute. This passage in the statement of basis and purpose, resting upon neither the text of the regulation nor the text of the statute, attempts to do what Congress declined to do: exempt national banks from all state banking laws, or at least state enforcement of those laws.

III

The dissent fails to persuade us. Its fundamental contention—that the exclusive grant of visitorial powers can be interpreted to preclude state enforcement of state laws—rests upon a logical fallacy. The dissent establishes, *post*, at 541–543 (and we do not at all contest), that in the course of exercising visitation powers the sovereign can compel compliance with the law. But it concludes from that, *post*, at 545, that *any* sovereign attempt to compel compliance with the law can be deemed an exercise of the visitation power. That conclusion obviously does not follow. For example, in the course of exercising its visitation powers, the sovereign can assuredly compel a bank to honor obligations that are in default. Does that mean that the sovereign's taking the same action in executing a civil judgment for payment of those obligations can be considered an exercise of the visitation power? Of course not. Many things can be compelled through the visitation power that can be compelled through the exercise of other sovereign power as well. The critical question is not what is being compelled, but what sovereign power has been invoked to compel it. And the power to enforce the law exists separate and apart from the power of visitation.

The dissent argues that the Comptroller's expansive reading of "visitorial powers" does not intrude upon "'the his-

toric police powers of the States,'" *post,* at 554 (quoting *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 230 (1947)), because, like federal maritime law, federal involvement in this field dates to "'the earliest days of the Republic,'" *post,* at 555 (quoting *United States* v. *Locke,* 529 U. S. 89, 108 (2000)). For that reason, the dissent concludes, this case does not raise the sort of federalism concerns that prompt a presumption against pre-emption. We have not invoked the presumption against pre-emption, and think it unnecessary to do so in giving force to the plain terms of the National Bank Act. Neither, however, should the incursion that the Comptroller's regulation makes upon traditional state powers be minimized. Although the sovereign visitorial power of assuring national-bank compliance with *all* laws inhered in the Federal Government from the time of its creation of national banks, the Comptroller was not given authority to enforce non-pre-empted state laws until 1966. See Financial Institutions Supervisory Act of 1966, Tit. III, 80 Stat. 1046–1055. A power first exercised during the lifetime of every current Justice is hardly involvement "from the earliest days of the Republic."

States, on the other hand, have always enforced their general laws against national banks—and have enforced their banking-related laws against national banks for at least 85 years, as evidenced by *St. Louis,* in which we upheld enforcement of a state anti-bank-branching law, 263 U. S., at 656. See also *Anderson Nat. Bank* v. *Luckett,* 321 U. S. 233, 237, 248–249 (1944) (state commissioner of revenue may enforce abandoned-bank-deposit law against national bank through "judicial proceedings"); *State ex rel. Lord* v. *First Nat. Bank of St. Paul,* 313 N. W. 2d 390, 393 (Minn. 1981) (state treasurer may enforce general unclaimed-property law with "specific provisions directed toward" banks against national bank); *Clovis Nat. Bank* v. *Callaway,* 69 N. M. 119, 130–132, 364 P. 2d 748, 756 (1961) (state treasurer may enforce

unclaimed-property law against national-bank deposits); *State* v. *First Nat. Bank of Portland*, 61 Ore. 551, 554–557, 123 P. 712, 714 (1912) (state attorney general may enforce bank-specific escheat law against national bank).[5]

The dissent seeks to minimize the regulation's incursion upon state powers by claiming that the regulation does not "declare the pre-emptive scope of the [National Bank Act]" but merely "interpret[s] the term 'visitorial powers.'" *Post*, at 555. That is much too kind. It is not without reason that the regulation is contained within a subpart of the Comptroller's regulations on "Bank Activities and Operations" that is entitled "Preemption." The purpose and function of the statutory term "visitorial powers" is to define and thereby limit the category of action reserved to the Federal Government and forbidden to the States. Any interpretation of "visitorial powers" necessarily "declares the pre-emptive scope of the NBA," *ibid.* What is clear from logic is also clear in application: The regulation declares that "[s]tate officials may not . . . prosecut[e] enforcement actions." 12 CFR § 7.4000(a). If that is not pre-emption, nothing is.

IV

Applying the foregoing principles to this case is not difficult. "Visitorial powers" in the National Bank Act refers to a sovereign's supervisory powers over corporations. They include any form of administrative oversight that allows a sovereign to inspect books and records on demand, even if the process is mediated by a court through prerogative writs or similar means. The Comptroller reasonably interpreted this statutory term to include "conducting examinations [and] inspecting or requiring the production of books or rec-

[5] All of these cases were decided before Congress added to § 484 its current subsection (b), which authorizes "State auditors and examiners" to review national-bank records to assure compliance with state unclaimed-property and escheat laws. See 96 Stat. 1521.

ords of national banks," § 7.4000, when the State conducts those activities in its capacity as supervisor of corporations.

When, however, a state attorney general brings suit to enforce state law against a national bank, he is not acting in the role of sovereign-as-supervisor, but rather in the role of sovereign-as-law-enforcer. Such a lawsuit is not an exercise of "visitorial powers," and thus the Comptroller erred by extending the definition of "visitorial powers" to include "prosecuting enforcement actions" in state courts, § 7.4000.

The request for information in the present case was stated to be "in lieu of" other action; implicit was the threat that if the request was not voluntarily honored, that other action would be taken. All parties have assumed, and we agree, that if the threatened action would have been unlawful the request-cum-threat could be enjoined. Here the threatened action was not the bringing of a civil suit, or the obtaining of a judicial search warrant based on probable cause, but rather the Attorney General's issuance of subpoena on his own authority under New York Executive Law, which permits such subpoenas in connection with his investigation of "repeated fraudulent or illegal acts . . . in the carrying on, conducting or transaction of business." See N. Y. Exec. Law Ann. § 63(12) (West 2002). That is not the exercise of the power of law enforcement "vested in the courts of justice" which 12 U. S. C. § 484(a) exempts from the ban on exercise of supervisory power.

Accordingly, the injunction below is affirmed as applied to the threatened issuance of executive subpoenas by the Attorney General for the State of New York, but vacated insofar as it prohibits the Attorney General from bringing judicial enforcement actions.

* * *

The judgment of the Court of Appeals is affirmed in part and reversed in part.

It is so ordered.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE ALITO join, concurring in part and dissenting in part.

The Court holds that the term "visitorial powers" as used in the National Bank Act (NBA), 12 U. S. C. § 484(a), refers only "to a sovereign's supervisory powers over corporations," which are limited to "administrative oversight" including "inspect[ion of] books and records on demand." *Ante*, at 535. Based on this definition, the Court concludes that § 484(a) does not pre-empt a "state attorney general['s] . . . suit to enforce state law against a national bank." *Ante*, at 536. I would affirm the Court of Appeals' determinations that the term "visitorial powers" is ambiguous and that it was reasonable for the Office of the Comptroller of the Currency (OCC) to interpret the term to encompass state efforts to obtain national bank records and to enforce state fair lending laws against national banks. Accordingly, I respectfully concur in part and dissent in part.

I

A

The NBA provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized." 12 U. S. C. § 484(a). Through notice-and-comment rulemaking, OCC issued a regulation defining "visitorial powers" as including: "(i) Examination of a bank; (ii) Inspection of a bank's books and records; (iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) Enforcing compliance with any applicable federal or state laws concerning those activities." 12 CFR § 7.4000(a)(2) (2005). OCC further

concluded that 12 U. S. C. § 484(a)'s "vested in the courts of justice" exception pertains only to the "powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law." 12 CFR § 7.4000(b)(2). The Court of Appeals upheld OCC's regulation as reasonable. See 510 F. 3d 105 (CA2 2007).

This Court's decision in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), provides the framework for deciding this case. "In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 980 (2005). Accordingly, "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Ibid.*

OCC is "the administrator charged with supervision of the [NBA]," *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 256 (1995), and it acted through notice-and-comment rulemaking procedures in promulgating the regulation at issue in this case, see 69 Fed. Reg. 1895 (2004). As a result, 12 CFR § 7.4000 falls within the heartland of *Chevron*. See *United States* v. *Mead Corp.*, 533 U. S. 218, 229–230 (2001); see also, *e. g., Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 739 (1996) (deferring to OCC's interpretation of the term "'interest'" in the NBA). "It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering," and "that practice extends to the judgments of the Comptroller of the Cur-

rency with regard to the meaning of the banking laws." *Ibid.* The majority does not disagree. See *ante*, at 525. As a result, the only disputed question is whether the statutory term "visitorial powers" is ambiguous and, if so, whether OCC's construction of it is reasonable.

B

The majority concedes that there is "some ambiguity as to the meaning of the statutory term 'visitorial powers.'" *Ibid.* Yet it concludes that OCC's interpretation of § 484(a) is not entitled to deference because the Court "can discern the outer limits of the term 'visitorial powers' even through the clouded lens of history" and these outer definitional limits "do not include . . . ordinary enforcement of the law." *Ibid.* I cannot agree. The statutory term "visitorial powers" is susceptible to more than one meaning, and the agency's construction is reasonable.

Because the NBA does not define "visitorial powers," the ordinary meaning of the words chosen by Congress provides the starting point for interpreting the statute. See *Dean* v. *United States*, 556 U. S. 568, 572 (2009) ("We start, as always, with the language of the statute" (internal quotation marks omitted)); *Asgrow Seed Co.* v. *Winterboer*, 513 U. S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning"). In 1864, when the NBA was enacted, "visitation" was generally defined as "[i]nspection; superintendence; direction; [and] regulation." 2 A. Burrill, A Law Dictionary and Glossary 598 (2d ed. 1860); see also 2 J. Bouvier, A Law Dictionary 633 (rev. 4th ed. 1852) (defining "visitation" as "[t]he act of examining into the affairs of a corporation"). With respect to civil corporations, "visitation" was conducted "by the government itself, through the medium of the courts of justice." *Id.*, at 634. The Court has previously looked to these definitions in examining the meaning of "visitorial powers" for purposes of the NBA. See *Guthrie* v. *Harkness*, 199 U. S. 148, 158 (1905).

OCC's interpretation of "visitorial powers" to include both "[r]egulation and supervision of activities authorized or permitted pursuant to federal banking law" and "[e]nforcing compliance with any applicable federal or state laws concerning those activities," 12 CFR §§ 7.4000(a)(2)(iii), (iv), fits comfortably within this broad dictionary definition of "visitation." And, in turn, petitioner's demand for nonpublic information to force national banks to comply with state fair lending laws under threat of judicial action would appear to qualify as an attempt to "superinten[d]" the banks' federally authorized operations "through the medium of the courts of justice." See Burrill, *supra*, at 598; Bouvier, *supra*, at 634.

On the other hand, as the majority concludes, "visitorial powers" could be limited to conducting examinations of national banks or otherwise interfering with their internal operations. To support this argument, the majority briefly alludes to the common-law history of visitation. See *ante*, at 525–526; see also *United States* v. *Shabani*, 513 U. S. 10, 13 (1994) ("[A]bsent contrary indications, Congress intends to adopt the common law definition of statutory terms"). In so doing, the majority fully accepts petitioner's argument that "Congress invoked a then-familiar common law term of corporate governance—visitation—to clarify that the States, traditionally the supervisors of private corporations doing business within their jurisdictions, had no authority to examine the condition of a national bank, respond to any perceived financial risk, or hold the bank to its charter or the laws of its creation." Brief for Petitioner 21–22. Under the majority's view, any construction of § 484(a) that fails to preserve the right of the States to enforce through judicial action their generally applicable laws against national banks is unreasonable and, therefore, not entitled to deference. See *ante*, at 528–529.

But contrary to the majority's determination, the common-law tradition does not compel the conclusion that petitioner's definition of visitation is the only permissible in-

terpretation of the term. Indeed, a more thorough examination of § 484(a)'s common-law ancestry suggests the opposite. As the majority notes, see *ante*, at 525–526, the concept of visitation originated in Roman and canon law in which the term was used to describe the church hierarchy's authority over its own institutions, see Pound, Visitatorial Jurisdiction Over Corporations in Equity, 49 Harv. L. Rev. 369, 369–370 (1936). The practice of visitation later expanded to include the supervision of charities, universities, and civil corporations. *Ibid.*

With respect to churches, charities, and universities, a visitor's duties were narrow. In the university setting, for example, the "power of the visitor [was] confined to offences against the *private* laws of the college; he ha[d] no cognizance of acts of disobedience to the general laws of the land." 2 S. Kyd, Law of Corporations 276 (1794) (emphasis in original). The visitor's duties were equally narrow in the governance of ecclesiastical and charitable institutions. See 1 W. Blackstone, Commentaries on the Laws of England 467–472 (1765); *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 673–677 (1819) (Story, J., concurring). If the sweep of a visitor's authority with respect to civil corporations was the same, the majority would have a stronger argument that the "visitorial powers" prohibition was similarly limited. See *ante*, at 525–526. However, the common-law tradition instead suggests that visitorial powers were broader with respect to civil corporations, including banks.

Historically, visitorial authority over civil corporations was exercised only by the sovereign who had broad authority to assure compliance with generally applicable laws. See Blackstone, *supra*, at 469 ("The king being thus constituted by law the visitor of all civil corporations, the law has also appointed the place, wherein he shall exercise this jurisdiction: which is the court of king's bench; where, and where only, all misbehaviors of this kind of corporations are enquired into and redressed, and all their controversies de-

cided"); 2 J. Kent, Commentaries on American Law 241 (1827) (explaining that "visitation of civil corporations is by the government itself, through the medium of the courts of justice"). "Civil corporations, whether public, as the corporations of towns and cities; or private, as bank, insurance, manufacturing, and other companies of the like nature, are not subject to [private] visitation. They are subject to the general law of the land, and amenable to the judicial tribunals for the exercise and the abuse of their powers." *Id.*, at 244; see also J. Angell & S. Ames, Law of Private Corporations § 684, p. 680 (rev. 4th ed. 1852) ("Civil corporations, whether public or private, being created for public use and advantage, properly fall under the superintendency of that sovereign power whose duty it is to take care of the public interest; whereas, corporations, whose object is the distribution of a private benefaction, may well find jealous guardians in the zeal or vanity of the founder, his heirs, or appointees").

States have traditionally exercised their visitorial powers over civil corporations by invoking the authority of the judiciary to "compel domestic corporations or their officers to perform specific duties incumbent on them by reason of their charters, *or under statutes or ordinances or imposed by the common law.*" Pound, *supra*, at 375 (emphasis added); see also S. Merrill, Law of Mandamus § 158, p. 194 (1892) (explaining that "under the visitorial power of the state, any breach of duty by a private corporation may be corrected by" the writ of mandamus and that the duty "may be imposed by [the corporation's] charter, by the general statutes, or by the common law" (footnotes omitted)). As Merrill explained, such actions were employed to compel common carriers and certain other civil corporations to adhere to "statutory or common law" duties, including the duty to "exten[d] to all without discrimination the use of their services." *Id.*, § 162, at 200; see also J. Grant, A Practical Treatise on the Law of Corporations in General, As Well Aggregate as Sole 262

(1854) (explaining that mandamus was available when corporations "refuse[d] to perform a duty cast upon them by the law of the land").[1]

Even before enactment of the NBA, several States enacted laws granting banking commissioners specific authority to investigate compliance with generally applicable laws and to use the courts to ensure observance therewith. See, *e. g.*, Act of Feb. 23, ch. 14, § 2, 1838 Mass. Acts p. 303 (authorizing banking commissioners to "visit" a bank and "examine all [its] affairs" to determine whether it had "complied with the provisions of law applicable to [its] transactions"); Act of May 14, ch. 363, § 12, 1840 N. Y. Laws pp. 307–308 (authorizing banking commissioners to bring judicial actions against banks "found to have violated any law of this state . . . in the same manner and with the like effect as any incorporated bank may be proceeded against for a violation of its

[1] By looking to Justice Story's concurrence in *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518 (1819), for authoritative guidance, see *ante*, at 526–527, the majority seemingly rejects the distinction between the visitor's role in supervising civil corporations and the visitor's far more limited role in supervising private institutions such as churches, universities, and charitable organizations. See *ante*, at 527, n. 1. In *Woodward*, the Court addressed the scope of the visitor's authority over a private college—not a civil corporation. See 4 Wheat., at 562–563 ("The corporation in question is not a *civil*, although it is a *lay* corporation. It is an *eleemosynary* corporation. . . . Eleemosynary corporations are for the management of private property, according to the will of the donors. They are private corporations" (emphasis in original)). Visitors historically did not have "law enforcement power" over churches, universities, and charitable organizations. See *supra*, at 540–541. But there is strong evidence that visitors of civil corporations—*i. e.*, sovereigns—were so empowered. See *supra*, at 541–542 and this page. The distinction between these species of visitation is crucial because it yields divergent understandings as to the scope of the visitor's power to enforce generally applicable laws in court. Moreover, the majority's failure to confront this important difference leaves a gap in its historical analysis that, in turn, undermines its conclusion that OCC's interpretation of § 484(a) was unreasonable.

charter"). Indeed, Congress modeled the NBA after New York's supervisory regime. See J. Knox, A History of Banking in the United States 422 (1903) (reprint 1969).

Petitioner contends, and the majority agrees, that this understanding of the common law confuses the sovereign's "enforcement of general laws that apply equally to all actors within a State, like the ban on discrimination found in New York Executive Law § 296–a" with "an exercise of visitorial powers." Brief for Petitioner 24; see also *ante*, at 529 (concluding that "a sovereign's 'visitorial powers' and its power to enforce the law are two different things"). But this narrow conception of visitorial powers does not fully capture the common law. In a section entitled "Visitorial power," one treatise explained that "[a]s a general rule the state has the same control, in this respect, over corporations that it has over individuals." C. Elliott, Law of Private Corporations § 90, p. 80 (rev. 3d ed. 1900); see also 1 S. Thompson, Commentaries on the Law of Private Corporations § 475, p. 580 (J. Thompson rev. 2d ed. 1908) ("In its visitorial capacity the state checks and controls corporate affairs, even for the protection of those who deal with them"). If the sovereign's power of visitation was limited to oversight of "corporate affairs," visitation would not parallel the sovereign's control over individuals or allow the sovereign to protect through judicial action the rights of individuals who "deal with" the corporation. See *ibid.*

The Wisconsin Supreme Court's decision in *Attorney General* v. *Chicago & Northwestern R. Co.*, 35 Wis. 425 (1874)—which has been referred to as "the leading American case for the visitorial jurisdiction of equity," Pound, 49 Harv. L. Rev., at 380—illustrates the point. In that case, the state attorney general sought a writ of injunction to "restrain the two defendant companies from exacting tolls for the carriage of passengers or freight in excess of the maximum rates established by" Wisconsin law, 35 Wis., at 432. The attorney general "appl[ied] for the writ on behalf of the public," *id.*,

at 531, in order "'to correct abuses and save the rights of the people,'" *id.*, at 572. The court found that the attorney general's visitorial power included enforcement of generally applicable law against civil corporations through courts of equity. See *id.*, at 529–530. As the court explained, the common-law understanding of visitorial powers had expanded beyond its ecclesiastical roots to include such authority. See *id.*, at 530 ("The grounds on which this jurisdiction rests are ancient; but the extent of its application has grown rapidly of late years, until a comparatively obscure and insignificant jurisdiction has become one of great magnitude and public import").

As a result, the majority's conclusion that when "a state attorney general brings suit to enforce state law against a national bank, he is not acting in the role of sovereign-as-supervisor, but rather in the role of sovereign-as-law-enforcer," *ante*, at 536, cannot be reconciled with this leading case or the general common-law understanding on which the decision rests. At common law, all attempts by the sovereign to compel civil corporations to comply with state law—whether through administrative subpoenas or judicial actions—were visitorial in nature. Thus, even if the sovereign's law enforcement and visitorial powers were at one time distinct, by common law, they had merged at least with respect to the enforcement of generally applicable public laws against civil corporations. See Thompson, *supra*, § 460, at 556 ("The police power, *in its visitorial aspect*, as exercised by congress and the several states, extends to the minutest details of the banking business" (emphasis added)). By construing visitation so narrowly, the majority implicitly rejects the efforts of William Blackstone, James Kent, and Roscoe Pound, see *supra*, at 541–542, in elucidating the historical meaning of this concept. Like OCC, each of these venerable legal scholars understood visitation of civil corporations to include the power to enforce generally applicable laws through judicial actions. See *ibid.*

In the end, OCC was presented with a broad dictionary definition of "visitation" and a common-law history suggesting that the scope of the visitor's authority varied in accordance with the nature of the organization under supervision. It is possible that the "visitorial powers" are narrower than OCC concluded. But a visitor's powers could also be broader. There is support for the proposition that visitation includes enforcement of all generally applicable laws. See *supra*, at 540–545 and this page. OCC instead interpreted "visitorial powers" to prohibit only enforcement of laws concerning "activities authorized or permitted pursuant to federal banking law." 12 CFR §§ 7.4000(a)(2)(iii) and (iv). States are thus free to enforce applicable laws that do not regulate federally authorized banking activities, see § 7.4000(a)(3), "including, for example, criminal, tax, zoning, and labor and employment laws," Brief for Federal Respondent 15 (citing 69 Fed. Reg. 1896).

Thus, although the text and history of visitation do not authoritatively support either party's construction of the statute, OCC's decision to adopt a more modest construction than could have been supported by the common-law and dictionary definition reinforces the reasonableness of its regulation. Put simply, OCC selected a permissible construction of a statutory term that was susceptible to multiple interpretations.

C

Petitioner nonetheless argues that the original structure of the NBA compels us to adopt his reading of "visitorial powers." When enacted in 1864, the "visitorial powers" clause was preceded by a statutory provision directing the Comptroller of the Currency to appoint persons "to make a thorough examination into all the affairs of [every banking] association" and to "make a full and detailed report of the condition of the association to the comptroller." Act of June 3, 1864, ch. 106, § 54, 13 Stat. 116. In addition, the "visitorial powers" clause was succeeded by a sentence concerning the

compensation due to the examiners. See *ibid.* Petitioner contends that the placement of the "visitorial powers" clause between these two provisions indicates that it originally meant to ban States only from conducting the particular type of "thorough examination" of banking affairs described in the neighboring provisions. And, petitioner adds, § 484 currently resides in the subchapter of the statute entitled "Bank Examinations," which still includes a provision directing the Comptroller to appoint examiners "to make a thorough examination of all the affairs of the bank and . . . make a full and detailed report of the condition of said bank to the Comptroller of the Currency." 12 U. S. C. § 481.

Petitioner's argument is undermined, however, by other structural attributes of this subchapter. In § 484(b), for example, Congress provided that "[n]otwithstanding" the statute's visitorial-powers prohibition, "State auditors and examiners may . . . review [a national bank's] records solely to ensure compliance with applicable State unclaimed property or escheat laws." Such review does not fall within petitioner's definition of "visitorial powers" because the enforcement of state property laws is in no way associated with national bank examinations or internal operations. Thus, were § 484(a) to have the meaning petitioner assigns, there would have been no reason for Congress to identify the § 484(b) authority as an exception to § 484(a)'s "visitorial powers" prohibition, as the authority granted in § 484(b) would never have been eliminated by § 484(a).

Other exceptions in § 484 also support OCC's construction of the statute. For example, § 484(a) includes an exception for visitations "authorized by Federal law." One type of visitation authorized by law is described in 26 U. S. C. § 3305(c), which provides that "[n]othing contained in [§ 484] shall prevent any State from requiring any national" bank to provide payroll records and reports for unemployment tax purposes. Similarly, 12 U. S. C. § 62 permits state tax officials to inspect national bank shareholder lists. Both provisions would be

unnecessary if "visitorial powers" were limited to bank examinations and internal operations.

In sum, the NBA's structure does not compel the construction of § 484(a)'s text that petitioner advocates. If anything, given the manner in which Congress crafted exceptions to the "visitorial powers" ban in the statute, the opposite is true.[2]

D

The majority also accepts petitioner's contention that OCC's construction of "visitorial powers" is unreasonable because it conflicts with several of this Court's decisions. See *ante*, at 526–529. But petitioner cannot prevail by simply showing that this Court previously adopted a construction of § 484 that differs from the interpretation later chosen by the agency. "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to

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[2] Contrary to the majority's conclusion, see *ante*, at 530, n. 3, petitioner's structural argument is also undermined by the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal), 108 Stat. 2338, which authorized national banks to operate interstate branches. The statute provides that "[t]he laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State" unless federal law separately pre-empts their application or the Comptroller determines that application of the state law would have a "discriminatory effect" on the national bank branch. See *id.*, at 2349–2350, 12 U. S. C. § 36(f)(1)(A). Riegle-Neal further provides that "[t]he provisions of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency." See *id.*, at 2350, 12 U. S. C. § 36(f)(1)(B). The United States has interpreted the "shall be enforced" language to provide OCC with exclusive enforcement authority. See Brief for Federal Respondent 46–48. This construction reinforces OCC's interpretation of § 484(a). If OCC has exclusive authority to enforce state law with respect to interstate branches of national banks, it would be reasonable to interpret the statute to operate similarly with respect to the national banks themselves.

Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U. S., at 982. These decisions do not construe § 484 in a manner that trumps OCC's regulation.

This Court's *only* decision directly addressing the meaning of "visitorial powers" is *Guthrie*, which held that the NBA did not prohibit a suit brought by a private shareholder seeking to inspect the books of a national bank, 199 U. S., at 157. In so holding, the Court contrasted "the private right of the shareholder to have an examination of the business in which he is interested" with a visitor's "public right" to examine "the conduct of the corporation with a view to keeping it within its legal powers." *Id.*, at 158–159. *Guthrie* thus draws a line between enforcement of private rights and the public act of visitation that is consistent with the definition of visitation embraced by OCC. See *id.*, at 158 ("In no case or authority that we have been able to find has there been a definition of this right, which would include the private right of the shareholder to have an examination of the business in which he is interested . . . "). The agency has never taken the position that the "visitorial powers" prohibition extends to private action.

Nor does this Court's decision in *First Nat. Bank in St. Louis* v. *Missouri*, 263 U. S. 640 (1924) *(St. Louis)*, foreclose OCC's construction of the statute. In that case, the State of Missouri brought a *quo warranto* proceeding in state court "to determine [the national bank's] authority to establish and conduct a branch bank in the City of St. Louis." *Id.*, at 655. The Court first held that federal law did not authorize national banks to engage in branch banking. See *id.*, at 656–659. "Having determined that the power sought to be exercised by the bank finds no justification in any law or authority of the United States," the Court then concluded that "the way is open for the enforcement of the state statute." *Id.*, at 660.

Petitioner contends, and the majority agrees, see *ante,* at 527–528, and n. 2, that *St. Louis* stands for the proposition that a State retains the right to enforce any state law that is not substantively pre-empted with respect to national banks, see 263 U. S., at 660 ("To demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law. . . . What the State is seeking to do is to vindicate and enforce its own law . . . "). Under this view, then, because the New York fair lending laws are not substantively pre-empted, he is not exercising "visitorial powers" by enforcing them.

Respondents counter that the holding of *St. Louis* is not so broad. In their view, the Court held only that a State may enforce its laws against a national bank when federal law grants the bank no authority to engage in the underlying activity at issue. See Brief for Respondent Clearing House Association 33–34. Here, federal law expressly authorizes national banks to make mortgage loans. See 12 U. S. C. § 371(a). Thus, unlike in *St. Louis*—in which the relevant state-law-proscribed conduct in a category that was wholly beyond the powers granted to national banks—petitioner seeks to superintend the manner in which the national banks engage in activity expressly authorized by federal law. According to respondents, then, § 484(a)'s ban on unauthorized visitation provides the "controlling reason" forbidding state enforcement that was absent from *St. Louis,* see 263 U. S., at 660.

There is no need to decide which party has the better argument. The *St. Louis* decision nowhere references § 484(a) or addresses "visitorial powers." Thus, as noted above, even if the decision is best read to support petitioner's view of the statute, that conclusion is insufficient to deny *Chevron* deference to OCC's construction of § 484(a). "Since *Chevron* teaches that a court's opinion as to the best reading of an

ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes." *Brand X*, *supra*, at 983. A judicial decision that fails to directly confront the provision at issue cannot be deemed to have adopted the "authoritative" construction of the statute.[3] Petitioner's reliance on other decisions of this Court is misplaced for this very same reason. See *First Nat. Bank in Plant City* v. *Dickinson*, 396 U. S. 122 (1969); *Anderson Nat. Bank* v. *Luckett*, 321 U. S. 233 (1944); *First Nat. Bank of Bay City* v. *Fellows*, 244 U. S. 416 (1917); *Easton* v. *Iowa*, 188 U. S. 220 (1903); *Waite* v. *Dowley*, 94 U. S. 527 (1877); *National Bank* v. *Commonwealth*, 9 Wall. 353 (1870). None of these decisions addressed the meaning of "visitorial powers" for purposes of § 484(a), let alone provided a definitive construction of the statute.

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[3] The majority's suggestion that the Court's decision in *First Nat. Bank in St. Louis* v. *Missouri*, 263 U. S. 640 (1924), is not "authoritative" falls short of the mark. See *ante*, at 528, n. 2; see, *e. g.*, *ante*, at 529 ("[R]eading 'visitorial powers' as limiting only sovereign oversight and supervision would produce an entirely commonplace result—the precise result contemplated by our opinion in *St. Louis*"). According to the majority, irrespective of which party has the better reading of that case, it "would still stand for the proposition that the exclusive federal power of visitation does not prevent States from enforcing their law." *Ante*, at 528, n. 2. But that conclusion rests on the assumption that the *St. Louis* Court shared the majority's conception of law enforcement and visitation as categorically distinct for purposes of § 484(a). It is impossible to verify that assumption, however, because the bank never raised the "visitorial powers" defense in that case. See Reply Brief for Petitioner 6. If the *Chevron* doctrine is to have any interpretative value, an agency's construction of a statute cannot be foreclosed by a prior judicial decision in which the provision in question was neither raised by the parties nor passed upon by the court.

Finally, this Court's decision in *Watters* v. *Wachovia Bank, N. A.*, 550 U. S. 1 (2007), supports OCC's construction of the statute. *Watters* addressed whether the NBA pre-empted the application of certain Michigan laws to the mortgage-lending activities of an operating subsidiary of a national bank. See *id.*, at 7–8. In deciding that issue, the Court did not reach the question presented here. But the Court was fully aware that the Michigan statutes granted state banking commissioners the very enforcement authority that petitioner seeks to exert over the national banks in this case. See *id.*, at 9–10 (citing Mich. Comp. Laws Ann. §§ 445.1661 (West 2002), 493.56b (West Supp. 2005)); see also 550 U. S., at 34 (STEVENS, J., dissenting) (describing §§ 445.1661 and 493.56b as "state visitorial oversight").[4]

As the Court explained, although "the Michigan provisions at issue exempt[ed] national banks from coverage . . . [t]his [was] not simply a matter of the Michigan Legislature's grace. For, as the parties recognize, the NBA would have preemptive force, *i. e.*, it would spare a national bank from state controls of the kind here involved." *Id.*, at 13 (citations omitted); see *ibid.* (explaining that "real estate lending, when conducted by a national bank, is immune from state visitorial control"). The Court's conclusion in *Watters* that § 484(a) deprives the States of inspection and enforcement authority over the mortgage-lending practices of national

[4] The majority contends that *Watters* is "fully in accord with the well established distinction between supervision and law enforcement." *Ante*, at 528. But this argument ignores the reach of the statutes that the Court assumed were visitorial in *Watters*. The Michigan laws at issue in *Watters* allowed for much more than "'general supervision and control'" of the operating subsidiaries of national banks. *Ante*, at 528. They also included provisions permitting the state attorney general to "take any appropriate legal action to enjoin the operation of the business" and allowing the commissioner "[t]o bring an action in . . . circuit court in the name and on behalf of this state" to enjoin "any unsafe or injurious practice or act in violation of this act or a rule promulgated under this act." §§ 445.1661(e), 493.56b.

banks lends weight to the agency's construction of the statute.

II

Petitioner also argues that three different background principles trigger a clear-statement rule that overcomes any *Chevron* deference to which OCC's construction of § 484 otherwise might be entitled. I disagree. None of petitioner's arguments provide a doctrinal basis for refusing to defer to the agency's reasonable construction of this statute.

First, petitioner contends that OCC's regulation, which interprets § 484(a) to pre-empt state enforcement of state law but not the substantive state law itself, undermines important federalism principles and therefore triggers a requirement that Congress clearly state its pre-emptive intentions, see *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991) ("[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute" (internal quotation marks omitted; alteration in original)). Petitioner is incorrect because OCC's construction of the statute does not alter the balance of power established by the Constitution.

National banks are created by federal statute and therefore are subject to full congressional control. The States "can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Farmers' and Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29, 34 (1875); see also *Watters*, 550 U. S., at 10 ("Nearly 200 years ago, in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), this Court held federal law supreme over state law with respect to national banking"). As a result, the only question presented by this case is whether Congress has seen it "proper to permit" the States to enforce state fair lending laws against national banks. OCC's reasonable conclusion that § 484(a) answers that question in the negative does not alter the federal-state balance; it simply pre-

serves for OCC the oversight responsibilities assigned to it by Congress. See *id.*, at 22 ("Regulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses. The Tenth Amendment, therefore, is not implicated here" (citation omitted)).

Second, petitioner argues that a clear statement is required because "the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). There should be no presumption against pre-emption because Congress has expressly pre-empted state law in this case. See *Altria Group, Inc.* v. *Good*, 555 U. S. 70, 98 (2008) (THOMAS, J., dissenting) ("[T]he presumption against pre-emption 'dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself' " (quoting *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 545 (1992) (SCALIA, J., concurring in judgment in part and dissenting in part))); see, *e. g.*, *Riegel* v. *Medtronic, Inc.*, 552 U. S. 312, 315–316 (2008) (construing the express pre-emption provision of the Medical Device Amendments of 1976, 21 U. S. C. § 360c *et seq.*, without any reliance on the presumption against pre-emption).

In any event, this presumption is "not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U. S. 89, 108 (2000). National banking is the paradigmatic example. "In defining the pre-emptive scope of statutes and regulations granting a power to national banks," this Court has taken the firm view that "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Barnett Bank of Marion Cty., N. A.* v. *Nelson*, 517 U. S. 25, 33 (1996). As a result, federal legislation concerning national banks is "not normally limited by, but rather ordinarily pre-empt[s], contrary state law." *Id.*, at 32. As with general maritime law,

Congress' "legislat[ion] in th[is] field from the earliest days of the Republic" and its creation of an "extensive federal statutory and regulatory scheme" mean that an "'assumption' of nonpre-emption is not triggered." *Locke*, *supra*, at 108. That the States may also have legislated alongside Congress in this area, see *ante*, at 534–535, does not alter this conclusion, see, *e. g.*, *Franklin Nat. Bank of Franklin Square* v. *New York*, 347 U. S. 373 (1954).

Last, petitioner argues that *Chevron* deference is inapplicable because OCC's regulation declares the pre-emptive scope of the NBA. And, the majority flatly asserts that "[i]f that is not pre-emption, nothing is." *Ante*, at 535. But OCC did not declare the pre-emptive scope of the statute; rather, it interpreted the term "visitorial powers" to encompass state enforcement of state fair lending laws. The pre-emption of state enforcement authority to which petitioner objects thus follows from the statute itself—not agency action. See *Smiley*, 517 U. S., at 744 ("This argument confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive. We may assume (without deciding) that the latter question must always be decided *de novo* by the courts. That is *not* the question at issue here; there is no doubt that § 85 pre-empts state law" (emphasis in original)).

Here, Congress—not the agency—has decided that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." 12 U. S. C. § 484(a). Indeed, the majority agrees that it is the "statutory term"—and not OCC's regulation—that "define[s] and thereby limit[s] the category of action reserved to the Federal Government and forbidden to the States." *Ante*, at 535. As a result, OCC has simply interpreted that term to encompass petitioner's decision to demand national bank records and threaten judicial enforcement of New York fair lending laws as a means of obtaining them. As *Smiley* showed, a federal agency's construction of an ambiguous statutory term may clarify the

pre-emptive scope of enacted federal law, but that fact alone does not mean that it is the agency, rather than Congress, that has effected the pre-emption.

Petitioner's federalism-based objections to *Chevron* deference ultimately turn on a single proposition: It is doubtful that Congress pre-empted state enforcement of state laws but not the underlying state laws themselves. But it is not this Court's task to decide whether the statutory scheme established by Congress is unusual or even "'[b]izarre.'" See *ante*, at 529. The Court must decide only whether the construction adopted by the agency is unambiguously foreclosed by the statute's text. Here, the text, structure, and history of "visitorial powers" support the agency's reasonable interpretation of § 484. Petitioner has not identified any constitutional principle that would require Congress to take the greater step of pre-empting all enforcement of state lending laws (including private enforcement) even though its central concern was the allocation of the right to exercise public visitation over national bank activities.

* * *

For all these reasons, I would affirm the judgment of the Court of Appeals.

Syllabus

RICCI ET AL. *v.* DeSTEFANO ET AL.

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

No. 07–1428. Argued April 22, 2009—Decided June 29, 2009*

New Haven, Conn. (City), uses objective examinations to identify those firefighters best qualified for promotion. When the results of such an exam to fill vacant lieutenant and captain positions showed that white candidates had outperformed minority candidates, a rancorous public debate ensued. Confronted with arguments both for and against certifying the test results—and threats of a lawsuit either way—the City threw out the results based on the statistical racial disparity. Petitioners, white and Hispanic firefighters who passed the exams but were denied a chance at promotions by the City's refusal to certify the test results, sued the City and respondent officials, alleging that discarding the test results discriminated against them based on their race in violation of, *inter alia*, Title VII of the Civil Rights Act of 1964. The defendants responded that had they certified the test results, they could have faced Title VII liability for adopting a practice having a disparate impact on minority firefighters. The District Court granted summary judgment for the defendants, and the Second Circuit affirmed.

Held: The City's action in discarding the tests violated Title VII. Pp. 576–593.

(a) Title VII prohibits intentional acts of employment discrimination based on race, color, religion, sex, and national origin, 42 U. S. C. § 2000e–2(a)(1) (disparate treatment), as well as policies or practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities, § 2000e–2(k)(1)(A)(i) (disparate impact). Once a plaintiff has established a prima facie case of disparate impact, the employer may defend by demonstrating that its policy or practice is "job related for the position in question and consistent with business necessity." *Ibid.* If the employer meets that burden, the plaintiff may still succeed by showing that the employer refuses to adopt an available alternative practice that has less disparate impact and serves the employer's legitimate needs. §§ 2000e–2(k)(1)(A)(ii) and (C). Pp. 577–578.

(b) Under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an

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*Together with No. 08–328, *Ricci et al.* v. *DeStefano et al.*, also on certiorari to the same court.

unintentional, disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action. The Court's analysis begins with the premise that the City's actions would violate Title VII's disparate-treatment prohibition absent some valid defense. All the evidence demonstrates that the City rejected the test results because the higher scoring candidates were white. Without some other justification, this express, race-based decisionmaking is prohibited. The question, therefore, is whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination. The Court has considered cases similar to the present litigation, but in the context of the Fourteenth Amendment's Equal Protection Clause. Such cases can provide helpful guidance in this statutory context. See *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 993. In those cases, the Court held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a "strong basis in evidence" that the remedial actions were necessary. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 500; see also *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 277. In announcing the strong-basis-in-evidence standard, the *Wygant* plurality recognized the tension between eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other. 476 U. S., at 277. It reasoned that "[e]videntiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees." *Ibid.* The same interests are at work in the interplay between Title VII's disparate-treatment and disparate-impact provisions. Applying the strong-basis-in-evidence standard to Title VII gives effect to both provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. It also allows the disparate-impact prohibition to work in a manner that is consistent with other Title VII provisions, including the prohibition on adjusting employment-related test scores based on race, see § 2000e–2(*l*), and the section that expressly protects bona fide promotional exams, see § 2000e–2(h). Thus, the Court adopts the strong-basis-in-evidence standard as a matter of statutory construction in order to resolve any conflict between Title VII's disparate-treatment and disparate-impact provisions. Pp. 578–585.

(c) The City's race-based rejection of the test results cannot satisfy the strong-basis-in-evidence standard. Pp. 585–593.

(i) The racial adverse impact in this litigation was significant, and petitioners do not dispute that the City was faced with a prima facie

case of disparate-impact liability. The problem for respondents is that such a prima facie case—essentially, a threshold showing of a significant statistical disparity, *Connecticut* v. *Teal*, 457 U. S. 440, 446, and nothing more—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the test results. That is because the City could be liable for disparate-impact discrimination only if the exams at issue were not job related and consistent with business necessity, or if there existed an equally valid, less discriminatory alternative that served the City's needs but that the City refused to adopt. §§ 2000e–2(k)(1)(A), (C). Based on the record the parties developed through discovery, there is no substantial basis in evidence that the tests were deficient in either respect. Pp. 585–587.

(ii) The City's assertions that the exams at issue were not job related and consistent with business necessity are blatantly contradicted by the record, which demonstrates the detailed steps taken to develop and administer the tests and the painstaking analyses of the questions asked to assure their relevance to the captain and lieutenant positions. The testimony also shows that complaints that certain examination questions were contradictory or did not specifically apply to firefighting practices in the City were fully addressed, and that the City turned a blind eye to evidence supporting the exams' validity. Pp. 587–589.

(iii) Respondents also lack a strong basis in evidence showing an equally valid, less discriminatory testing alternative that the City, by certifying the test results, would necessarily have refused to adopt. Respondents' three arguments to the contrary all fail. First, respondents refer to testimony that a different composite-score calculation would have allowed the City to consider black candidates for then-open positions, but they have produced no evidence to show that the candidate weighting actually used was indeed arbitrary, or that the different weighting would be an equally valid way to determine whether candidates are qualified for promotions. Second, respondents argue that the City could have adopted a different interpretation of its charter provision limiting promotions to the highest scoring applicants, and that the interpretation would have produced less discriminatory results; but respondents' approach would have violated Title VII's prohibition of race-based adjustment of test results, § 2000e–2(*l*). Third, testimony asserting that the use of an assessment center to evaluate candidates' behavior in typical job tasks would have had less adverse impact than written exams does not aid respondents, as it is contradicted by other statements in the record indicating that the City could not have used assessment centers for the exams at issue. Especially when it is noted that the strong-basis-in-evidence standard applies to these cases, respondents

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cannot create a genuine issue of fact based on a few stray (and contradictory) statements in the record. Pp. 589–592.

(iv) Fear of litigation alone cannot justify the City's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions. Discarding the test results was impermissible under Title VII, and summary judgment is appropriate for petitioners on their disparate-treatment claim. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of today's holding the City can avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability. Pp. 592–593.

530 F. 3d 87, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 594. ALITO, J., filed a concurring opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 596. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined, *post*, p. 608.

Gregory S. Coleman argued the cause for petitioners in both cases. With him on the briefs were *Edward C. Dawson*, *Dori K. Goldman*, and *Karen Lee Torre.*

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* in both cases supporting vacatur and remand. With him on the brief were *Acting Assistant Attorney General King*, *Deputy Solicitor General Katyal*, *Lisa S. Blatt*, *Leondra R. Kruger*, *Steven H. Rosenbaum*, *Jessica Dunsay Silver*, *Gregory B. Friel*, *Lisa J. Stark*, *Carol A. DeDeo*, *Edward D. Sieger*, *Carolyn L. Wheeler*, and *Gail S. Coleman.*

Christopher J. Meade argued the cause for respondents in both cases. With him on the brief were *Seth P. Waxman*, *Anne K. Small*, *Victor A. Bolden*, *Kathleen M. Foster*, *David T. Goldberg*, and *Richard A. Roberts.*†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the American Civil Rights Union by *Peter J. Ferrara;* for Bridgeport Fire-

JUSTICE KENNEDY delivered the opinion of the Court.

In the fire department of New Haven, Connecticut—as in emergency-service agencies throughout the Nation—fire-

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fighters for Merit Employment, Inc., by *Stewart I. Edelstein;* for the Cato Institute et al. by *Ilya Shapiro* and *Manuel S. Klausner;* for the Center for Individual Rights et al. by *Michael E. Rosman;* for the Concerned American Firefighters Association, Philadelphia Chapter, by *Gregory J. Sullivan;* for the Eagle Forum Education and Legal Defense Fund by *Douglas G. Smith;* for Law Professors et al. by *Martin S. Kaufman;* for the Mountain States Legal Foundation by *J. Scott Detamore;* for the National Association of Police Organizations by *Scott M. Abeles;* for the Pacific Legal Foundation et al. by *Sharon L. Browne*, *Alan W. Foutz*, and *Steven G. Gieseler;* and for Joe Oakley et al. by *Henry C. Shelton III*, *Brian S. Faughnan*, and *Emily C. Taube.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the State of Maryland et al. by *Douglas F. Gansler*, Attorney General of Maryland, *Austin C. Schlick*, *Steven M. Sullivan*, and *Michele J. McDonald*, by *Richard A. Svobodny*, Acting Attorney General of Alaska, and by the Attorneys General for their respective States as follows: *Dustin McDaniel* of Arkansas, *Tom Miller* of Iowa, *Catherine Cortez Masto* of Nevada, and *Mark L. Shurtleff* of Utah; for the American Civil Liberties Union et al. by *Kevin K. Russell*, *Amy Howe*, *Pamela S. Karlan*, *Jeffrey L. Fisher*, *Steven R. Shapiro*, and *Dennis D. Parker;* for the Asian American Justice Center et al. by *Vincent A. Eng* and *Karen K. Narasaki;* for the Equal Employment Advisory Council by *Rae T. Vann*, *Jeffrey A. Norris*, and *Lorence L. Kessler;* for Industrial-Organizational Psychologists by *David C. Frederick* and *Derek T. Ho;* for the International Association of Black Professional Fire Fighters et al. by *Christy B. Bishop* and *Dennis R. Thompson;* for the International Association of Hispanic Firefighters et al. by *Marcia L. McCormick;* for the International Municipal Lawyers Association et al. by *Andrew J. Pincus* and *Charles Rothfeld;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Michael L. Foreman*, *Sarah Crawford*, *Catherine Sun Wood*, *Marc H. Morial*, *Angela Ciccolo*, and *Eva Paterson;* for the NAACP Legal Defense & Educational Fund, Inc., by *John Payton*, *Jacqueline A. Berrien*, *Debo P. Adegbile*, *Matthew Colangelo*, and *Joshua Civin;* for the National Partnership for Women & Families et al. by *Helen Norton*, *Judith L. Lichtman*, *Marcia D. Greenberger*, and *Jocelyn Samuels;* for the New York Law School Racial Justice Project by *Elise C. Boddie;* for the Opportunity Agenda by *Ankur J. Goel* and *Alan Jenkins;* and for the Society for Human Resource Man-

fighters prize their promotion to and within the officer ranks. An agency's officers command respect within the department and in the whole community; and, of course, added responsibilities command increased salary and benefits. Aware of the intense competition for promotions, New Haven, like many cities, relies on objective examinations to identify the best qualified candidates.

In 2003, 118 New Haven firefighters took examinations to qualify for promotion to the rank of lieutenant or captain. Promotion examinations in New Haven (or City) were infrequent, so the stakes were high. The results would determine which firefighters would be considered for promotions during the next two years, and the order in which they would be considered. Many firefighters studied for months, at considerable personal and financial cost.

When the examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a public debate that turned rancorous. Some firefighters argued the tests should be discarded because the results showed the tests to be discriminatory. They threatened a discrimination lawsuit if the City made promotions based on the tests. Other firefighters said the exams were neutral and fair. And they, in turn, threatened a discrimination lawsuit if the City, relying on the statistical racial disparity, ignored the test results and denied promotions to the candidates who had performed well. In the end the City took the side of those who protested the test results. It threw out the examinations.

Certain white and Hispanic firefighters who likely would have been promoted based on their good test performance

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agement by *Samuel Estreicher*, *Meir Feder*, *Donald B. Ayer*, and *Lawrence D. Rosenberg*.

Briefs of *amici curiae* were filed in both cases for the Anti-Defamation League by *Michael F. Smith*, *Martin E. Karlinsky*, *Howard W. Goldstein*, *Steven M. Freeman*, and *Steven C. Sheinberg;* for the Claremont Institute Center for Constitutional Jurisprudence by *John C. Eastman* and *Edwin Meese III;* and for Kedar Bhatia by *Alan Sager*.

sued the City and some of its officials. Theirs is the suit now before us. The suit alleges that, by discarding the test results, the City and the named officials discriminated against the plaintiffs based on their race, in violation of both Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment. The City and the officials defended their actions, arguing that if they had certified the results, they could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters. The District Court granted summary judgment for the defendants, and the Court of Appeals affirmed.

We conclude that race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. Respondents, we further determine, cannot meet that threshold standard. As a result, the City's action in discarding the tests was a violation of Title VII. In light of our ruling under the statutes, we need not reach the question whether respondents' actions may have violated the Equal Protection Clause.

I

This litigation comes to us after the parties' cross-motions for summary judgment, so we set out the facts in some detail. As the District Court noted, although "the parties strenuously dispute the relevance and legal import of, and inferences to be drawn from, many aspects of this case, the underlying facts are largely undisputed." 554 F. Supp. 2d 142, 145 (Conn. 2006).

A

When the City of New Haven undertook to fill vacant lieutenant and captain positions in its fire department (Department), the promotion and hiring process was governed by the City charter, in addition to federal and state law. The

charter establishes a merit system. That system requires the City to fill vacancies in the classified civil-service ranks with the most qualified individuals, as determined by job-related examinations. After each examination, the New Haven Civil Service Board (CSB) certifies a ranked list of applicants who passed the test. Under the charter's "rule of three," the relevant hiring authority must fill each vacancy by choosing one candidate from the top three scorers on the list. Certified promotional lists remain valid for two years.

The City's contract with the New Haven firefighters' union specifies additional requirements for the promotion process. Under the contract, applicants for lieutenant and captain positions were to be screened using written and oral examinations, with the written exam accounting for 60 percent and the oral exam 40 percent of an applicant's total score. To sit for the examinations, candidates for lieutenant needed 30 months' experience in the Department, a high school diploma, and certain vocational training courses. Candidates for captain needed one year's service as a lieutenant in the Department, a high school diploma, and certain vocational training courses.

After reviewing bids from various consultants, the City hired Industrial/Organizational Solutions, Inc. (IOS), to develop and administer the examinations, at a cost to the City of $100,000. IOS is an Illinois company that specializes in designing entry-level and promotional examinations for fire and police departments. In order to fit the examinations to the New Haven Department, IOS began the test-design process by performing job analyses to identify the tasks, knowledge, skills, and abilities that are essential for the lieutenant and captain positions. IOS representatives interviewed incumbent captains and lieutenants and their supervisors. They rode with and observed other on-duty officers. Using information from those interviews and ride-alongs, IOS wrote job-analysis questionnaires and administered them to most of the incumbent battalion chiefs, captains, and

lieutenants in the Department. At every stage of the job analyses, IOS, by deliberate choice, oversampled minority firefighters to ensure that the results—which IOS would use to develop the examinations—would not unintentionally favor white candidates.

With the job-analysis information in hand, IOS developed the written examinations to measure the candidates' job-related knowledge. For each test, IOS compiled a list of training manuals, Department procedures, and other materials to use as sources for the test questions. IOS presented the proposed sources to the New Haven fire chief and assistant fire chief for their approval. Then, using the approved sources, IOS drafted a multiple-choice test for each position. Each test had 100 questions, as required by CSB rules, and was written below a 10th-grade reading level. After IOS prepared the tests, the City opened a 3-month study period. It gave candidates a list that identified the source material for the questions, including the specific chapters from which the questions were taken.

IOS developed the oral examinations as well. These concentrated on job skills and abilities. Using the job-analysis information, IOS wrote hypothetical situations to test incident-command skills, firefighting tactics, interpersonal skills, leadership, and management ability, among other things. Candidates would be presented with these hypotheticals and asked to respond before a panel of three assessors.

IOS assembled a pool of 30 assessors who were superior in rank to the positions being tested. At the City's insistence (because of controversy surrounding previous examinations), all the assessors came from outside Connecticut. IOS submitted the assessors' resumes to City officials for approval. They were battalion chiefs, assistant chiefs, and chiefs from departments of similar sizes to New Haven's throughout the country. Sixty-six percent of the panelists were minorities, and each of the nine three-member assessment panels con-

tained two minority members. IOS trained the panelists for several hours on the day before it administered the examinations, teaching them how to score the candidates' responses consistently using checklists of desired criteria.

Candidates took the examinations in November and December 2003. Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics. 554 F. Supp. 2d, at 145. Eight lieutenant positions were vacant at the time of the examination. As the rule of three operated, this meant that the top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white. *Ibid.* Subsequent vacancies would have allowed at least 3 black candidates to be considered for promotion to lieutenant.

Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics. *Ibid.* Seven captain positions were vacant at the time of the examination. Under the rule of three, 9 candidates were eligible for an immediate promotion to captain—7 whites and 2 Hispanics. *Ibid.*

B

The City's contract with IOS contemplated that, after the examinations, IOS would prepare a technical report that described the examination processes and methodologies and analyzed the results. But in January 2004, rather than requesting the technical report, City officials, including the City's counsel, Thomas Ude, convened a meeting with IOS Vice President Chad Legel. (Legel was the leader of the IOS team that developed and administered the tests.) Based on the test results, the City officials expressed concern that the tests had discriminated against minority candidates. Legel defended the examinations' validity, stating that any numerical disparity between white and minority candidates was likely due to various external factors and was

in line with results of the Department's previous promotional examinations.

Several days after the meeting, Ude sent a letter to the CSB purporting to outline its duties with respect to the examination results. Ude stated that under federal law, "a statistical demonstration of disparate impact," standing alone, "constitutes a sufficiently serious claim of racial discrimination to serve as a predicate for employer-initiated, voluntar[y] remedies—even . . . race-conscious remedies." App. to Pet. for Cert. in No. 07–1428, p. 443a; see also 554 F. Supp. 2d, at 145 (issue of disparate impact "appears to have been raised by . . . Ude").

1

The CSB first met to consider certifying the results on January 22, 2004. Tina Burgett, director of the City's Department of Human Resources, opened the meeting by telling the CSB that "there is a significant disparate impact on these two exams." App. to Pet. for Cert. in No. 07–1428, at 466a. She distributed lists showing the candidates' races and scores (written, oral, and composite) but not their names. Ude also described the test results as reflecting "a very significant disparate impact," *id.*, at 477a, and he outlined possible grounds for the CSB's refusing to certify the results.

Although they did not know whether they had passed or failed, some firefighter-candidates spoke at the first CSB meeting in favor of certifying the test results. Michael Blatchley stated that "[e]very one" of the questions on the written examination "came from the [study] material. . . . [I]f you read the materials and you studied the material, you would have done well on the test." App. in No. 06–4996–cv (CA2), pp. A772–A773 (hereinafter CA2 App.). Frank Ricci stated that the test questions were based on the Department's own rules and procedures and on "nationally recognized" materials that represented the "accepted standard[s]" for firefighting. *Id.*, at A785–A786. Ricci stated that he

had "several learning disabilities," including dyslexia; that he had spent more than $1,000 to purchase the materials and pay his neighbor to read them on tape so he could "give it [his] best shot"; and that he had studied "8 to 13 hours a day to prepare" for the test. *Id.*, at A786, A789. "I don't even know if I made it," Ricci told the CSB, "[b]ut the people who passed should be promoted. When your life's on the line, second best may not be good enough." *Id.*, at A787–A788.

Other firefighters spoke against certifying the test results. They described the test questions as outdated or not relevant to firefighting practices in New Haven. Gary Tinney stated that source materials "came out of New York. . . . Their makeup of their city and everything is totally different than ours." *Id.*, at A774–A775; see also *id.*, at A779, A780–A781. And they criticized the test materials, a full set of which cost about $500, for being too expensive and too long.

2

At a second CSB meeting, on February 5, the president of the New Haven firefighters' union asked the CSB to perform a validation study to determine whether the tests were job related. Petitioners' counsel in this action argued that the CSB should certify the results. A representative of the International Association of Black Professional Firefighters, Donald Day from neighboring Bridgeport, Connecticut, "beseech[ed]" the CSB "to throw away that test," which he described as "inherently unfair" because of the racial distribution of the results. *Id.*, at A830–A831. Another Bridgeport-based representative of the association, Ronald Mackey, stated that a validation study was necessary. He suggested that the City could "adjust" the test results to "meet the criteria of having a certain amount of minorities get elevated to the rank of Lieutenant and Captain." *Id.*, at A838. At the end of this meeting, the CSB members agreed to ask IOS to send a representative to explain how it had developed and administered the examinations. They also

discussed asking a panel of experts to review the examinations and advise the CSB whether to certify the results.

3

At a third meeting, on February 11, Legel addressed the CSB on behalf of IOS. Legel stated that IOS had previously prepared entry-level firefighter examinations for the City but not a promotional examination. He explained that IOS had developed examinations for departments in communities with demographics similar to New Haven's, including Orange County, Florida; Lansing, Michigan; and San Jose, California.

Legel explained the exam-development process to the CSB. He began by describing the job analyses IOS performed of the captain and lieutenant positions—the interviews, ride-alongs, and questionnaires IOS designed to "generate a list of tasks, knowledge, skills and abilities that are considered essential to performance" of the jobs. *Id.*, at A931–A932. He outlined how IOS prepared the written and oral examinations, based on the job-analysis results, to test most heavily those qualities that the results indicated were "critica[l]" or "essentia[l]." *Id.*, at A931. And he noted that IOS took the material for each test question directly from the approved source materials. Legel told the CSB that third-party reviewers had scrutinized the examinations to ensure that the written test was drawn from the source material and that the oral test accurately tested real-world situations that captains and lieutenants would face. Legel confirmed that IOS had selected oral-examination panelists so that each three-member assessment panel included one white, one black, and one Hispanic member.

Near the end of his remarks, Legel "implor[ed] anyone that had . . . concerns to review the content of the exam. In my professional opinion, it's facially neutral. There's nothing in those examinations . . . that should cause somebody to think that one group would perform differently than another group." *Id.*, at A961.

At the next meeting, on March 11, the CSB heard from three witnesses it had selected to "tell us a little bit about their views of the testing, the process, [and] the methodology." *Id.*, at A1020. The first, Christopher Hornick, spoke to the CSB by telephone. Hornick is an industrial/organizational psychologist from Texas who operates a consulting business that "direct[ly]" competes with IOS. *Id.*, at A1029. Hornick, who had not "stud[ied] the test at length or in detail" and had not "seen the job analysis data," told the CSB that the scores indicated a "relatively high adverse impact." *Id.*, at A1028, A1030, A1043. He stated that "[n]ormally, whites outperform ethnic minorities on the majority of standardized testing procedures," but that he was "a little surprised" by the disparity in the candidates' scores—although "[s]ome of it is fairly typical of what we've seen in other areas of the countr[y] and other tests." *Id.*, at A1028–A1029. Hornick stated that the "adverse impact on the written exam was somewhat higher but generally in the range that we've seen professionally." *Id.*, at A1030–A1031.

When asked to explain the New Haven test results, Hornick opined in the telephone conversation that the collective-bargaining agreement's requirement of using written and oral examinations with a 60/40 composite score might account for the statistical disparity. He also stated that "[b]y not having anyone from within the [D]epartment review" the tests before they were administered—a limitation the City had imposed to protect the security of the exam questions—"you inevitably get things in there" that are based on the source materials but are not relevant to New Haven. *Id.*, at A1034–A1035. Hornick suggested that testing candidates at an "assessment center" rather than using written and oral examinations "might serve [the City's] needs better." *Id.*, at A1039–A1040. Hornick stated that assessment centers, where candidates face real-world situations and respond just as they would in the field, allow candi-

dates "to demonstrate how they would address a particular problem as opposed to just verbally saying it or identifying the correct option on a written test." *Ibid.*

Hornick made clear that he was "not suggesting that [IOS] somehow created a test that had adverse impacts that it should not have had." *Id.*, at A1038. He described the IOS examinations as "reasonably good test[s]." *Id.*, at A1041. He stated that the CSB's best option might be to "certify the list as it exists" and work to change the process for future tests, including by "[r]ewriting the Civil Service Rules." *Ibid.* Hornick concluded his telephonic remarks by telling the CSB that "for the future," his company "certainly would like to help you if we can." *Id.*, at A1046.

The second witness was Vincent Lewis, a fire program specialist for the Department of Homeland Security and a retired fire captain from Michigan. Lewis, who is black, had looked "extensively" at the lieutenant exam and "a little less extensively" at the captain exam. He stated that the candidates "should know that material." *Id.*, at A1048, A1052. In Lewis' view, the "questions were relevant for both exams," and the New Haven candidates had an advantage because the study materials identified the particular book chapters from which the questions were taken. In other departments, by contrast, "you had to know basically the . . . entire book." *Id.*, at A1053. Lewis concluded that any disparate impact likely was due to a pattern that "usually whites outperform some of the minorities on testing," or that "more whites . . . take the exam." *Id.*, at A1054.

The final witness was Janet Helms, a professor at Boston College whose "primary area of expertise" is "not with firefighters per se" but in "race and culture as they influence performance on tests and other assessment procedures." *Id.*, at A1060. Helms expressly declined the CSB's offer to review the examinations. At the outset, she noted that "regardless of what kind of written test we give in this country . . . we can just about predict how many people will pass

who are members of under-represented groups. And your data are not that inconsistent with what predictions would say were the case." *Id.*, at A1061. Helms nevertheless offered several "ideas about what might be possible factors" to explain statistical differences in the results. *Id.*, at A1062. She concluded that because 67 percent of the respondents to the job-analysis questionnaires were white, the test questions might have favored white candidates, because "most of the literature on firefighters shows that the different groups perform the job differently." *Id.*, at A1063. Helms closed by stating that no matter what test the City had administered, it would have revealed "a disparity between blacks and whites, Hispanics and whites," particularly on a written test. *Id.*, at A1072.

5

At the final CSB meeting, on March 18, Ude (the City's counsel) argued against certifying the examination results. Discussing the City's obligations under federal law, Ude advised the CSB that a finding of adverse impact "is the beginning, not the end, of a review of testing procedures" to determine whether they violated the disparate-impact provision of Title VII. Ude focused the CSB on determining "whether there are other ways to test for . . . those positions that are equally valid with less adverse impact." *Id.*, at A1101. Ude described Hornick as having said that the written examination "had one of the most severe adverse impacts that he had seen" and that "there are much better alternatives to identifying [firefighting] skills." *Ibid.* Ude offered his "opinion that promotions . . . as a result of these tests would not be consistent with federal law, would not be consistent with the purposes of our Civil Service Rules or our Charter[,] nor is it in the best interests of the firefighters . . . who took the exams." *Id.*, at A1103–A1104. He stated that previous Department exams "have not had this kind of result," and that previous results had not been "challenged as

having adverse impact, whereas we are assured that these will be." *Id.*, at A1107, A1108.

CSB Chairman Segaloff asked Ude several questions about the Title VII disparate-impact standard.

> "CHAIRPERSON SEGALOFF: [M]y understanding is the group . . . that is making to throw the exam out has the burden of showing that there is out there an exam that is reasonably probable or likely to have less of an adverse impact. It's not our burden to show that there's an exam out there that can be better. We've got an exam. We've got a result. . . .
>
> "MR. UDE: Mr. Chair, I point out that Dr. Hornick said that. He said that there are other tests out there that would have less adverse impact and that [would] be more valid.
>
> "CHAIRPERSON SEGALOFF: You think that's enough for us to throw this test upside-down . . . because Dr. Hornick said it?
>
> "MR. UDE: I think that by itself would be sufficient. Yes. I also would point out that . . . it is the employer's burden to justify the use of the examination." *Id.*, at A1108–A1109.

Karen DuBois-Walton, the City's chief administrative officer, spoke on behalf of Mayor John DeStefano and argued against certifying the results. DuBois-Walton stated that the results, when considered under the rule of three and applied to then-existing captain and lieutenant vacancies, created a situation in which black and Hispanic candidates were disproportionately excluded from opportunity. DuBois-Walton also relied on Hornick's testimony, asserting that Hornick "made it extremely clear that . . . there are more appropriate ways to assess one's ability to serve" as a captain or lieutenant. *Id.*, at A1120.

Burgett (the human resources director) asked the CSB to discard the examination results. She, too, relied on Hor-

nick's statement to show the existence of alternative testing methods, describing Hornick as having "started to point out that alternative testing does exist" and as having "begun to suggest that there are some different ways of doing written examinations." *Id.*, at A1125, A1128.

Other witnesses addressed the CSB. They included the president of the New Haven firefighters' union, who supported certification. He reminded the CSB that Hornick "also concluded that the tests were reasonable and fair and under the current structure to certify them." *Id.*, at A1137. Firefighter Frank Ricci again argued for certification; he stated that although "assessment centers in some cases show less adverse impact," *id.*, at A1140, they were not available alternatives for the current round of promotions. It would take several years, Ricci explained, for the Department to develop an assessment-center protocol and the accompanying training materials. *Id.*, at A1141. Lieutenant Matthew Marcarelli, who had taken the captain's exam, spoke in favor of certification.

At the close of witness testimony, the CSB voted on a motion to certify the examinations. With one member recused, the CSB deadlocked 2 to 2, resulting in a decision not to certify the results. Explaining his vote to certify the results, Chairman Segaloff stated that "nobody convinced me that we can feel comfortable that, in fact, there's some likelihood that there's going to be an exam designed that's going to be less discriminatory." *Id.*, at A1159–A1160.

C

The CSB's decision not to certify the examination results led to this lawsuit. The plaintiffs—who are the petitioners here—are 17 white firefighters and 1 Hispanic firefighter who passed the examinations but were denied a chance at promotions when the CSB refused to certify the test results. They include the named plaintiff, Frank Ricci, who addressed the CSB at multiple meetings.

Petitioners sued the City, Mayor DeStefano, DuBois-Walton, Ude, Burgett, and the two CSB members who voted against certification. Petitioners also named as a defendant Boise Kimber, a New Haven resident who voiced strong opposition to certifying the results. Those individuals are respondents in this Court. Petitioners filed suit under Rev. Stat. §§ 1979 and 1980, 42 U. S. C. §§ 1983 and 1985, alleging that respondents, by arguing or voting against certifying the results, violated and conspired to violate the Equal Protection Clause of the Fourteenth Amendment. Petitioners also filed timely charges of discrimination with the Equal Employment Opportunity Commission (EEOC); upon the EEOC's issuing right-to-sue letters, petitioners amended their complaint to assert that the City violated the disparate-treatment prohibition contained in Title VII of the Civil Rights Act of 1964, as amended. See 42 U. S. C. § 2000e–2(a).

The parties filed cross-motions for summary judgment. Respondents asserted they had a good-faith belief that they would have violated the disparate-impact prohibition in Title VII, § 2000e–2(k), had they certified the examination results. It follows, they maintained, that they cannot be held liable under Title VII's disparate-treatment provision for attempting to comply with Title VII's disparate-impact bar. Petitioners countered that respondents' good-faith belief was not a valid defense to allegations of disparate treatment and unconstitutional discrimination.

The District Court granted summary judgment for respondents. 554 F. Supp. 2d 142. It described petitioners' argument as "boil[ing] down to the assertion that if [respondents] cannot prove that the disparities on the Lieutenant and Captain exams were due to a particular flaw inherent in those exams, then they should have certified the results because there was no other alternative in place." *Id.*, at 156. The District Court concluded that, "[n]otwithstanding the shortcomings in the evidence on existing, effective alterna-

tives, it is not the case that [respondents] *must* certify a test where they cannot pinpoint its deficiency explaining its disparate impact . . . simply because they have not yet formulated a better selection method." *Ibid.* It also ruled that respondents' "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent" under Title VII. *Id.*, at 160. The District Court rejected petitioners' equal protection claim on the theory that respondents had not acted because of "discriminatory animus" toward petitioners. *Id.*, at 162. It concluded that respondents' actions were not "based on race" because "all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted." *Id.*, at 161.

After full briefing and argument by the parties, the Court of Appeals affirmed in a one-paragraph, unpublished summary order; it later withdrew that order, issuing in its place a nearly identical, one-paragraph *per curiam* opinion adopting the District Court's reasoning. 530 F. 3d 87 (CA2 2008). Three days later, the Court of Appeals voted 7 to 6 to deny rehearing en banc, over written dissents by Chief Judge Jacobs and Judge Cabranes. 530 F. 3d 88.

This action presents two provisions of Title VII to be interpreted and reconciled, with few, if any, precedents in the courts of appeals discussing the issue. Depending on the resolution of the statutory claim, a fundamental constitutional question could also arise. We found it prudent and appropriate to grant certiorari. 555 U. S. 1091 (2009). We now reverse.

II

Petitioners raise a statutory claim, under the disparate-treatment prohibition of Title VII, and a constitutional claim, under the Equal Protection Clause of the Fourteenth Amendment. A decision for petitioners on their statutory claim would provide the relief sought, so we consider it first.

See *Atkins* v. *Parker*, 472 U. S. 115, 123 (1985); *Escambia County* v. *McMillan*, 466 U. S. 48, 51 (1984) *(per curiam)* ("[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case").

A

Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Title VII prohibits both intentional discrimination (known as "disparate treatment") as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as "disparate impact").

As enacted in 1964, Title VII's principal nondiscrimination provision held employers liable only for disparate treatment. That section retains its original wording today. It makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." § 2000e–2(a)(1); see also 78 Stat. 255. Disparate-treatment cases present "the most easily understood type of discrimination," *Teamsters* v. *United States*, 431 U. S. 324, 335, n. 15 (1977), and occur where an employer has "treated [a] particular person less favorably than others because of" a protected trait, *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 985–986 (1988). A disparate-treatment plaintiff must establish "that the defendant had a discriminatory intent or motive" for taking a job-related action. *Id.*, at 986.

The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact. But in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), the Court interpreted the Act to prohibit, in some cases, employers' facially neutral practices that, in fact, are

"discriminatory in operation." *Id.*, at 431. The *Griggs* Court stated that the "touchstone" for disparate-impact liability is the lack of "business necessity": "If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited." *Ibid.;* see also *id.*, at 432 (employer's burden to demonstrate that practice has "a manifest relationship to the employment in question"); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 425 (1975). Under those precedents, if an employer met its burden by showing that its practice was job related, the plaintiff was required to show a legitimate alternative that would have resulted in less discrimination. *Ibid.* (allowing complaining party to show "that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest").

Twenty years after *Griggs,* the Civil Rights Act of 1991, 105 Stat. 1071, was enacted. The Act included a provision codifying the prohibition on disparate-impact discrimination. That provision is now in force along with the disparate-treatment section already noted. Under the disparate-impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(k)(1)(A)(i). An employer may defend against liability by demonstrating that the practice is "job related for the position in question and consistent with business necessity." *Ibid.* Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs. §§2000e–2(k)(1)(A)(ii) and (C).

B

Petitioners allege that when the CSB refused to certify the captain and lieutenant exam results based on the race of

the successful candidates, it discriminated against them in violation of Title VII's disparate-treatment provision. The City counters that its decision was permissible because the tests "appear[ed] to violate Title VII's disparate-impact provisions." Brief for Respondents 12.

Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense. All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race—*i. e.*, how minority candidates had performed when compared to white candidates. As the District Court put it, the City rejected the test results because "too many whites and not enough minorities would be promoted were the lists to be certified." 554 F. Supp. 2d, at 152; see also *ibid.* (respondents' "own arguments . . . show that the City's reasons for advocating non-certification were related to the racial distribution of the results"). Without some other justification, this express, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race. See § 2000e–2(a)(1).

The District Court did not adhere to this principle, however. It held that respondents' "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent." *Id.*, at 160. And the Government makes a similar argument in this Court. It contends that the "structure of Title VII belies any claim that an employer's intent to comply with Title VII's disparate-impact provisions constitutes prohibited discrimination on the basis of race." Brief for United States as *Amicus Curiae* 11. But both of those statements turn upon the City's objective—avoiding disparate-impact liability—while ignoring the City's conduct in the name of reaching that objective. Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision

because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.

We consider, therefore, whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination. Courts often confront cases in which statutes and principles point in different directions. Our task is to provide guidance to employers and courts for situations when these two prohibitions could be in conflict absent a rule to reconcile them. In providing this guidance our decision must be consistent with the important purpose of Title VII—that the workplace be an environment free of discrimination, where race is not a barrier to opportunity.

With these principles in mind, we turn to the parties' proposed means of reconciling the statutory provisions. Petitioners take a strict approach, arguing that under Title VII, it cannot be permissible for an employer to take race-based adverse employment actions in order to avoid disparate-impact liability—even if the employer knows its practice violates the disparate-impact provision. See Brief for Petitioners 43. Petitioners would have us hold that, under Title VII, avoiding unintentional discrimination cannot justify intentional discrimination. That assertion, however, ignores the fact that, by codifying the disparate-impact provision in 1991, Congress has expressly prohibited both types of discrimination. We must interpret the statute to give effect to both provisions where possible. See, *e. g.*, *United States* v. *Atlantic Research Corp.*, 551 U. S. 128, 137 (2007) (rejecting an interpretation that would render a statutory provision "a dead letter"). We cannot accept petitioners' broad and inflexible formulation.

Petitioners next suggest that an employer in fact must be in violation of the disparate-impact provision before it can

use compliance as a defense in a disparate-treatment suit. Again, this is overly simplistic and too restrictive of Title VII's purpose. The rule petitioners offer would run counter to what we have recognized as Congress' intent that "voluntary compliance" be "the preferred means of achieving the objectives of Title VII." *Firefighters* v. *Cleveland*, 478 U. S. 501, 515 (1986); see also *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 290 (1986) (O'Connor, J., concurring in part and concurring in judgment). Forbidding employers to act unless they know, with certainty, that a practice violates the disparate-impact provision would bring compliance efforts to a near standstill. Even in the limited situations when this restricted standard could be met, employers likely would hesitate before taking voluntary action for fear of later being proved wrong in the course of litigation and then held to account for disparate treatment.

At the opposite end of the spectrum, respondents and the Government assert that an employer's good-faith belief that its actions are necessary to comply with Title VII's disparate-impact provision should be enough to justify race-conscious conduct. But the original, foundational prohibition of Title VII bars employers from taking adverse action "because of . . . race." § 2000e–2(a)(1). And when Congress codified the disparate-impact provision in 1991, it made no exception to disparate-treatment liability for actions taken in a good-faith effort to comply with the new, disparate-impact provision in subsection (k). Allowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact. A minimal standard could cause employers to discard the results of lawful and beneficial promotional examinations even where there is little if any evidence of disparate-impact discrimination. That would amount to a *de facto* quota system, in which a "focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures."

Watson, 487 U. S., at 992 (plurality opinion). Even worse, an employer could discard test results (or other employment practices) with the intent of obtaining the employer's preferred racial balance. That operational principle could not be justified, for Title VII is express in disclaiming any interpretation of its requirements as calling for outright racial balancing. § 2000e–2(j). The purpose of Title VII "is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." *Griggs*, 401 U. S., at 434.

In searching for a standard that strikes a more appropriate balance, we note that this Court has considered cases similar to this one, albeit in the context of the Equal Protection Clause of the Fourteenth Amendment. The Court has held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a "'strong basis in evidence'" that the remedial actions were necessary. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 500 (1989) (quoting *Wygant*, *supra*, at 277 (plurality opinion)). This suit does not call on us to consider whether the statutory constraints under Title VII must be parallel in all respects to those under the Constitution. That does not mean the constitutional authorities are irrelevant, however. Our cases discussing constitutional principles can provide helpful guidance in this statutory context. See *Watson*, *supra*, at 993 (plurality opinion).

Writing for a plurality in *Wygant* and announcing the strong-basis-in-evidence standard, Justice Powell recognized the tension between eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other. 476 U. S., at 277. The plurality stated that those "related constitutional duties are not always harmonious," and that "reconciling them requires . . . employers to act with extraordinary care." *Ibid.* The plurality required a strong basis in evidence because "[e]videntiary support for the conclusion that

remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees." *Ibid.* The Court applied the same standard in *Croson,* observing that "an amorphous claim that there has been past discrimination . . . cannot justify the use of an unyielding racial quota." 488 U. S., at 499.

The same interests are at work in the interplay between the disparate-treatment and disparate-impact provisions of Title VII. Congress has imposed liability on employers for unintentional discrimination in order to rid the workplace of "practices that are fair in form, but discriminatory in operation." *Griggs, supra,* at 431. But it has also prohibited employers from taking adverse employment actions "because of" race. § 2000e–2(a)(1). Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. The standard leaves ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress' efforts to eradicate workplace discrimination. See *Firefighters, supra,* at 515. And the standard appropriately constrains employers' discretion in making race-based decisions: It limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.

Resolving the statutory conflict in this way allows the disparate-impact prohibition to work in a manner that is consistent with other provisions of Title VII, including the prohibition on adjusting employment-related test scores on the basis of race. See § 2000e–2(*l*). Examinations like those administered by the City create legitimate expectations on the part of those who took the tests. As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in prepar-

ing for the tests. Employment tests can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent. Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics.

If an employer cannot rescore a test based on the candidates' race, § 2000e–2(*l*), then it follows *a fortiori* that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates—absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision. Restricting an employer's ability to discard test results (and thereby discriminate against qualified candidates on the basis of their race) also is in keeping with Title VII's express protection of bona fide promotional examinations. See § 2000e–2(h) ("[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race"); cf. *AT&T Corp.* v. *Hulteen*, 556 U. S. 701, 710 (2009).

For the foregoing reasons, we adopt the strong-basis-in-evidence standard as a matter of statutory construction to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII.

Our statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII. We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case. As we explain below, because respondents have not met their burden under Title VII, we need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution.

Nor do we question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. But once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race. Doing so, absent a strong basis in evidence of an impermissible disparate impact, amounts to the sort of racial preference that Congress has disclaimed, § 2000e–2(j), and is antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race.

Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. And when, during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussions toward that end. We hold only that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.

C

The City argues that, even under the strong-basis-in-evidence standard, its decision to discard the examination results was permissible under Title VII. That is incorrect. Even if respondents were motivated as a subjective matter by a desire to avoid committing disparate-impact discrimination, the record makes clear there is no support for the conclusion that respondents had an objective, strong basis in evidence to find the tests inadequate, with some consequent disparate-impact liability in violation of Title VII.

On this basis, we conclude that petitioners have met their obligation to demonstrate that there is "no genuine issue as to any material fact" and that they are "entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(c). On a motion for summary judgment, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott* v. *Harris*, 550 U. S. 372, 380 (2007). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 587 (1986) (internal quotation marks omitted). In this Court, the City's only defense is that it acted to comply with Title VII's disparate-impact provision. To succeed on their motion, then, petitioners must demonstrate that there can be no genuine dispute that there was no strong basis in evidence for the City to conclude it would face disparate-impact liability if it certified the examination results. See *Celotex Corp.* v. *Catrett*, 477 U. S. 317, 324 (1986) (where the nonmoving party "will bear the burden of proof at trial on a dispositive issue," the nonmoving party bears the burden of production under Rule 56 to "designate specific facts showing that there is a genuine issue for trial" (internal quotation marks omitted)).

The racial adverse impact here was significant, and petitioners do not dispute that the City was faced with a prima facie case of disparate-impact liability. On the captain exam, the pass rate for white candidates was 64 percent but was 37.5 percent for both black and Hispanic candidates. On the lieutenant exam, the pass rate for white candidates was 58.1 percent; for black candidates, 31.6 percent; and for Hispanic candidates, 20 percent. The pass rates of minorities, which were approximately one-half the pass rates for white candidates, fall well below the 80-percent standard set by the EEOC to implement the disparate-impact provision of Title VII. See 29 CFR § 1607.4(D) (2008) (selection rate that

is less than 80 percent "of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact"); *Watson*, 487 U. S., at 995–996, n. 3 (plurality opinion) (EEOC's 80-percent standard is "a rule of thumb for the courts"). Based on how the passing candidates ranked and an application of the "rule of three," certifying the examinations would have meant that the City could not have considered black candidates for any of the then-vacant lieutenant or captain positions.

Based on the degree of adverse impact reflected in the results, respondents were compelled to take a hard look at the examinations to determine whether certifying the results would have had an impermissible disparate impact. The problem for respondents is that a prima facie case of disparate-impact liability—essentially, a threshold showing of a significant statistical disparity, *Connecticut* v. *Teal*, 457 U. S. 440, 446 (1982), and nothing more—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results. That is because the City could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt. §§ 2000e–2(k)(1)(A), (C). We conclude there is no strong basis in evidence to establish that the tests were deficient in either of these respects. We address each of the two points in turn, based on the record developed by the parties through discovery—a record that concentrates in substantial part on the statements various witnesses made to the CSB.

1

There is no genuine dispute that the examinations were job related and consistent with business necessity. The City's assertions to the contrary are "blatantly contradicted

by the record." *Scott, supra*, at 380. The CSB heard statements from Chad Legel (the IOS vice president) as well as City officials outlining the detailed steps IOS took to develop and administer the examinations. IOS devised the written examinations, which were the focus of the CSB's inquiry, after painstaking analyses of the captain and lieutenant positions—analyses in which IOS made sure that minorities were overrepresented. And IOS drew the questions from source material approved by the Department. Of the outside witnesses who appeared before the CSB, only one, Vincent Lewis, had reviewed the examinations in any detail, and he was the only one with any firefighting experience. Lewis stated that the "questions were relevant for both exams." CA2 App. A1053. The only other witness who had seen any part of the examinations, Christopher Hornick (a competitor of IOS'), criticized the fact that no one within the Department had reviewed the tests—a condition imposed by the City to protect the integrity of the exams in light of past alleged security breaches. But Hornick stated that the exams "appea[r] to be . . . reasonably good" and recommended that the CSB certify the results. *Id.*, at A1041.

Arguing that the examinations were not job related, respondents note some candidates' complaints that certain examination questions were contradictory or did not specifically apply to firefighting practices in New Haven. But Legel told the CSB that IOS had addressed those concerns—that it entertained "a handful" of challenges to the validity of particular examination questions, that it "reviewed those challenges and provided feedback [to the City] as to what we thought the best course of action was," and that he could remember at least one question IOS had thrown out ("offer-[ing] credit to everybody for that particular question"). *Id.*, at A955–A957. For his part, Hornick said he "suspect[ed] that some of the criticisms . . . [leveled] by candidates" were not valid. *Id.*, at A1035.

The City, moreover, turned a blind eye to evidence that supported the exams' validity. Although the City's contract with IOS contemplated that IOS would prepare a technical report consistent with EEOC guidelines for examination-validity studies, the City made no request for its report. After the January 2004 meeting between Legel and some of the City-official respondents, in which Legel defended the examinations, the City sought no further information from IOS, save its appearance at a CSB meeting to explain how it developed and administered the examinations. IOS stood ready to provide respondents with detailed information to establish the validity of the exams, but respondents did not accept that offer.

2

Respondents also lacked a strong basis in evidence of an equally valid, less discriminatory testing alternative that the City, by certifying the examination results, would necessarily have refused to adopt. Respondents raise three arguments to the contrary, but each argument fails. First, respondents refer to testimony before the CSB that a different composite-score calculation—weighting the written and oral examination scores 30/70—would have allowed the City to consider two black candidates for then-open lieutenant positions and one black candidate for then-open captain positions. (The City used a 60/40 weighting as required by its contract with the New Haven firefighters' union.) But respondents have produced no evidence to show that the 60/40 weighting was indeed arbitrary. In fact, because that formula was the result of a union-negotiated collective-bargaining agreement, we presume the parties negotiated that weighting for a rational reason. Nor does the record contain any evidence that the 30/70 weighting would be an equally valid way to determine whether candidates possess the proper mix of job knowledge and situational skills to earn promotions. Changing the weighting formula, moreover, could well have violated Title VII's prohibition of altering test scores on the

basis of race. See § 2000e–2(*l*). On this record, there is no basis to conclude that a 30/70 weighting was an equally valid alternative the City could have adopted.

Second, respondents argue that the City could have adopted a different interpretation of the "rule of three" that would have produced less discriminatory results. The rule, in the New Haven city charter, requires the City to promote only from "those applicants with the three highest scores" on a promotional examination. New Haven, Conn., Code of Ordinances, Tit. I, Art. XXX, § 160 (1993). A state court has interpreted the charter to prohibit so-called "banding"—the City's previous practice of rounding scores to the nearest whole number and considering all candidates with the same whole-number score as being of one rank. Banding allowed the City to consider three ranks of candidates (with the possibility of multiple candidates filling each rank) for purposes of the rule of three. See *Kelly* v. *New Haven*, No. CV000444614, 2004 WL 114377, *3 (Conn. Super. Ct., Jan. 9, 2004). Respondents claim that employing banding here would have made four black and one Hispanic candidates eligible for then-open lieutenant and captain positions.

A state court's prohibition of banding, as a matter of municipal law under the charter, may not eliminate banding as a valid alternative under Title VII. See 42 U. S. C. § 2000e–7. We need not resolve that point, however. Here, banding was not a valid alternative for this reason: Had the City reviewed the exam results and then adopted banding to make the minority test scores appear higher, it would have violated Title VII's prohibition of adjusting test results on the basis of race. § 2000e–2(*l*); see also *Chicago Firefighters Local 2* v. *Chicago*, 249 F. 3d 649, 656 (CA7 2001) (Posner, J.) ("We have no doubt that if banding were adopted in order to make lower black scores seem higher, it would indeed be . . . forbidden"). As a matter of law, banding was not an alternative available to the City when it was considering whether to certify the examination results.

Third, and finally, respondents refer to statements by Hornick in his telephone interview with the CSB regarding alternatives to the written examinations. Hornick stated his "belie[f]" that an "assessment center process," which would have evaluated candidates' behavior in typical job tasks, "would have demonstrated less adverse impac[t]." CA2 App. A1039. But Hornick's brief mention of alternative testing methods, standing alone, does not raise a genuine issue of material fact that assessment centers were available to the City at the time of the examinations and that they would have produced less adverse impact. Other statements to the CSB indicated that the Department could not have used assessment centers for the 2003 examinations. *Supra*, at 574. And although respondents later argued to the CSB that Hornick had pushed the City to reject the test results, *supra*, at 572–574, the truth is that the essence of Hornick's remarks supported its certifying the test results. See *Scott*, 550 U. S., at 380. Hornick stated that adverse impact in standardized testing "has been in existence since the beginning of testing," CA2 App. A1037, and that the disparity in New Haven's test results was "somewhat higher but generally in the range that we've seen professionally," *id.*, at A1030–A1031. He told the CSB he was "not suggesting" that IOS "somehow created a test that had adverse impacts that it should not have had." *Id.*, at A1038. And he suggested that the CSB should "certify the list as it exists." *Id.*, at A1041.

Especially when it is noted that the strong-basis-in-evidence standard applies, respondents cannot create a genuine issue of fact based on a few stray (and contradictory) statements in the record. And there is no doubt respondents fall short of the mark by relying entirely on isolated statements by Hornick. Hornick had not "stud[ied] the test at length or in detail." *Id.*, at A1030. And as he told the CSB, he is a "direct competitor" of IOS'. *Id.*, at A1029. The remainder of his remarks showed that Hornick's pri-

mary concern—somewhat to the frustration of CSB members—was marketing his services for the future, not commenting on the results of the tests the City had already administered. See, *e. g.*, *id.*, at A1026, A1027, A1032, A1036, A1040, A1041. Hornick's hinting had its intended effect: The City has since hired him as a consultant. As for the other outside witnesses who spoke to the CSB, Vincent Lewis (the retired fire captain) thought the CSB should certify the test results. And Janet Helms (the Boston College professor) declined to review the examinations and told the CSB that, as a society, "we need to develop a new way of assessing people." *Id.*, at A1073. That task was beyond the reach of the CSB, which was concerned with the adequacy of the test results before it.

3

On the record before us, there is no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results. In other words, there is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job related or because other, equally valid and less discriminatory tests were available to the City. Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions. The City's discarding the test results was impermissible under Title VII, and summary judgment is appropriate for petitioners on their disparate-treatment claim.

* * *

The record in this litigation documents a process that, at the outset, had the potential to produce a testing procedure that was true to the promise of Title VII: No individual should face workplace discrimination based on race. Re-

spondents thought about promotion qualifications and relevant experience in neutral ways. They were careful to ensure broad racial participation in the design of the test itself and its administration. As we have discussed at length, the process was open and fair.

The problem, of course, is that after the tests were completed, the raw racial results became the predominant rationale for the City's refusal to certify the results. The injury arises in part from the high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established for the promotional process. Many of the candidates had studied for months, at considerable personal and financial expense, and thus the injury caused by the City's reliance on raw racial statistics at the end of the process was all the more severe. Confronted with arguments both for and against certifying the test results—and threats of a lawsuit either way—the City was required to make a difficult inquiry. But its hearings produced no strong evidence of a disparate-impact violation, and the City was not entitled to disregard the tests based solely on the racial disparity in the results.

Our holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.

Petitioners are entitled to summary judgment on their Title VII claim, and we therefore need not decide the underlying constitutional question. The judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring.

I join the Court's opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection? The question is not an easy one. See generally Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L. Rev. 493 (2003).

The difficulty is this: Whether or not Title VII's disparate-treatment provisions forbid "remedial" race-based actions when a disparate-impact violation would *not* otherwise result—the question resolved by the Court today—it is clear that Title VII not only permits but affirmatively *requires* such actions when a disparate-impact violation *would* otherwise result. See *ante*, at 580–581. But if the Federal Government is prohibited from discriminating on the basis of race, *Bolling* v. *Sharpe*, 347 U. S. 497, 500 (1954), then surely it is also prohibited from enacting laws mandating that third parties—*e. g.*, employers, whether private, state, or municipal—discriminate on the basis of race. See *Buchanan* v. *Warley*, 245 U. S. 60, 78–82 (1917). As the facts of these cases illustrate, Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory. See *ante*, at 578–579; *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279 (1979).

To be sure, the disparate-impact laws do not mandate imposition of quotas, but it is not clear why that should provide a safe harbor. Would a private employer not be guilty of unlawful discrimination if he refrained from establishing a racial hiring quota but intentionally designed his hiring practices to achieve the same end? Surely he would. In-

tentional discrimination is still occurring, just one step up the chain. Government compulsion of such design would therefore seemingly violate equal protection principles. Nor would it matter that Title VII requires consideration of race on a wholesale, rather than retail, level. "[T]he 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) (internal quotation marks omitted). And of course the purportedly benign motive for the disparate-impact provisions cannot save the statute. See *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227 (1995).

It might be possible to defend the law by framing it as simply an evidentiary tool used to identify genuine, intentional discrimination—to "smoke out," as it were, disparate treatment. See Primus, *supra*, at 498–499, 520–521. Disparate impact is sometimes (though not always, see *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 992 (1988) (plurality opinion)) a signal of something illicit, so a regulator might allow statistical disparities to play some role in the evidentiary process. Cf. *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802–803 (1973). But arguably the disparate-impact provisions sweep too broadly to be fairly characterized in such a fashion—since they fail to provide an affirmative defense for good-faith (*i. e.*, nonracially motivated) conduct, or perhaps even for good faith plus hiring standards that are entirely reasonable. See *post*, at 621–623, and n. 3 (GINSBURG, J., dissenting) (describing the demanding nature of the "business necessity" defense). This is a question that this Court will have to consider in due course. It is one thing to free plaintiffs from proving an employer's illicit intent, but quite another to preclude the employer from proving that its motives were pure and its actions reasonable.

The Court's resolution of these cases makes it unnecessary to resolve these matters today. But the war between disparate impact and equal protection will be waged sooner or

later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring.

I join the Court's opinion in full. I write separately only because the dissent, while claiming that "[t]he Court's recitation of the facts leaves out important parts of the story," *post*, at 609 (opinion of GINSBURG, J.), provides an incomplete description of the events that led to New Haven's decision to reject the results of its exam. The dissent's omissions are important because, when all of the evidence in the record is taken into account, it is clear that, even if the legal analysis in Parts II and III–A of the dissent were accepted, affirmance of the decision below is untenable.

I

When an employer in a disparate-treatment case under Title VII of the Civil Rights Act of 1964 claims that an employment decision, such as the refusal to promote, was based on a legitimate reason, two questions—one objective and one subjective—must be decided. The first, objective question is whether the reason given by the employer is one that is legitimate under Title VII. See *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502, 506–507 (1993). If the reason provided by the employer is not legitimate on its face, the employer is liable. *Id.*, at 509. The second, subjective question concerns the employer's intent. If an employer offers a facially legitimate reason for its decision but it turns out that this explanation was just a pretext for discrimination, the employer is again liable. See *id.*, at 510–512.

The question on which the opinion of the Court and the dissenting opinion disagree concerns the objective component of the determination that must be made when an employer justifies an employment decision, like the one made in

this litigation, on the ground that a contrary decision would have created a risk of disparate-impact liability. The Court holds—and I entirely agree—that concern about disparate-impact liability is a legitimate reason for a decision of the type involved here only if there was a "strong basis in evidence to find the tests inadequate." *Ante*, at 585. The Court ably demonstrates that in this litigation no reasonable jury could find that the city of New Haven (City) possessed such evidence and therefore summary judgment for petitioners is required. Because the Court correctly holds that respondents cannot satisfy this objective component, the Court has no need to discuss the question of respondents' actual intent. As the Court puts it, "[e]ven if respondents were motivated as a subjective matter by a desire to avoid committing disparate-impact discrimination, the record makes clear there is no support for the conclusion that respondents had an objective, strong basis in evidence to find the tests inadequate." *Ibid.*

The dissent advocates a different objective component of the governing standard. According to the dissent, the objective component should be whether the evidence provided "good cause" for the decision, *post*, at 625, and the dissent argues—incorrectly, in my view—that no reasonable juror could fail to find that such evidence was present here. But even if the dissent were correct on this point, I assume that the dissent would not countenance summary judgment for respondents if respondents' professed concern about disparate-impact litigation was simply a pretext. Therefore, the decision below, which sustained the entry of summary judgment for respondents, cannot be affirmed unless no reasonable jury could find that the City's asserted reason for scrapping its test—concern about disparate-impact liability—was a pretext and that the City's real reason was illegitimate, namely, the desire to placate a politically important racial constituency.

II

A

As initially described by the dissent, see *post*, at 609–618, the process by which the City reached the decision not to accept the test results was open, honest, serious, and deliberative. But even the District Court admitted that "a jury could rationally infer that city officials worked behind the scenes to sabotage the promotional examinations because they knew that, were the exams certified, the Mayor would incur the wrath of [Rev. Boise] Kimber and other influential leaders of New Haven's African-American community." 554 F. Supp. 2d 142, 162 (Conn. 2006) (internal quotation marks omitted), summarily aff'd, 530 F. 3d 87 (CA2 2008) *(per curiam)*.

This admission finds ample support in the record. Rev. Boise Kimber, to whom the District Court referred, is a politically powerful New Haven pastor and a self-professed "'kingmaker.'" App. to Pet. for Cert. in No. 07–1428, p. 906a; see also *id.*, at 909a. On one occasion, "[i]n front of TV cameras, he threatened a race riot during the murder trial of the black man arrested for killing white Yalie Christian Prince. He continues to call whites racist if they question his actions." *Id.*, at 931a.

Reverend Kimber's personal ties with seven-term New Haven Mayor John DeStefano (Mayor) stretch back more than a decade. In 1996, for example, Mayor DeStefano testified for Reverend Kimber as a character witness when Reverend Kimber—then the manager of a funeral home—was prosecuted and convicted for stealing prepaid funeral expenses from an elderly woman and then lying about the matter under oath. See *id.*, at 126a, 907a. "Reverend Kimber has played a leadership role in all of Mayor DeStefano's political campaigns, [and] is considered a valuable political supporter and vote-getter." *Id.*, at 126a. According to the Mayor's former campaign manager (who is currently his executive assistant), Reverend Kimber is an invaluable political

asset because "[h]e's very good at organizing people and putting together field operations, as a result of his ties to labor, his prominence in the religious community and his longstanding commitment to roots." *Id.*, at 908a (internal quotation marks and alteration omitted).

In 2002, the Mayor picked Reverend Kimber to serve as the chairman of the New Haven Board of Fire Commissioners (BFC), "despite the fact that he had no experience in the profession, fire administration, [or] municipal management." *Id.*, at 127a; see also *id.*, at 928a–929a. In that capacity, Reverend Kimber told firefighters that certain new recruits would not be hired because "'they just have too many vowels in their name[s].'" Thanawala, New Haven Fire Panel Chairman Steps Down Over Racial Slur, Hartford Courant, June 13, 2002, p. B2. After protests about this comment, Reverend Kimber stepped down as chairman of the BFC, *ibid.;* see also App. to Pet. for Cert. in No. 07–1428, at 929a, but he remained on the BFC and retained "a direct line to the mayor," *id.*, at 816a.

Almost immediately after the test results were revealed in "early January" 2004, Reverend Kimber called the City's chief administrative officer, Karen Dubois-Walton, who "acts 'on behalf of the Mayor.'" *Id.*, at 221a, 812a. Dubois-Walton and Reverend Kimber met privately in her office because he wanted "to express his opinion" about the test results and "to have some influence" over the City's response. *Id.*, at 815a–816a. As discussed in further detail below, Reverend Kimber adamantly opposed certification of the test results—a fact that he or someone in the Mayor's office eventually conveyed to the Mayor. *Id.*, at 229a.

B

On January 12, 2004, Tina Burgett (the director of the City's Department of Human Resources) sent an e-mail to Dubois-Walton to coordinate the City's response to the test results. Burgett wanted to clarify that the City's executive

officials would meet "sans the Chief, and that once we had a better fix on the next steps we would meet with the Mayor (possibly) and then the two Chiefs." *Id.*, at 446a. The "two Chiefs" are Fire Chief William Grant (who is white) and Assistant Fire Chief Ronald Dumas (who is African-American). Both chiefs believed that the test results should be certified. *Id.*, at 228a, 817a. Petitioners allege, and the record suggests, that the Mayor and his staff colluded "sans the Chief[s]" because "the defendants did not want Grant's and Dumas' views to be expressed or known; accordingly both men were prevented by the Mayor and his staff from making any statements regarding the matter." *Id.*, at 228a.[1]

The next day, on January 13, 2004, Chad Legel, who had designed the tests, flew from Chicago to New Haven to meet with Dubois-Walton, Burgett, and Thomas Ude, the City's corporate counsel. *Id.*, at 179a. "Legel outlined the merits of the examination and why city officials should be confident in the validity of the results." *Ibid.* But according to Legel, Dubois-Walton was "argumentative" and apparently had already made up her mind that the tests were "'discriminatory.'" *Id.*, at 179a–180a. Again according to Legel, "[a] theme" of the meeting was "the political and racial overtones of what was going on in the City." *Id.*, at 181a. "Legel came away from the January 13, 2004 meeting with the impression that defendants were already leaning toward discarding the examination results." *Id.*, at 180a.

On January 22, 2004, the Civil Service Board (CSB or Board) convened its first public meeting. Almost immediately, Reverend Kimber began to exert political pressure on the CSB. He began a loud, minutes-long outburst that required the CSB chairman to shout him down and hold him out of order three times. See *id.*, at 187a, 467a–468a; see

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[1] Although the dissent disputes it, see *post*, at 639–640, n. 17, the record certainly permits the inference that petitioners' allegation is true. See App. to Pet. for Cert. in No. 07–1428, pp. 846a–851a (deposition of Dubois-Walton).

also App. in No. 06–4996–cv (CA2), pp. A703–A705. Reverend Kimber protested the public meeting, arguing that he and the other fire commissioners should first be allowed to meet with the CSB in private. App. to Pet. for Cert. in No. 07–1428, at 188a.

Four days after the CSB's first meeting, Mayor DeStefano's executive aide sent an e-mail to Dubois-Walton, Burgett, and Ude. *Id.*, at 190a. The message clearly indicated that the Mayor had made up his mind to oppose certification of the test results (but nevertheless wanted to conceal that fact from the public):

> "I wanted to make sure we are all on the same page for this meeting tomorrow. . . . *[L]et's remember, that these folks are not against certification yet. So we can't go in and tell them that is our position;* we have to deliberate and arrive there as the fairest and most cogent outcome." *Ibid.*

On February 5, 2004, the CSB convened its second public meeting. Reverend Kimber again testified and threatened the CSB with political recriminations if they voted to certify the test results:

> "I look at this [Board] tonight. I look at three whites and one Hispanic and no blacks. . . . I would hope that you would not put yourself in this type of position, *a political ramification that may come back upon you* as you sit on this [Board] and decide the future of a department and the future of those who are being promoted.
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> . . . . .
>
> "(APPLAUSE)." *Id.*, at 492a (emphasis added).

One of the CSB members "t[ook] great offense" because he believed that Reverend Kimber "consider[ed] [him] a bigot because [his] face is white." *Id.*, at 496a. The offended

CSB member eventually voted not to certify the test results. *Id.*, at 586a–587a.

One of Reverend Kimber's "friends and allies," Lieutenant Gary Tinney, also exacerbated racial tensions before the CSB. *Id.*, at 129a. After some firefighters applauded in support of certifying the test results, "Lt. Tinney exclaimed, 'Listen to the Klansmen behind us.'" *Id.*, at 225a.

Tinney also has strong ties to the Mayor's office. See, *e. g.*, *id.*, at 129a–130a, 816a–817a. After learning that he had not scored well enough on the captain's exam to earn a promotion, Tinney called Dubois-Walton and arranged a meeting in her office. *Id.*, at 830a–831a, 836a. Tinney alleged that the white firefighters had cheated on their exams—an accusation that Dubois-Walton conveyed to the Board without first conducting an investigation into its veracity. *Id.*, at 837a–838a; see also App. 164 (statement of CSB chairman, noting the allegations of cheating). The allegation turned out to be baseless. App. to Pet. for Cert. in No. 07–1428, at 836a.

Dubois-Walton never retracted the cheating allegation, but she and other executive officials testified several times before the CSB. In accordance with directions from the Mayor's office to make the CSB meetings appear deliberative, see *id.*, at 190a, executive officials remained publicly uncommitted about certification—while simultaneously "work[ing] as a team" behind closed doors with the secretary of the CSB to devise a political message that would convince the CSB to vote against certification, see *id.*, at 447a. At the public CSB meeting on March 11, 2004, for example, Corporation Counsel Ude bristled at one board member's suggestion that City officials were recommending against certifying the test results. See *id.*, at 215a ("Attorney Ude took offense, stating, 'Frankly, because I would never make a recommendation—I would not have made a recommendation like that'"). But within days of making that public statement, Ude privately told other members of the Mayor's team "the ONLY

way we get to a decision not to certify is" to focus on something other than "a big discussion re: adverse impact" law. *Id.*, at 458a–459a.

As part of its effort to deflect attention from the specifics of the test, the City relied heavily on the testimony of Dr. Christopher Hornick, who is one of Chad Legel's competitors in the test-development business. Hornick never "studied the test [that Legel developed] at length or in detail," *id.*, at 549a; see also *id.*, at 203a, 553a, but Hornick did review and rely upon literature sent to him by Burgett to criticize Legel's test. For example, Hornick "noted in the literature that [Burgett] sent that the test was not customized to the New Haven Fire Department." *Id.*, at 551a. The chairman of the CSB immediately corrected Hornick. *Id.*, at 552a ("Actually, it was, Dr. Hornick"). Hornick also relied on newspaper accounts—again, sent to him by Burgett—pertaining to the controversy surrounding the certification decision. See *id.*, at 204a, 557a. Although Hornick again admitted that he had no knowledge about the actual test that Legel had developed and that the City had administered, see *id.*, at 560a–561a, the City repeatedly relied upon Hornick as a testing "guru" and, in the CSB chairman's words, "the City ke[pt] quoting him as a person that we should rely upon more than anybody else [to conclude that there] is a better way—a better mousetrap."[2] App. in No. 06–4996–cv (CA2), at A1128. Dubois-Walton later admitted that the City rewarded Hornick for his testimony by hiring him to develop and administer an alternative test. App. to Pet. for Cert. in

[2] The City's heavy reliance on Hornick's testimony makes the two chiefs' silence all the more striking. See *supra*, at 599–600. While Hornick knew little or nothing about the tests he criticized, the two chiefs were involved "during the lengthy process that led to the devising of the administration of these exams," App. to Pet. for Cert. in No. 07–1428, at 847a, including "collaborating with City officials on the extensive job analyses that were done," "selection of the oral panelists," and selection of "the proper content and subject matter of the exams," *id.*, at 847a–848a.

No. 07–1428, at 854a; see also *id.*, at 562a–563a (Hornick's plea for future business from the City on the basis of his criticisms of Legel's tests).

At some point prior to the CSB's public meeting on March 18, 2004, the Mayor decided to use his executive authority to disregard the test results—*even if* the CSB ultimately voted to certify them. *Id.*, at 819a–820a. Accordingly, on the evening of March 17th, Dubois-Walton sent an e-mail to the Mayor, the Mayor's executive assistant, Burgett, and attorney Ude, attaching two alternative press releases. *Id.*, at 457a. The first would be issued if the CSB voted not to certify the test results; the second would be issued (and would explain the Mayor's invocation of his executive authority) if the CSB voted to certify the test results. *Id.*, at 217a–218a, 590a–591a, 819a–820a. Half an hour after Dubois-Walton circulated the alternative drafts, Burgett replied: "[W]ell, that seems to say it all. Let's hope draft #2 hits the shredder tomorrow nite." *Id.*, at 457a.

Soon after the CSB voted against certification, Mayor DeStefano appeared at a dinner event and "took credit for the scu[tt]ling of the examination results." *Id.*, at 230a.

C

Taking into account all the evidence in the summary judgment record, a reasonable jury could find the following. Almost as soon as the City disclosed the racial makeup of the list of firefighters who scored the highest on the exam, the City administration was lobbied by an influential community leader to scrap the test results, and the City administration decided on that course of action before making any real assessment of the possibility of a disparate-impact violation. To achieve that end, the City administration concealed its internal decision but worked—as things turned out, successfully—to persuade the CSB that acceptance of the test results would be illegal and would expose the City to disparate-impact liability. But in the event that the CSB

was not persuaded, the Mayor, wielding ultimate decision-making authority, was prepared to overrule the CSB immediately. Taking this view of the evidence, a reasonable jury could easily find that the City's real reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency. It is noteworthy that the Solicitor General—whose position on the principal legal issue here is largely aligned with the dissent—concludes that "[n]either the district court nor the court of appeals . . . adequately considered whether, viewing the evidence in the light most favorable to petitioners, a genuine issue of material fact remained whether respondents' claimed purpose to comply with Title VII was a pretext for intentional racial discrimination . . . ." Brief for United States as *Amicus Curiae* 6; see also *id.*, at 32–33.

III

I will not comment at length on the dissent's criticism of my analysis, but two points require a response.

The first concerns the dissent's statement that I "equat[e] political considerations with unlawful discrimination." *Post*, at 642. The dissent misrepresents my position: I draw no such equation. Of course "there are many ways in which a politician can attempt to win over a constituency—including a racial constituency—without engaging in unlawful discrimination." *Ibid.* But—as I assume the dissent would agree—there are some things that a public official cannot do, and one of those is engaging in intentional racial discrimination when making employment decisions.

The second point concerns the dissent's main argument—that efforts by the Mayor and his staff to scuttle the test results are irrelevant because the ultimate decision was made by the CSB. According to the dissent, "[t]he relevant decision was made by the CSB," *post*, at 640, and there is "scant cause to suspect" that anything done by the opponents

of certification, including the Mayor and his staff, "prevented the CSB from evenhandedly assessing the reliability of the exams and rendering an independent, good-faith decision on certification," *post*, at 641.

Adoption of the dissent's argument would implicitly decide an important question of Title VII law that this Court has never resolved—the circumstances in which an employer may be held liable based on the discriminatory intent of subordinate employees who influence but do not make the ultimate employment decision. There is a large body of Court of Appeals case law on this issue, and these cases disagree about the proper standard. See *EEOC* v. *BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F. 3d 476, 484–488 (CA10 2006) (citing cases and describing the approaches taken in different Circuits). One standard is whether the subordinate "exerted influenc[e] over the titular decisionmaker." *Russell* v. *McKinney Hosp. Venture*, 235 F. 3d 219, 227 (CA5 2000); see also *Poland* v. *Chertoff*, 494 F. 3d 1174, 1182 (CA9 2007) (A subordinate's bias is imputed to the employer where the subordinate "influenced or was involved in the decision or decisionmaking process"). Another is whether the discriminatory input "caused the adverse employment action." See *BCI Coca-Cola Bottling Co. of Los Angeles*, *supra*, at 487.

In the present cases, a reasonable jury could certainly find that these standards were met. The dissent makes much of the fact that members of the CSB swore under oath that their votes were based on the good-faith belief that certification of the results would have violated federal law. See *post*, at 640. But the good faith of the CSB members would not preclude a finding that the presentations engineered by the Mayor and his staff influenced or caused the CSB decision.

The least employee-friendly standard asks only whether "the actual decisionmaker" acted with discriminatory intent, see *Hill* v. *Lockheed Martin Logistics Management, Inc.*,

354 F. 3d 277, 291 (CA4 2004) (en banc), and it is telling that, even under this standard, summary judgment for respondents would not be proper. This is so because a reasonable jury could certainly find that in New Haven, the Mayor—not the CSB—wielded the final decisionmaking power. After all, the Mayor claimed that authority and was poised to use it in the event that the CSB decided to accept the test results. See *supra*, at 604. If the Mayor had the authority to overrule a CSB decision *accepting* the test results, the Mayor also presumably had the authority to overrule the CSB's decision *rejecting* the test results. In light of the Mayor's conduct, it would be quite wrong to throw out petitioners' case on the ground that the CSB was the ultimate decisionmaker.

* * *

Petitioners are firefighters who seek only a fair chance to move up the ranks in their chosen profession. In order to qualify for promotion, they made personal sacrifices. Petitioner Frank Ricci, who is dyslexic, found it necessary to "hir[e] someone, at considerable expense, to read onto audiotape the content of the books and study material[s]." App. to Pet. for Cert. in No. 07–1428, at 169a. He "studied an average of eight to thirteen hours a day . . . , even listening to audio tapes while driving his car." *Ibid.* Petitioner Benjamin Vargas, who is Hispanic, had to "give up a part-time job," and his wife had to "take leave from her own job in order to take care of their three young children while Vargas studied." *Id.*, at 176a. "Vargas devoted countless hours to study . . . , missed two of his children's birthdays and over two weeks of vacation time," and "incurred significant financial expense" during the 3-month study period. *Id.*, at 176a–177a.

Petitioners were denied promotions for which they qualified because of the race and ethnicity of the firefighters who achieved the highest scores on the City's exam. The District Court threw out their case on summary judgment, even

though that court all but conceded that a jury could find that the City's asserted justification was pretextual. The Court of Appeals then summarily affirmed that decision.

The dissent grants that petitioners' situation is "unfortunate" and that they "understandably attract this Court's sympathy." *Post* this page and 644. But "sympathy" is not what petitioners have a right to demand. What they have a right to demand is evenhanded enforcement of the law—of Title VII's prohibition against discrimination based on race. And that is what, until today's decision, has been denied them.

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

In assessing claims of race discrimination, "[c]ontext matters." *Grutter* v. *Bollinger*, 539 U. S. 306, 327 (2003). In 1972, Congress extended Title VII of the Civil Rights Act of 1964 to cover public employment. At that time, municipal fire departments across the country, including New Haven's, pervasively discriminated against minorities. The extension of Title VII to cover jobs in firefighting effected no overnight change. It took decades of persistent effort, advanced by Title VII litigation, to open firefighting posts to members of racial minorities.

The white firefighters who scored high on New Haven's promotional exams understandably attract this Court's sympathy. But they had no vested right to promotion. Nor have other persons received promotions in preference to them. New Haven maintains that it refused to certify the test results because it believed, for good cause, that it would be vulnerable to a Title VII disparate-impact suit if it relied on those results. The Court today holds that New Haven has not demonstrated "a strong basis in evidence" for its plea. *Ante*, at 563. In so holding, the Court pretends that "[t]he City rejected the test results solely because the higher scoring candidates were white." *Ante*, at 580. That preten-

sion, essential to the Court's disposition, ignores substantial evidence of multiple flaws in the tests New Haven used. The Court similarly fails to acknowledge the better tests used in other cities, which have yielded less racially skewed outcomes.[1]

By order of this Court, New Haven, a city in which African-Americans and Hispanics account for nearly 60 percent of the population, must today be served—as it was in the days of undisguised discrimination—by a fire department in which members of racial and ethnic minorities are rarely seen in command positions. In arriving at its order, the Court barely acknowledges the pathmarking decision in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), which explained the centrality of the disparate-impact concept to effective enforcement of Title VII. The Court's order and opinion, I anticipate, will not have staying power.

I

A

The Court's recitation of the facts leaves out important parts of the story. Firefighting is a profession in which the legacy of racial discrimination casts an especially long shadow. In extending Title VII to state and local government employers in 1972, Congress took note of a U. S. Commission on Civil Rights (USCCR) report finding racial discrimination in municipal employment even "more pervasive than in the private sector." H. R. Rep. No. 92–238, p. 17 (1971). According to the report, overt racism was partly to blame, but so too was a failure on the part of municipal em-

[1] Never mind the flawed tests New Haven used and the better selection methods used elsewhere, JUSTICE ALITO's concurring opinion urges. Overriding all else, racial politics, fired up by a strident African-American pastor, were at work in New Haven. See *ante*, at 599–604. Even a detached and disinterested observer, however, would have every reason to ask: Why did such racially skewed results occur in New Haven, when better tests likely would have produced less disproportionate results?

ployers to apply merit-based employment principles. In making hiring and promotion decisions, public employers often "rel[ied] on criteria unrelated to job performance," including nepotism or political patronage. 118 Cong. Rec. 1817 (1972). Such flawed selection methods served to entrench preexisting racial hierarchies. The USCCR report singled out police and fire departments for having "[b]arriers to equal employment . . . greater . . . than in any other area of State or local government," with African-Americans "hold[ing] almost no positions in the officer ranks." *Ibid.* See also National Commission on Fire Prevention and Control, America Burning 5 (1973) ("Racial minorities are under-represented in the fire departments in nearly every community in which they live.").

The city of New Haven (City) was no exception. In the early 1970's, African-Americans and Hispanics composed 30 percent of New Haven's population, but only 3.6 percent of the City's 502 firefighters. The racial disparity in the officer ranks was even more pronounced: "[O]f the 107 officers in the Department only one was black, and he held the lowest rank above private." *Firebird Soc. of New Haven, Inc.* v. *New Haven Bd. of Fire Comm'rs*, 66 F. R. D. 457, 460 (Conn. 1975).

Following a lawsuit and settlement agreement, see *ibid.*, the City initiated efforts to increase minority representation in the New Haven Fire Department (Department). Those litigation-induced efforts produced some positive change. New Haven's population includes a greater proportion of minorities today than it did in the 1970's: Nearly 40 percent of the City's residents are African-American and more than 20 percent are Hispanic. Among entry-level firefighters, minorities are still underrepresented, but not starkly so. As of 2003, African-Americans and Hispanics constituted 30 percent and 16 percent of the City's firefighters, respectively. In supervisory positions, however, significant disparities remain. Overall, the senior officer ranks (captain and higher)

are nine percent African-American and nine percent Hispanic. Only one of the Department's 21 fire captains is African-American. See App. in No. 06–4996–cv (CA2), p. A1588 (hereinafter CA2 App.). It is against this backdrop of entrenched inequality that the promotion process at issue in this litigation should be assessed.

B

By order of its charter, New Haven must use competitive examinations to fill vacancies in fire-officer and other civil-service positions. Such examinations, the City's civil-service rules specify, "shall be practical in nature, shall relate to matters which fairly measure the relative fitness and capacity of the applicants to discharge the duties of the position which they seek, and shall take into account character, training, experience, physical and mental fitness." *Id.*, at A331. The City may choose among a variety of testing methods, including written and oral exams and "[p]erformance tests to demonstrate skill and ability in performing actual work." *Id.*, at A332.

New Haven, the record indicates, did not closely consider what sort of "practical" examination would "fairly measure the relative fitness and capacity of the applicants to discharge the duties" of a fire officer. Instead, the City simply adhered to the testing regime outlined in its two-decades-old contract with the local firefighters' union: a written exam, which would account for 60 percent of an applicant's total score, and an oral exam, which would account for the remaining 40 percent. *Id.*, at A1045. In soliciting bids from exam development companies, New Haven made clear that it would entertain only "proposals that include a written component that will be weighted at 60%, and an oral component that will be weighted at 40%." *Id.*, at A342. Chad Legel, a representative of the winning bidder, Industrial/Organizational Solutions, Inc. (IOS), testified during his deposition that the City never asked whether alternative methods

might better measure the qualities of a successful fire officer, including leadership skills and command presence. See *id.*, at A522 ("I was under contract and had responsibility only to create the oral interview and the written exam.").

Pursuant to New Haven's specifications, IOS developed and administered the oral and written exams. The results showed significant racial disparities. On the lieutenant exam, the pass rate for African-American candidates was about one-half the rate for Caucasian candidates; the pass rate for Hispanic candidates was even lower. On the captain exam, both African-American and Hispanic candidates passed at about half the rate of their Caucasian counterparts. See App. 225–226. More striking still, although nearly half of the 77 lieutenant candidates were African-American or Hispanic, none would have been eligible for promotion to the eight positions then vacant. The highest scoring African-American candidate ranked 13th; the top Hispanic candidate was 26th. As for the seven then-vacant captain positions, two Hispanic candidates would have been eligible, but no African-Americans. The highest scoring African-American candidate ranked 15th. See *id.*, at 218–219.

These stark disparities, the Court acknowledges, sufficed to state a prima facie case under Title VII's disparate-impact provision. See *ante*, at 586 ("The pass rates of minorities . . . f[e]ll well below the 80-percent standard set by the [Equal Employment Opportunity Commission (EEOC)] to implement the disparate-impact provision of Title VII."). New Haven thus had cause for concern about the prospect of Title VII litigation and liability. City officials referred the matter to the New Haven Civil Service Board (CSB), the entity responsible for certifying the results of employment exams.

Between January and March 2004, the CSB held five public meetings to consider the proper course. At the first meeting, New Haven's Corporation Counsel, Thomas Ude, described the legal standard governing Title VII disparate-impact claims. Statistical imbalances alone, Ude correctly

recognized, do not give rise to liability. Instead, presented with a disparity, an employer "has the opportunity and the burden of proving that the test is job-related and consistent with business necessity." CA2 App. A724. A Title VII plaintiff may attempt to rebut an employer's showing of job-relatedness and necessity by identifying alternative selection methods that would have been at least as valid but with "less of an adverse or disparate or discriminatory effect." *Ibid.* See also *id.*, at A738. Accordingly, the CSB commissioners understood, their principal task was to decide whether they were confident about the reliability of the exams: Had the exams fairly measured the qualities of a successful fire officer despite their disparate results? Might an alternative examination process have identified the most qualified candidates without creating such significant racial imbalances?

Seeking a range of input on these questions, the CSB heard from test takers, the test designer, subject-matter experts, City officials, union leaders, and community members. Several candidates for promotion, who did not yet know their exam results, spoke at the CSB's first two meetings. Some candidates favored certification. The exams, they emphasized, had closely tracked the assigned study materials. Having invested substantial time and money to prepare themselves for the test, they felt it would be unfair to scrap the results. See, *e. g.*, *id.*, at A772–A773, A785–A789.

Other firefighters had a different view. A number of the exam questions, they pointed out, were not germane to New Haven's practices and procedures. See, *e. g.*, *id.*, at A774–A784. At least two candidates opposed to certification noted unequal access to study materials. Some individuals, they asserted, had the necessary books even before the syllabus was issued. Others had to invest substantial sums to purchase the materials and "wait a month and a half for some of the books because they were on back-order." *Id.*, at A858. These disparities, it was suggested, fell at least in part along racial lines. While many Caucasian applicants could obtain

materials and assistance from relatives in the fire service, the overwhelming majority of minority applicants were "first-generation firefighters" without such support networks. See *id.*, at A857–A861, A886–A887.

A representative of the Northeast Region of the International Association of Black Professional Firefighters, Donald Day, also spoke at the second meeting. Statistical disparities, he told the CSB, had been present in the Department's previous promotional exams. On earlier tests, however, a few minority candidates had fared well enough to earn promotions. *Id.*, at A828. See also App. 218–219. Day contrasted New Haven's experience with that of nearby Bridgeport, where minority firefighters held one-third of lieutenant and captain positions. Bridgeport, Day observed, had once used a testing process similar to New Haven's, with a written exam accounting for 70 percent of an applicant's score, an oral exam for 25 percent, and seniority for the remaining five percent. CA2 App. A830. Bridgeport recognized, however, that the oral component, more so than the written component, addressed the sort of "real-life scenarios" fire officers encounter on the job. *Id.*, at A832. Accordingly, that city "changed the relative weights" to give primacy to the oral exam. *Ibid.* Since that time, Day reported, Bridgeport had seen minorities "fairly represented" in its exam results. *Ibid.*

The CSB's third meeting featured IOS representative Legel, the leader of the team that had designed and administered the exams for New Haven. Several City officials also participated in the discussion. Legel described the exam development process in detail. The City, he recounted, had set the "parameters" for the exams, specifically, the requirement of written and oral components with a 60/40 weighting. *Id.*, at A923, A974. For security reasons, Department officials had not been permitted to check the content of the questions prior to their administration. Instead, IOS retained a senior fire officer from Georgia to review the exams "for con-

tent and fidelity to the source material." *Id.*, at A936. Legel defended the exams as "facially neutral," and stated that he "would stand by the[ir] validity." *Id.*, at A962. City officials did not dispute the neutrality of IOS's work. But, they cautioned, even if individual exam questions had no intrinsic bias, the selection process as a whole may nevertheless have been deficient. The officials urged the CSB to consult with experts about the "larger picture." *Id.*, at A1012.

At its fourth meeting, CSB solicited the views of three individuals with testing-related expertise. Dr. Christopher Hornick, an industrial/organizational psychology consultant with 25 years' experience with police and firefighter testing, described the exam results as having "relatively high adverse impact." *Id.*, at A1028. Most of the tests he had developed, Hornick stated, exhibited "significantly and dramatically less adverse impact." *Id.*, at A1029. Hornick downplayed the notion of "facial neutrality." It was more important, he advised the CSB, to consider "the broader issue of how your procedures and your rules and the types of tests that you are using are contributing to the adverse impact." *Id.*, at A1038.

Specifically, Hornick questioned New Haven's union-prompted 60/40 written/oral examination structure, noting the availability of "different types of testing procedures that are much more valid in terms of identifying the best potential supervisors in [the] fire department." *Id.*, at A1032. He suggested, for example, "an assessment center process, which is essentially an opportunity for candidates . . . to demonstrate how they would address a particular problem as opposed to just verbally saying it or identifying the correct option on a written test." *Id.*, at A1039–A1040. Such selection processes, Hornick said, better "identif[y] the best possible people" and "demonstrate dramatically less adverse impacts." *Ibid.* Hornick added:

> "I've spoken to at least 10,000, maybe 15,000, firefighters in group settings in my consulting practice and I have never one time ever had anyone in the fire service say to me, 'Well, the person who answers—gets the highest score on a written job knowledge, multiple-guess test makes the best company officer.' We know that it's not as valid as other procedures that exist." *Id.*, at A1033.

See also *id.*, at A1042–A1043 ("I think a person's leadership skills, their command presence, their interpersonal skills, their management skills, their tactical skills could have been identified and evaluated in a much more appropriate way.").

Hornick described the written test itself as "reasonably good," *id.*, at A1041, but he criticized the decision not to allow Department officials to check the content. According to Hornick, this "inevitably" led to "test[ing] for processes and procedures that don't necessarily match up into the department." *Id.*, at A1034–A1035. He preferred "experts from within the department who have signed confidentiality agreements . . . to make sure that the terminology and equipment that's being identified from standardized reading sources apply to the department." *Id.*, at A1035.

Asked whether he thought the City should certify the results, Hornick hedged: "There is adverse impact in the test. That will be identified in any proceeding that you have. You will have industrial psychology experts, if it goes to court, on both sides. And it will not be a pretty or comfortable position for anyone to be in." *Id.*, at A1040–A1041. Perhaps, he suggested, New Haven might certify the results but immediately begin exploring "alternative ways to deal with these issues" in the future. *Id.*, at A1041.

The two other witnesses made relatively brief appearances. Vincent Lewis, a specialist with the Department of Homeland Security and former fire officer in Michigan, believed the exams had generally tested relevant material, although he noted a relatively heavy emphasis on questions

pertaining to being an "apparatus driver." He suggested that this may have disadvantaged test takers "who had not had the training or had not had an opportunity to drive the apparatus." *Id.*, at A1051. He also urged the CSB to consider whether candidates had, in fact, enjoyed equal access to the study materials. *Ibid.* Cf. *supra*, at 613–614.

Janet Helms, a professor of counseling psychology at Boston College, observed that two-thirds of the incumbent fire officers who submitted job analyses to IOS during the exam-design phase were Caucasian. Members of different racial groups, Helms told the CSB, sometimes do their jobs in different ways, "often because the experiences that are open to white male firefighters are not open to members of these other under-represented groups." CA2 App. A1063–A1064. The heavy reliance on job analyses from white firefighters, she suggested, may thus have introduced an element of bias. *Id.*, at A1063.

The CSB's fifth and final meeting began with statements from City officials recommending against certification. Ude, New Haven's counsel, repeated the applicable disparate-impact standard:

> "[A] finding of adverse impact is the beginning, not the end, of a review of testing procedures. Where a procedure demonstrates adverse impact, you look to how closely it is related to the job that you're looking to fill and you also look at whether there are other ways to test for those qualities, those traits, those positions that are equally valid with less adverse impact." *Id.*, at A1100–A1101.

New Haven, Ude and other officials asserted, would be vulnerable to Title VII liability under this standard. Even if the exams were "facially neutral," significant doubts had been raised about whether they properly assessed the key attributes of a successful fire officer. *Id.*, at A1103. See also *id.*, at A1125 ("Upon close reading of the exams, the

questions themselves would appear to test a candidate's ability to memorize textbooks but not necessarily to identify solutions to real problems on the fire ground."). Moreover, City officials reminded the CSB, Hornick and others had identified better, less discriminatory selection methods—such as assessment centers or exams with a more heavily weighted oral component. *Id.*, at A1108–A1109, A1129–A1130.

After giving members of the public a final chance to weigh in, the CSB voted on certification, dividing 2 to 2. By rule, the result was noncertification. Voting no, Commissioner Webber stated, "I originally was going to vote to certify. . . . But I've heard enough testimony here to give me great doubts about the test itself and . . . some of the procedures. And I believe we can do better." *Id.*, at A1157. Commissioner Tirado likewise concluded that the "flawed" testing process counseled against certification. *Id.*, at A1158. Chairman Segaloff and Commissioner Caplan voted to certify. According to Segaloff, the testimony had not "compelled [him] to say this exam was not job-related," and he was unconvinced that alternative selection processes would be "less discriminatory." *Id.*, at A1159–A1160. Both Segaloff and Caplan, however, urged the City to undertake civil-service reform. *Id.*, at A1150–A1154.

C

Following the CSB's vote, petitioners—17 white firefighters and one Hispanic firefighter, all of whom had high marks on the exams—filed suit in the United States District Court for the District of Connecticut. They named as defendants—respondents here—the City, several City officials, a local political activist, and the two CSB members who voted against certifying the results. By opposing certification, petitioners alleged, respondents had discriminated against them in violation of Title VII's disparate-treatment provision and the Fourteenth Amendment's Equal Protec-

tion Clause. The decision not to certify, respondents answered, was a lawful effort to comply with Title VII's disparate-impact provision and thus could not have run afoul of Title VII's prohibition of disparate treatment. Characterizing respondents' stated rationale as a mere pretext, petitioners insisted that New Haven would have had a solid defense to any disparate-impact suit.

In a decision summarily affirmed by the Court of Appeals, the District Court granted summary judgment for respondents. 554 F. Supp. 2d 142 (Conn. 2006), aff'd, 530 F. 3d 87 (CA2 2008) *(per curiam)*. Under Second Circuit precedent, the District Court explained, "the intent to remedy the disparate impact" of a promotional exam "is not equivalent to an intent to discriminate against non-minority applicants." 554 F. Supp. 2d, at 157 (quoting *Hayden* v. *County of Nassau*, 180 F. 3d 42, 51 (CA2 1999)). Rejecting petitioners' pretext argument, the court observed that the exam results were sufficiently skewed "to make out a prima facie case of discrimination" under Title VII's disparate-impact provision. 554 F. Supp. 2d, at 158. Had New Haven gone forward with certification and been sued by aggrieved minority test takers, the City would have been forced to defend tests that were presumptively invalid. And, as the CSB testimony of Hornick and others indicated, overcoming that presumption would have been no easy task. *Id.*, at 153–156. Given Title VII's preference for voluntary compliance, the court held, New Haven could lawfully discard the disputed exams even if the City had not definitively "pinpoint[ed]" the source of the disparity and "ha[d] not yet formulated a better selection method." *Id.*, at 156.

Respondents were no doubt conscious of race during their decisionmaking process, the court acknowledged, but this did not mean they had engaged in racially disparate treatment. The conclusion they had reached and the action thereupon taken were race neutral in this sense: "[A]ll the test results were discarded, no one was promoted, and firefighters of

every race will have to participate in another selection process to be considered for promotion." *Id.*, at 158. New Haven's action, which gave no individual a preference, "was 'simply not analogous to a quota system or a minority set-aside where candidates, on the basis of their race, are not treated uniformly.'" *Id.*, at 157 (quoting *Hayden*, 180 F. 3d, at 50). For these and other reasons, the court also rejected petitioners' equal protection claim.

II

A

Title VII became effective in July 1965. Employers responded to the law by eliminating rules and practices that explicitly barred racial minorities from "white" jobs. But removing overtly race-based job classifications did not usher in genuinely equal opportunity. More subtle—and sometimes unconscious—forms of discrimination replaced once undisguised restrictions.

In *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), this Court responded to that reality and supplied important guidance on Title VII's mission and scope. Congress, the landmark decision recognized, aimed beyond "disparate treatment"; it targeted "disparate impact" as well. Title VII's original text, it was plain to the Court, "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.*, at 431.[2] Only by ig-

[2] The Court's disparate-impact analysis rested on two provisions of Title VII: § 703(a)(2), which made it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin"; and § 703(h), which permitted employers "to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 426, n. 1 (1971) (quoting 78 Stat. 255, 42 U. S. C. § 2000e–2(a)(2), (h) (1964

noring *Griggs* could one maintain that intentionally disparate treatment alone was Title VII's "original, foundational prohibition," and disparate impact a mere afterthought. Cf. *ante*, at 581.

Griggs addressed Duke Power Company's policy that applicants for positions, save in the company's labor department, be high school graduates and score satisfactorily on two professionally prepared aptitude tests. "[T]here was no showing of a discriminatory purpose in the adoption of the diploma and test requirements." 401 U. S., at 428. The policy, however, "operated to render ineligible a markedly disproportionate number of [African-Americans]." *Id.*, at 429. At the time of the litigation, in North Carolina, where the Duke Power plant was located, 34 percent of white males, but only 12 percent of African-American males, had high school diplomas. *Id.*, at 430, n. 6. African-Americans also failed the aptitude tests at a significantly higher rate than whites. *Ibid.* Neither requirement had been "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used." *Id.*, at 431.

The Court unanimously held that the company's diploma and test requirements violated Title VII. "[T]o achieve equality of employment opportunities," the Court comprehended, Congress "directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.*, at 429, 432. That meant "unnecessary barriers to employment" must fall, even if "neutral on their face" and "neutral in terms of intent." *Id.*, at 430, 431. "The touchstone" for determining whether a test or qualification meets Title VII's measure, the Court said, is not "good intent or the absence of discriminatory intent"; it is "business necessity." *Id.*, at 431, 432. Matching procedure to substance, the *Griggs* Court observed, Congress "placed on the em-

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ed.)). See also 401 U. S., at 433–436 (explaining that § 703(h) authorizes only tests that are "demonstrably a reasonable measure of job performance").

ployer the burden of showing that any given requirement . . . ha[s] a manifest relationship to the employment in question." *Id.*, at 432.

In *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), the Court, again without dissent, elaborated on *Griggs*. When an employment test "select[s] applicants for hire or promotion in a racial pattern significantly different from the pool of applicants," the Court reiterated, the employer must demonstrate a "manifest relationship" between test and job. 422 U. S., at 425. Such a showing, the Court cautioned, does not necessarily mean the employer prevails: "[I]t remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Ibid.*

Federal trial and appellate courts applied *Griggs* and *Albemarle* to disallow a host of hiring and promotion practices that "operate[d] as 'built in headwinds' for minority groups." *Griggs*, 401 U. S., at 432. Practices discriminatory in effect, courts repeatedly emphasized, could be maintained only upon an employer's showing of "an overriding and compelling business purpose." *Chrisner* v. *Complete Auto Transit, Inc.*, 645 F. 2d 1251, 1261, n. 9 (CA6 1981).[3] That a prac-

[3] See also *Dothard* v. *Rawlinson*, 433 U. S. 321, 332, n. 14 (1977) ("a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge"); *Williams* v. *Colorado Springs, Colo., School Dist.*, 641 F. 2d 835, 840–841 (CA10 1981) ("The term 'necessity' connotes that the exclusionary practice must be shown to be of great importance to job performance."); *Kirby* v. *Colony Furniture Co.*, 613 F. 2d 696, 705, n. 6 (CA8 1980) ("the proper standard for determining whether 'business necessity' justifies a practice which has a racially discriminatory result is not whether it is justified by routine business considerations but whether there is a *compelling* need for the employer to maintain that practice and whether the employer can prove there is *no* alternative to the challenged practice"); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 244, n. 87 (CA5 1974) ("this doctrine of business necessity . . . connotes an irresistible demand" (inter-

tice served "legitimate management functions" did not, it was generally understood, suffice to establish business necessity. *Williams* v. *Colorado Springs, Colo., School Dist.*, 641 F. 2d 835, 840–841 (CA10 1981) (internal quotation marks omitted). Among selection methods cast aside for lack of a "manifest relationship" to job performance were a number of written hiring and promotional examinations for firefighters.[4]

Moving in a different direction, in *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989), a bare majority of this Court significantly modified the *Griggs-Albemarle* delineation of Title VII's disparate-impact proscription. As to business necessity for a practice that disproportionately excludes members of minority groups, *Wards Cove* held, the employer bears only the burden of production, not the burden of persuasion. 490 U. S., at 659–660. And in place of the instruction that the challenged practice "must have a manifest relationship to the employment in question," *Griggs*, 401 U. S., at 432, *Wards Cove* said that the practice would be permissible as long as it "serve[d], in a significant way, the legitimate employment goals of the employer," 490 U. S., at 659.

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nal quotation marks omitted)); *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (CA2 1971) (an exclusionary practice "must not only directly foster safety and efficiency of a plant, but also be essential to those goals"); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 798 (CA4 1971) ("The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business.").

[4] See, *e. g.*, *Nash* v. *Jacksonville*, 837 F. 2d 1534 (CA11 1988), vacated, 490 U. S. 1103 (1989), opinion reinstated, 905 F. 2d 355 (1990); *Vulcan Pioneers, Inc.* v. *New Jersey Dept. of Civil Serv.*, 832 F. 2d 811 (CA3 1987); *Guardians Assn. of N. Y. City Police Dept.* v. *Civil Serv. Comm'n*, 630 F. 2d 79 (CA2 1980); *Ensley Branch of NAACP* v. *Seibels*, 616 F. 2d 812 (CA5 1980); *Firefighters Inst. for Racial Equality* v. *St. Louis*, 616 F. 2d 350 (CA8 1980); *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F. 2d 1017 (CA1 1974).

In response to *Wards Cove* and "a number of [other] recent decisions by the United States Supreme Court that sharply cut back on the scope and effectiveness of [civil rights] laws," Congress enacted the Civil Rights Act of 1991. H. R. Rep. No. 102–40, pt. 2, p. 2 (1991). Among the 1991 alterations, Congress formally codified the disparate-impact component of Title VII. In so amending the statute, Congress made plain its intention to restore "the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in Griggs v. Duke Power Co. . . . and in other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio." § 3(2), 105 Stat. 1071. Once a complaining party demonstrates that an employment practice causes a disparate impact, amended Title VII states, the burden is on the employer "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U. S. C. § 2000e–2(k)(1)(A)(i). If the employer carries that substantial burden, the complainant may respond by identifying "an alternative employment practice" which the employer "refuses to adopt." § 2000e–2(k)(1)(A)(ii), (C).

B

Neither Congress' enactments nor this Court's Title VII precedents (including the now-discredited decision in *Wards Cove*) offer even a hint of "conflict" between an employer's obligations under the statute's disparate-treatment and disparate-impact provisions. Cf. *ante*, at 580. Standing on an equal footing, these twin pillars of Title VII advance the same objectives: ending workplace discrimination and promoting genuinely equal opportunity. See *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973).

Yet the Court today sets at odds the statute's core directives. When an employer changes an employment practice in an effort to comply with Title VII's disparate-impact pro-

vision, the Court reasons, it acts "because of race"—something Title VII's disparate-treatment provision, see § 2000e–2(a)(1), generally forbids. *Ante*, at 579–580. This characterization of an employer's compliance-directed action shows little attention to Congress' design or to the *Griggs* line of cases Congress recognized as pathmarking.

"[O]ur task in interpreting separate provisions of a single Act is to give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose." *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U. S. 609, 631–632 (1973) (internal quotation marks omitted). A particular phrase need not "extend to the outer limits of its definitional possibilities" if an incongruity would result. *Dolan* v. *Postal Service*, 546 U. S. 481, 486 (2006). Here, Title VII's disparate-treatment and disparate-impact proscriptions must be read as complementary.

In codifying the *Griggs* and *Albemarle* instructions, Congress declared unambiguously that selection criteria operating to the disadvantage of minority group members can be retained only if justified by business necessity.[5] In keeping with Congress' design, employers who reject such criteria due to reasonable doubts about their reliability can hardly be held to have engaged in discrimination "because of" race. A reasonable endeavor to comply with the law and to ensure that qualified candidates of all races have a fair opportunity to compete is simply not what Congress meant to interdict. I would therefore hold that an employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII's disparate-treatment bar automatically or at all, subject to this key condition: The employer must have good cause to believe the

[5] What was the "business necessity" for the tests New Haven used? How could one justify, *e. g.*, the 60/40 written/oral ratio, see *supra*, at 611–612, 614–615, under that standard? Neither the Court nor the concurring opinions attempt to defend the ratio.

device would not withstand examination for business necessity. Cf. *Faragher* v. *Boca Raton*, 524 U. S. 775, 806 (1998) (observing that it accords with "clear statutory policy" for employers "to prevent violations" and "make reasonable efforts to discharge their duty" under Title VII).

EEOC's interpretative guidelines are corroborative. "[B]y the enactment of title VII," the guidelines state, "Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement." 29 CFR §1608.1(a) (2008). Recognizing EEOC's "enforcement responsibility" under Title VII, we have previously accorded the Commission's position respectful consideration. See, *e. g.*, *Albemarle*, 422 U. S., at 431; *Griggs*, 401 U. S., at 434. Yet the Court today does not so much as mention EEOC's counsel.

Our precedents defining the contours of Title VII's disparate-treatment prohibition further confirm the absence of any intrastatutory discord. In *Johnson* v. *Transportation Agency, Santa Clara Cty.*, 480 U. S. 616 (1987), we upheld a municipal employer's voluntary affirmative-action plan against a disparate-treatment challenge. Pursuant to the plan, the employer selected a woman for a road-dispatcher position, a job category traditionally regarded as "male." A male applicant who had a slightly higher interview score brought suit under Title VII. This Court rejected his claim and approved the plan, which allowed consideration of gender as "one of numerous factors." *Id.*, at 638. Such consideration, we said, is "fully consistent with Title VII" because plans of that order can aid "in eliminating the vestiges of discrimination in the workplace." *Id.*, at 642.

This litigation does not involve affirmative action. But if the voluntary affirmative action at issue in *Johnson* does not discriminate within the meaning of Title VII, neither does an employer's reasonable effort to comply with Title VII's disparate-impact provision by refraining from action of doubtful consistency with business necessity.

C

To "reconcile" the supposed "conflict" between disparate treatment and disparate impact, the Court offers an enigmatic standard. *Ante*, at 580. Employers may attempt to comply with Title VII's disparate-impact provision, the Court declares, only where there is a "strong basis in evidence" documenting the necessity of their action. *Ante*, at 583. The Court's standard, drawn from inapposite equal protection precedents, is not elaborated. One is left to wonder what cases would meet the standard and why the Court is so sure cases of this genre do not.

1

In construing Title VII, I note preliminarily, equal protection doctrine is of limited utility. The Equal Protection Clause, this Court has held, prohibits only intentional discrimination; it does not have a disparate-impact component. See *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 272 (1979); *Washington* v. *Davis*, 426 U. S. 229, 239 (1976). Title VII, in contrast, aims to eliminate all forms of employment discrimination, unintentional as well as deliberate. Until today, cf. *ante*, at 584; *ante*, p. 594 (SCALIA, J., concurring), this Court has never questioned the constitutionality of the disparate-impact component of Title VII, and for good reason. By instructing employers to avoid needlessly exclusionary selection processes, Title VII's disparate-impact provision calls for a "race-neutral means to increase minority . . . participation"—something this Court's equal protection precedents also encourage. See *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 238 (1995) (quoting *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 507 (1989)). "The very radicalism of holding disparate impact doctrine unconstitutional as a matter of equal protection," moreover, "suggests that only a very uncompromising court would issue such a decision." Primus, Equal Protection and Dis-

parate Impact: Round Three, 117 Harv. L. Rev. 493, 585 (2003).

The cases from which the Court draws its strong-basis-in-evidence standard are particularly inapt; they concern the constitutionality of absolute racial preferences. See *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 277 (1986) (plurality opinion) (invalidating a school district's plan to lay off nonminority teachers while retaining minority teachers with less seniority); *Croson*, 488 U. S., at 499–500 (rejecting a set-aside program for minority contractors that operated as "an unyielding racial quota"). An employer's effort to avoid Title VII liability by repudiating a suspect selection method scarcely resembles those cases. Race was not merely a relevant consideration in *Wygant* and *Croson;* it was the decisive factor. Observance of Title VII's disparate-impact provision, in contrast, calls for no racial preference, absolute or otherwise. The very purpose of the provision is to ensure that individuals are hired and promoted based on qualifications manifestly necessary to successful performance of the job in question, qualifications that do not screen out members of any race.[6]

2

The Court's decision in this litigation underplays a dominant Title VII theme. This Court has repeatedly emphasized that the statute "should not be read to thwart" efforts at voluntary compliance. *Johnson*, 480 U. S., at 630. Such

[6] Even in Title VII cases involving race-conscious (or gender-conscious) affirmative-action plans, the Court has never proposed a strong-basis-in-evidence standard. In *Johnson* v. *Transportation Agency, Santa Clara Cty.*, 480 U. S. 616 (1987), the Court simply examined the municipal employer's action for reasonableness: "Given the obvious imbalance in the Skilled Craft category, and given the Agency's commitment to eliminating such imbalances, it was plainly not unreasonable for the Agency . . . to consider as one factor the sex of [applicants] in making its decision." *Id.*, at 637. See also *Firefighters* v. *Cleveland*, 478 U. S. 501, 516 (1986) ("Title VII permits employers and unions voluntarily to make use of reasonable race-conscious affirmative action.").

compliance, we have explained, is "the preferred means of achieving [Title VII's] objectives." *Firefighters* v. *Cleveland*, 478 U. S. 501, 515 (1986). See also *Kolstad* v. *American Dental Assn.*, 527 U. S. 526, 545 (1999) ("Dissuading employers from [taking voluntary action] to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII."); 29 CFR § 1608.1(c). The strong-basis-in-evidence standard, however, as barely described in general, and cavalierly applied in this litigation, makes voluntary compliance a hazardous venture.

As a result of today's decision, an employer who discards a dubious selection process can anticipate costly disparate-treatment litigation in which its chances for success—even for surviving a summary-judgment motion—are highly problematic. Concern about exposure to disparate-impact liability, however well grounded, is insufficient to insulate an employer from attack. Instead, the employer must make a "strong" showing that (1) its selection method was "not job related and consistent with business necessity," or (2) that it refused to adopt "an equally valid, less discriminatory alternative." *Ante*, at 587. It is hard to see how these requirements differ from demanding that an employer establish "a provable, actual violation" *against itself*. Cf. *ante*, at 583. There is indeed a sharp conflict here, but it is not the false one the Court describes between Title VII's core provisions. It is, instead, the discordance of the Court's opinion with the voluntary compliance ideal. Cf. *Wygant*, 476 U. S., at 290 (O'Connor, J., concurring in part and concurring in judgment) ("The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they [act] would severely undermine public employers' incentive to meet voluntarily their civil rights obligations.").[7]

[7] Notably, prior decisions applying a strong-basis-in-evidence standard have not imposed a burden as heavy as the one the Court imposes today. In *Croson*, the Court found no strong basis in evidence because the city

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The Court's additional justifications for announcing a strong-basis-in-evidence standard are unimpressive. First, discarding the results of tests, the Court suggests, calls for a heightened standard because it "upset[s] an employee's legitimate expectation." *Ante*, at 585. This rationale puts the cart before the horse. The legitimacy of an employee's expectation depends on the legitimacy of the selection method. If an employer reasonably concludes that an exam fails to identify the most qualified individuals and needlessly shuts out a segment of the applicant pool, Title VII surely does not compel the employer to hire or promote based on the test, however unreliable it may be. Indeed, the statute's prime objective is to prevent exclusionary practices from "operat[ing] to 'freeze' the status quo." *Griggs*, 401 U. S., at 430.

Second, the Court suggests, anything less than a strong-basis-in-evidence standard risks creating "a *de facto* quota system, in which . . . an employer could discard test results . . . with the intent of obtaining the employer's preferred racial balance." *Ante*, at 581–582. Under a reasonableness standard, however, an employer could not cast aside a selection method based on a statistical disparity alone.[8] The employer must have good cause to believe that the method

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had offered "nothing approaching a prima facie case." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 500 (1989). The Court did not suggest that anything beyond a prima facie case would have been required. In the context of race-based electoral districting, the Court has indicated that a "strong basis" exists when the "threshold conditions" for liability are present. *Bush* v. *Vera*, 517 U. S. 952, 978 (1996) (plurality opinion).

[8] Infecting the Court's entire analysis is its insistence that the City rejected the test results "in sole reliance upon race-based statistics." *Ante*, at 584. See also *ante*, at 580, 587. But as the part of the story the Court leaves out, see *supra*, at 609–618, so plainly shows—the long history of rank discrimination against African-Americans in the firefighting profession, the multiple flaws in New Haven's test for promotions—"sole reliance" on statistics certainly is not descriptive of the CSB's decision.

screens out qualified applicants and would be difficult to justify as grounded in business necessity. Should an employer repeatedly reject test results, it would be fair, I agree, to infer that the employer is simply seeking a racially balanced outcome and is not genuinely endeavoring to comply with Title VII.

D

The Court stacks the deck further by denying respondents any chance to satisfy the newly announced strong-basis-in-evidence standard. When this Court formulates a new legal rule, the ordinary course is to remand and allow the lower courts to apply the rule in the first instance. See, *e. g.*, *Johnson* v. *California*, 543 U. S. 499, 515 (2005); *Pullman-Standard* v. *Swint*, 456 U. S. 273, 291 (1982). I see no good reason why the Court fails to follow that course today. Indeed, the sole basis for the Court's peremptory ruling is the demonstrably false pretension that respondents showed "nothing more" than "a significant statistical disparity." *Ante*, at 587; see *supra*, at 630, n. 8.[9]

[9] The Court's refusal to remand for further proceedings also deprives respondents of an opportunity to invoke 42 U. S. C. §2000e–12(b) as a shield to liability. Section 2000e–12(b) provides:

"In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [EEOC] . . . . Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect . . . ."

Specifically, given the chance, respondents might have called attention to the EEOC guidelines set out in 29 CFR §§1608.3 and 1608.4 (2008). The guidelines recognize that employers may "take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact." §1608.3(a). If "affirmative action" is in order, so is the lesser step of discarding a dubious selection device.

III

A

Applying what I view as the proper standard to the record thus far made, I would hold that New Haven had ample cause to believe its selection process was flawed and not justified by business necessity. Judged by that standard, petitioners have not shown that New Haven's failure to certify the exam results violated Title VII's disparate-treatment provision.[10]

The City, all agree, "was faced with a prima facie case of disparate-impact liability," *ante*, at 586 (majority opinion): The pass rate for minority candidates was half the rate for nonminority candidates, and virtually no minority candidates would have been eligible for promotion had the exam results been certified. Alerted to this stark disparity, the CSB heard expert and lay testimony, presented at public hearings, in an endeavor to ascertain whether the exams were fair and consistent with business necessity. Its investigation revealed grave cause for concern about the exam process itself and the City's failure to consider alternative selection devices.

Chief among the City's problems was the very nature of the tests for promotion. In choosing to use written and oral exams with a 60/40 weighting, the City simply adhered to the union's preference and apparently gave no consideration to whether the weighting was likely to identify the most qualified fire-officer candidates.[11] There is strong reason to think it was not.

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[10] The lower courts focused on respondents' "intent" rather than on whether respondents in fact had good cause to act. See 554 F. Supp. 2d 142, 157 (Conn. 2006). Ordinarily, a remand for fresh consideration would be in order. But the Court has seen fit to preclude further proceedings. I therefore explain why, if final adjudication by this Court is indeed appropriate, New Haven should be the prevailing party.

[11] This alone would have posed a substantial problem for New Haven in a disparate-impact suit, particularly in light of the disparate results the City's scheme had produced in the past. See *supra*, at 614. Under the

Relying heavily on written tests to select fire officers is a questionable practice, to say the least. Successful fire officers, the City's description of the position makes clear, must have the "[a]bility to lead personnel effectively, maintain discipline, promote harmony, exercise sound judgment, and cooperate with other officials." CA2 App. A432. These qualities are not well measured by written tests. Testifying before the CSB, Christopher Hornick, an exam-design expert with more than two decades of relevant experience, was emphatic on this point: Leadership skills, command presence, and the like "could have been identified and evaluated in a much more appropriate way." *Id.*, at A1042–A1043.

Hornick's commonsense observation is mirrored in case law and in Title VII's administrative guidelines. Courts have long criticized written firefighter promotion exams for being "more probative of the test taker's ability to recall what a particular text stated on a given topic than of his firefighting or supervisory knowledge and abilities." *Vulcan Pioneers, Inc.* v. *New Jersey Dept. of Civil Serv.*, 625 F. Supp. 527, 539 (NJ 1985). A fire officer's job, courts have

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Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines), employers must conduct "an investigation of suitable alternative selection procedures." 29 CFR §1607.3(B). See also *Officers for Justice* v. *Civil Serv. Comm'n*, 979 F. 2d 721, 728 (CA9 1992) ("before utilizing a procedure that has an adverse impact on minorities, the City has an *obligation* pursuant to the *Uniform Guidelines* to explore alternative procedures and to implement them if they have less adverse impact and are substantially equally valid"). It is no answer to "presume" that the two-decades-old 60/40 formula was adopted for a "rational reason" because it "was the result of a union-negotiated collective-bargaining agreement." Cf. *ante*, at 589. That the parties may have been "rational" says nothing about whether their agreed-upon selection process was consistent with business necessity. It is not at all unusual for agreements negotiated between employers and unions to run afoul of Title VII. See, *e. g., Peters* v. *Missouri-Pacific R. Co.*, 483 F. 2d 490, 497 (CA5 1973) (an employment practice "is not shielded [from the requirements of Title VII] by the facts that it is the product of collective bargaining and meets the standards of fair representation").

observed, "involves complex behaviors, good interpersonal skills, the ability to make decisions under tremendous pressure, and a host of other abilities—none of which is easily measured by a written, multiple choice test." *Firefighters Inst. for Racial Equality* v. *St. Louis*, 616 F. 2d 350, 359 (CA8 1980).[12] Interpreting the Uniform Guidelines, EEOC and other federal agencies responsible for enforcing equal opportunity employment laws have similarly recognized that, as measures of "interpersonal relations" or "ability to function under danger (*e. g.*, firefighters)," "[p]encil-and-paper tests . . . generally are not close enough approximations of work behaviors to show content validity." 44 Fed. Reg. 12007 (1979). See also 29 CFR § 1607.15(C)(4).[13]

Given these unfavorable appraisals, it is unsurprising that most municipal employers do not evaluate their fire-officer candidates as New Haven does. Although comprehensive statistics are scarce, a 1996 study found that nearly two-thirds of surveyed municipalities used assessment centers

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[12] See also *Nash*, 837 F. 2d, at 1538 ("the examination did not test the one aspect of job performance that differentiated the job of firefighter engineer from fire lieutenant (combat): supervisory skills"); *Firefighters Inst. for Racial Equality* v. *St. Louis*, 549 F. 2d 506, 512 (CA8 1977) ("there is no good pen and paper test for evaluating supervisory skills"); *Boston Chapter, NAACP*, 504 F. 2d, at 1023 ("[T]here is a difference between memorizing . . . fire fighting terminology and being a good fire fighter. If the Boston Red Sox recruited players on the basis of their knowledge of baseball history and vocabulary, the team might acquire [players] who could not bat, pitch or catch.").

[13] Cf. *Gillespie* v. *Wisconsin*, 771 F. 2d 1035, 1043 (CA7 1985) (courts must evaluate "the degree to which the nature of the examination procedure approximates the job conditions"). In addition to "content validity," the Uniform Guidelines discuss "construct validity" and "criterion validity" as means by which an employer might establish the reliability of a selection method. See 29 CFR § 1607.14(B)–(D). Content validity, however, is the only type of validity addressed by the parties and "the only feasible type of validation in these circumstances." Brief for Industrial-Organizational Psychologists as *Amicus Curiae* 7, n. 2 (hereinafter I–O Psychologists Brief).

("simulations of the real world of work") as part of their promotion processes. P. Lowry, A Survey of the Assessment Center Process in the Public Sector, 25 Public Personnel Management 307, 315 (1996). That figure represented a marked increase over the previous decade, see *ibid.*, so the percentage today may well be even higher. Among municipalities still relying in part on written exams, the median weight assigned to them was 30 percent—half the weight given to New Haven's written exam. *Id.*, at 309.

Testimony before the CSB indicated that these alternative methods were both more reliable and notably less discriminatory in operation. According to Donald Day of the International Association of Black Professional Firefighters, nearby Bridgeport saw less skewed results after switching to a selection process that placed primary weight on an oral exam. CA2 App. A830–A832; see *supra*, at 614. And Hornick described assessment centers as "demonstrat[ing] dramatically less adverse impacts" than written exams. CA2 App. A1040.[14] Considering the prevalence of these proven alternatives, New Haven was poorly positioned to argue that promotions based on its outmoded and exclusionary selection process qualified as a business necessity. Cf. *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 798, n. 7 (CA4 1971) ("It should go without saying that a practice is hardly 'necessary' if an alternative practice better effectuates its intended purpose or is equally effective but less discriminatory.").[15]

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[14] See also G. Thornton & D. Rupp, Assessment Centers in Human Resource Management 15 (2006) ("Assessment centers predict future success, do not cause adverse impact, and are seen as fair by participants."); W. Cascio & H. Aguinis, Applied Psychology in Human Resource Management 372 (6th ed. 2005) ("research has demonstrated that adverse impact is less of a problem in an [assessment center] as compared to an aptitude test"). Cf. *Firefighters Inst. for Racial Equality*, 549 F. 2d, at 513 (recommending assessment centers as an alternative to written exams).

[15] Finding the evidence concerning these alternatives insufficiently developed to "create a genuine issue of fact," *ante*, at 591, the Court effectively confirms that an employer cannot prevail under its strong-basis-

Ignoring the conceptual and other defects in New Haven's selection process, the Court describes the exams as "painstaking[ly]" developed to test "relevant" material and on that basis finds no substantial risk of disparate-impact liability. See *ante*, at 588. Perhaps such reasoning would have sufficed under *Wards Cove*, which permitted exclusionary practices as long as they advanced an employer's "legitimate" goals. 490 U. S., at 659. But Congress repudiated *Wards Cove* and reinstated the "business necessity" rule attended by a "manifest relationship" requirement. See *Griggs*, 401 U. S., at 431–432. See also *supra*, at 624. Like the chess player who tries to win by sweeping the opponent's pieces off the table, the Court simply shuts from its sight the formidable obstacles New Haven would have faced in defending against a disparate-impact suit. See *Lanning* v. *Southeastern Pa. Transp. Auth.*, 181 F. 3d 478, 489 (CA3 1999) ("Judicial application of a standard focusing solely on whether the qualities measured by an . . . exam bear some relationship to the job in question would impermissibly write out the business necessity prong of the Act's chosen standard.").

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in-evidence standard unless the employer decisively proves a disparate-impact violation against itself. The Court's specific arguments are unavailing. First, the Court suggests, changing the oral/written weighting may have violated Title VII's prohibition on altering test scores. *Ante*, at 590. No one is arguing, however, that the results of the exams given should have been altered. Rather, the argument is that the City could have availed itself of a better option when it initially decided what selection process to use. Second, with respect to assessment centers, the Court identifies "statements to the CSB indicat[ing] that the Department could not have used [them] for the 2003 examinations." *Ante*, at 591. The Court comes up with only a single statement on this subject—an offhand remark made by petitioner Ricci, who hardly qualifies as an expert in testing methods. See *ante*, at 574. Given the large number of municipalities that regularly use assessment centers, it is impossible to fathom why the City, with proper planning, could not have done so as well.

That IOS representative Chad Legel and his team may have been diligent in designing the exams says little about the exams' suitability for selecting fire officers. IOS worked within the City's constraints. Legel never discussed with the City the propriety of the 60/40 weighting and "was not asked to consider the possibility of an assessment center." CA2 App. A522. See also *id.*, at A467. The IOS exams, Legel admitted, had not even attempted to assess "command presence": "[Y]ou would probably be better off with an assessment center if you cared to measure that." *Id.*, at A521. Cf. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F. 2d 1017, 1021–1022 (CA1 1974) ("A test fashioned from materials pertaining to the job . . . superficially may seem job-related. But what is at issue is whether it demonstrably selects people who will perform better the required on-the-job behaviors.").

In addition to the highly questionable character of the exams and the neglect of available alternatives, the City had other reasons to worry about its vulnerability to disparate-impact liability. Under the City's ground rules, IOS was not allowed to show the exams to anyone in the New Haven Fire Department prior to their administration. This "precluded [IOS] from being able to engage in [its] normal subject matter expert review process"—something Legel described as "very critical." CA2 App. A477, A506. As a result, some of the exam questions were confusing or irrelevant, and the exams may have overtested some subject-matter areas while missing others. See, *e. g.*, *id.*, at A1034–A1035, A1051. Testimony before the CSB also raised questions concerning unequal access to study materials, see *id.*, at A857–A861, and the potential bias introduced by relying principally on job analyses from nonminority fire officers to develop the exams, see *id.*, at A1063–A1064.[16] See also *supra*, at 613–614, 617.

[16] The I–O Psychologists Brief identifies still other, more technical flaws in the exams that may well have precluded the City from prevailing in a

The Court criticizes New Haven for failing to obtain a "technical report" from IOS, which, the Court maintains, would have provided "detailed information to establish the validity of the exams." *Ante*, at 589. The record does not substantiate this assertion. As Legel testified during his deposition, the technical report merely summarized "the steps that [IOS] took methodologically speaking," and would not have established the exams' reliability. CA2 App. A461. See also *id.*, at A462 (the report "doesn't say anything that other documents that already existed wouldn't say").

In sum, the record solidly establishes that the City had good cause to fear disparate-impact liability. Moreover, the Court supplies no tenable explanation why the evidence of the tests' multiple deficiencies does not create at least a triable issue under a strong-basis-in-evidence standard.

B

Concurring in the Court's opinion, JUSTICE ALITO asserts that summary judgment for respondents would be improper even if the City had good cause for its noncertification decision. A reasonable jury, he maintains, could have found that respondents were not actually motivated by concern about disparate-impact litigation, but instead sought only "to placate a politically important [African-American] constitu-

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disparate-impact suit. Notably, the exams were never shown to be suitably precise to allow strict rank ordering of candidates. A difference of one or two points on a multiple-choice exam should not be decisive of an applicant's promotion chances if that difference bears little relationship to the applicant's qualifications for the job. Relatedly, it appears that the line between a passing and failing score did not accurately differentiate between qualified and unqualified candidates. A number of fire-officer promotional exams have been invalidated on these bases. See, *e. g.*, *Guardians Assn.*, 630 F. 2d, at 105 ("When a cutoff score unrelated to job performance produces disparate racial results, Title VII is violated."); *Vulcan Pioneers, Inc.* v. *New Jersey Dept. of Civil Serv.*, 625 F. Supp. 527, 538 (NJ 1985) ("[T]he tests here at issue are not appropriate for ranking candidates.").

ency." *Ante,* at 597. As earlier noted, I would not oppose a remand for further proceedings fair to both sides. See *supra,* at 632, n. 10. It is the Court that has chosen to short circuit this litigation based on its pretension that the City has shown, and can show, nothing more than a statistical disparity. See *supra,* at 630, n. 8, 631. JUSTICE ALITO compounds the Court's error.

Offering a truncated synopsis of the many hours of deliberations undertaken by the CSB, JUSTICE ALITO finds evidence suggesting that respondents' stated desire to comply with Title VII was insincere, a mere "pretext" for discrimination against white firefighters. *Ante,* at 596–597. In support of his assertion, JUSTICE ALITO recounts at length the alleged machinations of Rev. Boise Kimber (a local political activist), Mayor John DeStefano, and certain members of the mayor's staff. See *ante,* at 598–604.

Most of the allegations JUSTICE ALITO repeats are drawn from petitioners' statement of facts they deem undisputed, a statement displaying an adversarial zeal not uncommonly found in such presentations.[17] What cannot credibly be de-

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[17] Some of petitioners' so-called facts find little support in the record, and many others can scarcely be deemed material. Petitioners allege, for example, that City officials prevented New Haven's fire chief and assistant chief from sharing their views about the exams with the CSB. App. to Pet. for Cert. in No. 07–1428, p. 228a. None of the materials petitioners cite, however, "suggests" that this proposition is accurate. Cf. *ante,* at 600. In her deposition testimony, City official Karen Dubois-Walton specifically denied that she or her colleagues directed the chief and assistant chief not to appear. App. to Pet. for Cert. in No. 07–1428, p. 850a. Moreover, contrary to the insinuations of petitioners and JUSTICE ALITO, the statements made by City officials before the CSB did not emphasize allegations of cheating by test takers. Cf. *ante,* at 602–603. In her deposition, Dubois-Walton acknowledged sharing the cheating allegations not with the CSB, but with a different City commission. App. to Pet. for Cert. in No. 07–1428, p. 837a. JUSTICE ALITO also reports that the City's attorney advised the mayor's team that the way to convince the CSB not to certify was "to focus on something other than 'a big discussion re: adverse impact' law." *Ante,* at 603 (quoting App. to Pet. for Cert. in No. 07–1428,

nied, however, is that the decision against certification of the exams was made neither by Kimber nor by the mayor and his staff. The relevant decision was made by the CSB, an unelected, politically insulated body. It is striking that JUSTICE ALITO's concurrence says hardly a word about the CSB itself, perhaps because there is scant evidence that its motivation was anything other than to comply with Title VII's disparate-impact provision. Notably, petitioners did not even seek to take depositions of the two commissioners who voted against certification. Both submitted uncontested affidavits declaring unequivocally that their votes were "based solely on [their] good faith belief that certification" would have discriminated against minority candidates in violation of federal law. CA2 App. A1605, A1611.

JUSTICE ALITO discounts these sworn statements, suggesting that the CSB's deliberations were tainted by the preferences of Kimber and City officials, whether or not the CSB itself was aware of the taint. Kimber and City officials, JUSTICE ALITO speculates, decided early on to oppose certification and then "engineered" a skewed presentation to the CSB to achieve their preferred outcome. *Ante*, at 606.

As an initial matter, JUSTICE ALITO exaggerates the influence of these actors. The CSB, the record reveals, designed and conducted an inclusive decisionmaking process, in which it heard from numerous individuals on both sides of the certification question. See, *e. g.*, CA2 App. A1090. Kimber and others no doubt used strong words to urge the CSB not to certify the exam results, but the CSB received "pressure" from supporters of certification as well as opponents. Cf. *ante*, at 600. Petitioners, for example, engaged counsel to speak on their behalf before the CSB. Their counsel did not mince words: "[I]f you discard these results," she warned, "you will get sued. You will force the taxpay-

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p. 458a). This is a misleading abbreviation of the attorney's advice. Focusing on the exams' defects and on disparate-impact law is precisely what he recommended. See *id.*, at 458a–459a.

ers of the city of New Haven into protracted litigation." CA2 App. A816. See also *id.*, at A788.

The local firefighters union—an organization required by law to represent all the City's firefighters—was similarly outspoken in favor of certification. Discarding the test results, the union's president told the CSB, would be "totally ridiculous." *Id.*, at A806. He insisted, inaccurately, that the City was not at risk of disparate-impact liability because the exams were administered pursuant to "a collective bargaining agreement." *Id.*, at A1137. Cf. *supra*, at 632–633, n. 11. Never mentioned by JUSTICE ALITO in his attempt to show testing expert Christopher Hornick's alliance with the City, *ante*, at 603–604, the CSB solicited Hornick's testimony at the union's suggestion, not the City's. CA2 App. A1128. Hornick's cogent testimony raised substantial doubts about the exams' reliability. See *supra*, at 615–616.[18]

There is scant cause to suspect that maneuvering or overheated rhetoric, from either side, prevented the CSB from evenhandedly assessing the reliability of the exams and rendering an independent, good-faith decision on certification. JUSTICE ALITO acknowledges that the CSB had little patience for Kimber's antics. *Ante*, at 600–602.[19] As to petitioners, Chairman Segaloff—who voted to certify the exam

[18] City officials, JUSTICE ALITO reports, sent Hornick newspaper accounts and other material about the exams prior to his testimony. *Ante*, at 603. Some of these materials, JUSTICE ALITO intimates, may have given Hornick an inaccurate portrait of the exams. But Hornick's testimony before the CSB, viewed in full, indicates that Hornick had an accurate understanding of the exam process. Much of Hornick's analysis focused on the 60/40 weighting of the written and oral exams, something that neither the Court nor the concurrences even attempt to defend. It is, moreover, entirely misleading to say that the City later hired union-proposed Hornick as a "rewar[d]" for his testimony. Cf. *ibid.*

[19] To be clear, the board of fire commissioners on which Kimber served is an entity separate from the CSB. Kimber was *not* a member of the CSB. Kimber, JUSTICE ALITO states, requested a private meeting with the CSB. *Ante*, at 601. There is not a shred of evidence that a private meeting with Kimber or anyone else took place.

results—dismissed the threats made by their counsel as unhelpful and needlessly "inflammatory." CA2 App. A821. Regarding the views expressed by City officials, the CSB made clear that they were entitled to no special weight. *Id.*, at A1080.[20]

In any event, JUSTICE ALITO's analysis contains a more fundamental flaw: It equates political considerations with unlawful discrimination. As JUSTICE ALITO sees it, if the mayor and his staff were motivated by their desire "to placate a . . . racial constituency," *ante*, at 597, then they engaged in unlawful discrimination against petitioners. But JUSTICE ALITO fails to ask a vital question: "[P]lacate" how? That political officials would have politics in mind is hardly extraordinary, and there are many ways in which a politician can attempt to win over a constituency—including a racial constituency—without engaging in unlawful discrimination. As courts have recognized, "[p]oliticians routinely respond to bad press . . . , but it is not a violation of Title VII to take advantage of a situation to gain political favor." *Henry* v. *Jones*, 507 F. 3d 558, 567 (CA7 2007).

The real issue, then, is not whether the mayor and his staff were politically motivated; it is whether their attempt to score political points was legitimate (*i. e.*, nondiscriminatory). Were they seeking to exclude white firefighters from promotion (unlikely, as a fair test would undoubtedly result in the addition of white firefighters to the officer ranks), or did they realize, at least belatedly, that their tests could be toppled in a disparate-impact suit? In the latter case,

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[20] JUSTICE ALITO points to evidence that the mayor had decided not to make promotions based on the exams even if the CSB voted to certify the results, going so far as to prepare a press release to that effect. *Ante*, at 604. If anything, this evidence reinforces the conclusion that the CSB—which made the noncertification decision—remained independent and above the political fray. The mayor and his staff needed a contingency plan precisely because they did not control the CSB.

there is no disparate-treatment violation. JUSTICE ALITO, I recognize, would disagree. In his view, an employer's action to avoid Title VII disparate-impact liability qualifies as a presumptively improper race-based employment decision. See *ante*, at 597. I reject that construction of Title VII. See *supra*, at 625–627. As I see it, when employers endeavor to avoid exposure to disparate-impact liability, they do not thereby encounter liability for disparate treatment.

Applying this understanding of Title VII, supported by *Griggs* and the long line of decisions following *Griggs*, see *supra*, at 623–624, and nn. 3–4, the District Court found no genuine dispute of material fact. That court noted, particularly, the guidance furnished by Second Circuit precedent. See *supra*, at 619. Petitioners' allegations that City officials took account of politics, the District Court determined, simply "d[id] not suffice" to create an inference of unlawful discrimination. 554 F. Supp. 2d, at 160, n. 12. The noncertification decision, even if undertaken "in a political context," reflected a legitimate "intent not to implement a promotional process based on testing results that had an adverse impact." *Id.*, at 158, 160. Indeed, the District Court perceived "a total absence of any evidence of discriminatory animus towards [petitioners]." *Id.*, at 158. See also *id.*, at 162 ("Nothing in the record in this case suggests that the City defendants or CSB acted 'because of' discriminatory animus toward [petitioners] or other non-minority applicants for promotion."). Perhaps the District Court could have been more expansive in its discussion of these issues, but its conclusions appear entirely consistent with the record before it.[21]

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[21] The District Court, JUSTICE ALITO writes, "all but conceded that a jury could find that the City's asserted justification was pretextual" by "admitt[ing] that 'a jury could rationally infer that city officials worked behind the scenes to sabotage the promotional examinations because they knew that, were the exams certified, the Mayor would incur the wrath of

It is indeed regrettable that the City's noncertification decision would have required all candidates to go through another selection process. But it would have been more regrettable to rely on flawed exams to shut out candidates who may well have the command presence and other qualities needed to excel as fire officers. Yet that is the choice the Court makes today. It is a choice that breaks the promise of *Griggs* that groups long denied equal opportunity would not be held back by tests "fair in form, but discriminatory in operation." 401 U. S., at 431.

* * *

These cases present an unfortunate situation, one New Haven might well have avoided had it utilized a better selection process in the first place. But what this litigation does not present is race-based discrimination in violation of Title VII. I dissent from the Court's judgment, which rests on the false premise that respondents showed "a significant statistical disparity," but "nothing more." See *ante*, at 587.

[Rev. Boise] Kimber and other influential leaders of New Haven's African-American community.'" *Ante*, at 598, 608 (quoting 554 F. Supp. 2d, at 162). The District Court drew the quoted passage from petitioners' lower court brief, and used it in reference to a First Amendment claim not before this Court. In any event, it is not apparent why these alleged political maneuvers suggest an intent to discriminate against petitioners. That City officials may have wanted to please political supporters is entirely consistent with their stated desire to avoid a disparate-impact violation. Cf. *Ashcroft* v. *Iqbal*, 556 U. S. 662, 682 (2009) (allegations that senior Government officials condoned the arrest and detention of thousands of Arab Muslim men following the September 11 attacks failed to establish even a "plausible inference" of unlawful discrimination sufficient to survive a motion to dismiss).

Reporter's Note

The next page is purposely numbered 901. The numbers between 644 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 15 THROUGH OCTOBER 2, 2009

JUNE 15, 2009

Certiorari Dismissed

No. 08–10147. MICHAELESCO *v.* EMC MORTGAGE CORP. Sup. Ct. Conn. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–10264. IVEY *v.* GEITHNER, SECRETARY OF THE TREASURY. C. A. D. C. 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: 296 Fed. Appx. 94.

No. 08–10333. MOORE *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 08M83. HARRIS *v.* HARVEY, TREASURER, ASHTABULA COUNTY, OHIO, ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time under Rule 14.5 denied.

No. 08M84. SMALLS *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 08–998. HAMILTON, CHAPTER 13 TRUSTEE *v.* LANNING. C. A. 10th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 08–8355. STRUCK *v.* COOK COUNTY PUBLIC GUARDIAN. App. Ct. Ill., 1st Dist. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [556 U. S. 1150] denied.

No. 08–8570. ANGEL *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [556 U. S. 1163] denied.

No. 08–8689. DANIEL *v.* COLEE ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [556 U. S. 1177] denied.

No. 08–8826. PARKER *v.* LOUISIANA. Sup. Ct. La. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [556 U. S. 1177] denied.

No. 08–8837. IN RE CARLTON. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [556 U. S. 1180] denied.

No. 08–8862. IN RE RATCLIFF. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [556 U. S. 1207] denied.

No. 08–9035. PICKERING-GEORGE *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [556 U. S. 1206] denied.

No. 08–9045. HUNDLEY *v.* ZIEGLER ET AL. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [556 U. S. 1178] denied.

No. 08–9822. BAGLEY *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 6, 2009, 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. 08–10485. IN RE TORRES;
No. 08–10517. IN RE BECKUM; and
No. 08–10533. IN RE PRESTON. Petitions for writs of habeas corpus denied.

No. 08–9744. In re de Leon Mata. Petition for writ of mandamus denied.

No. 08–9756. In re McCreary. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 08–1134. United Student Aid Funds, Inc. *v.* Espinosa. C. A. 9th Cir. Certiorari granted. Reported below: 553 F. 3d 1193.

No. 08–1198. Stolt-Nielsen S. A. et al. *v.* AnimalFeeds International Corp. C. A. 2d Cir. Certiorari granted. Reported below: 548 F. 3d 85.

No. 08–240. Mac's Shell Service, Inc., et al. *v.* Shell Oil Products Co. LLC et al.; and

No. 08–372. Shell Oil Products Co. LLC et al. *v.* Mac's Shell Service, Inc., et al. C. A. 1st Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 524 F. 3d 33.

No. 08–1151. Stop the Beach Renourishment, Inc. *v.* Florida Department of Environmental Protection et al. Sup. Ct. Fla. Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 998 So. 2d 1102.

Certiorari Denied

No. 07–1501. IKON Office Solutions, Inc., et al. *v.* New-Cal Industries, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 513 F. 3d 1038.

No. 08–763. Mabry *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 536 F. 3d 231.

No. 08–884. Berger et al. *v.* Internal Revenue Service et al. C. A. 3d Cir. Certiorari denied. Reported below: 288 Fed. Appx. 829.

No. 08–890. Diaz et al. *v.* Paterson, Governor of New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 3d 88.

No. 08–910. TYRRELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 269 Fed. Appx. 922.

No. 08–987. CAMPA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 529 F. 3d 980.

No. 08–1027. ALLIANCE FOR COMMUNITY MEDIA ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 3d 763.

No. 08–1051. INTERNATIONAL GAME TECHNOLOGY ET AL. *v.* ARISTOCRAT TECHNOLOGIES AUSTRALIA PTY LTD. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 543 F. 3d 657.

No. 08–1086. TROUT ET AL. *v.* MABUS, SECRETARY OF THE NAVY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 540 F. 3d 442.

No. 08–1137. ENTEC CORP. ET AL. *v.* CENTRO DE RECAUDACION DE INGRESOS MUNICIPALES. Sup. Ct. P. R. Certiorari denied.

No. 08–1146. BROWN, TRUSTEE, KATELYN ANDREWS SEGREGATED SETTLEMENT ACCOUNT *v.* NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES. Sup. Ct. N. C. Certiorari denied. Reported below: 362 N. C. 599, 669 S. E. 2d 310.

No. 08–1249. UNITED STATES EX REL. SANDERS *v.* NORTH AMERICAN BUS INDUSTRIES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 546 F. 3d 288.

No. 08–1251. BURRISS ELECTRICAL, INC. *v.* OFFICE OF OCCUPATIONAL SAFETY AND HEALTH, SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING AND REGULATION. Ct. App. S. C. Certiorari denied.

No. 08–1255. DURALL *v.* QUINN, SUPERINTENDENT, MONROE CORRECTIONAL COMPLEX. C. A. 9th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 114.

No. 08–1258. AVOCENT HUNTSVILLE CORP. ET AL. *v.* ATEN INTERNATIONAL CO., LTD. C. A. Fed. Cir. Certiorari denied. Reported below: 552 F. 3d 1324.

No. 08–1259. WEISS ET UX. *v.* EL AL ISRAEL AIRLINES. C. A. 2d Cir. Certiorari denied. Reported below: 309 Fed. Appx. 483.

No. 08–1269. LOUISIANA *v.* ARMSTARD. Sup. Ct. La. Certiorari denied. Reported below: 998 So. 2d 89.

No. 08–1275. YOUNG SUN SHIN *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 3d 1019.

No. 08–1282. DUPREE *v.* BIVONA. C. A. 2d Cir. Certiorari denied.

No. 08–1292. ACOSTA *v.* CITY OF PHOENIX, ARIZONA. C. A. 9th Cir. Certiorari denied. Reported below: 296 Fed. Appx. 606.

No. 08–1298. KRUEGER *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 08–1320. ALLEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 386 Ill. App. 3d 30, 898 N. E. 2d 136.

No. 08–1323. DAIRE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–1344. CHUTEHALL CONSTRUCTION CO., LTD. *v.* MASSACHUSETTS ET AL. App. Ct. Mass. Certiorari denied. Reported below: 73 Mass. App. 1104, 896 N. E. 2d 656.

No. 08–1362. BADWAL *v.* BUIE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 570.

No. 08–1386. MENDIA *v.* HAWKER BEECHCRAFT CORP. C. A. 10th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 622.

No. 08–1399. HENDRICKSON ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–1400. RAFFERTY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 296 Fed. Appx. 788.

No. 08–1405. COMBS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 3d 768.

No. 08–1406. ELLIOT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 41.

No. 08–1417. MORALES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 560 F. 3d 112 and 316 Fed. Appx. 22.

No. 08–8252. DAVIS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 266 S. W. 3d 896.

No. 08–8276. MUNGIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 297 Fed. Appx. 314.

No. 08–8466. LEVETO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 540 F. 3d 200.

No. 08–8597. ESPADA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–8932. HEBNER *v.* EVANS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 543 F. 3d 1133.

No. 08–8980. BURNS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 08–9120. BEUKE *v.* HOUK, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 537 F. 3d 618.

No. 08–9160. GUEVARA-BARRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 253.

No. 08–9185. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 541 F. 3d 1064.

No. 08–9191. MCKINNON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 301 Fed. Appx. 117.

No. 08–9297. SPOTTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 590.

No. 08–9698. DORSEY *v.* BURTT, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 745.

No. 08–9699. WALKER *v.* ROBINSON. C. A. 5th Cir. Certiorari denied.

No. 08–9703. EVANS *v.* HENSE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9704. CURFMAN ET UX. *v.* PEARSON ET AL. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 08–9705. PETERS *v.* CHANDLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 453.

No. 08–9718. VIERRA *v.* COCHISE COUNTY, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 727.

No. 08–9725. JACKSON *v.* CITY OF COLUMBIA, SOUTH CAROLINA. Ct. App. S. C. Certiorari denied.

No. 08–9726. MAYER *v.* WYNDER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 278 Fed. Appx. 117.

No. 08–9728. SHECHET *v.* FAVALI ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 251 Fed. Appx. 17.

No. 08–9729. JEFFRIES *v.* PARKER, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 08–9731. BOONE *v.* TELCO PLUS CREDIT UNION ET AL. C. A. 5th Cir. Certiorari denied.

No. 08–9735. RICHARDSON *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 318 Fed. Appx. 492.

No. 08–9740. COLE *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 08–9742. CHAPMAN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 08–9749. PEARSON *v.* BESTCARE ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 48 App. Div. 3d 862, 851 N. Y. S. 2d 288.

No. 08–9750. CORDOVA RUBIO *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–9751. MCMANN *v.* MCQUIGGIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9762. JOHNSON *v.* LILES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 226.

No. 08–9766. SAABIRAH EL *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 300 Fed. Appx. 103.

No. 08–9773. HAWK *v.* REDDING ET AL. (two judgments). C. A. 11th Cir. Certiorari denied.

No. 08–9774. DUNN *v.* NOOTH, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 83.

No. 08–9776. COLE *v.* CLEO, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 402.

No. 08–9779. SEELY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 08–9781. JACOBS *v.* LANE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–9784. LANE-EL *v.* INDIANA DEPARTMENT OF CORRECTIONS ET AL. C. A. 7th Cir. Certiorari denied.

No. 08–9787. CONWAY *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9789. JACKSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–9790. CRUCE *v.* CARUSO, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–9795. RUSSELL *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 08–9800. LINDBERG *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 45 Cal. 4th 1, 190 P. 3d 664.

No. 08–9801. TREVINO *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 08–9805. TYSON *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 08–9862. BAGLEY *v.* CITY OF TAMPA, FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 08–9873. STOKES *v.* WOODS, SUPERINTENDENT, UPSTATE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 08–9876. COLACHIS ET AL. *v.* GRISWOLD ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–9912. JONES *v.* DUNCAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9960. TAYLOR *v.* BRUNSMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9966. WRIGHT *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 931 A. 2d 55.

No. 08–10016. KIMBLE *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 2 So. 3d 688.

No. 08–10025. DEVEREAUX *v.* MILLS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 934.

No. 08–10036. ALTHOFF *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 08–10082. RUDD, AKA AZIZ *v.* WERHOLTZ, SECRETARY, KANSAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 318 Fed. Appx. 625.

No. 08–10100. CAMPBELL *v.* KANSAS. Sup. Ct. Kan. Certiorari denied.

No. 08–10111. CAMPBELL *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 1 So. 3d 176.

No. 08–10114. AUSTIN *v.* CASKEY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 08–10163. FELDHACKER *v.* BAKEWELL, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 08–10165. HALL *v.* HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES. Sup. Ct. Neb. Certiorari denied.

No. 08–10166. HALL *v.* HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES. Sup. Ct. Neb. Certiorari denied.

No. 08–10184. JOSE C. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 45 Cal. 4th 534, 198 P. 3d 1087.

No. 08–10256. GARZA-GALVAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 252.

No. 08–10263. HEARN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 549 F. 3d 680.

No. 08–10271. CARR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 296 Fed. Appx. 912.

No. 08–10272. CORDOVA-SAAVEDRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 895.

No. 08–10279. VARGO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 309 Fed. Appx. 485.

No. 08–10280. WILKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 920.

No. 08–10283. ARMSTRONG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 554 F. 3d 1159.

No. 08–10284. MUNOZ-ASTELLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 631.

No. 08–10285. MENDOZA-RAMIREZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 326 Fed. Appx. 705.

No. 08–10286. OCHOA-SUAREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–10287. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–10289. SWAIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 324 Fed. Appx. 219.

No. 08–10290. REYES-CARRANZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–10292. CAMPBELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 221.

No. 08–10293. DANGER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–10294. SMART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–10297. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 74.

No. 08–10298. SANTIAGO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 08–10300. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 306 Fed. Appx. 719.

No. 08–10301. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 261.

No. 08–10303. MOSLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 611.

No. 08–10305. HERNANDEZ-VALOIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 08–10307. FROST *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 318 Fed. Appx. 664.

No. 08–10308. HEAD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–10310. PAYTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 225.

No. 08–10311. SOMERVILLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–10313. SOREIDE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–10316. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–10320. ADAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 08–10324. WOODS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 964.

No. 08–10325. WILSON-GARCIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 309 Fed. Appx. 633.

No. 08–10327. DEGLACE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 288.

No. 08–10329. CAMPUSANO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 556 F. 3d 36.

No. 08–10330. RICHARDSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 239.

No. 08–10331. RODRIGUEZ-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 316 Fed. Appx. 570.

No. 08–10332. ORDONEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 980.

No. 08–10334. CLARK *v.* ROCK, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 309 Fed. Appx. 528.

No. 08–10339. DOWELL *v.* ANDERSON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 08–10340. COUNCIL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 269.

No. 08–10342. FONG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–10344. HERNANDEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 323.

No. 08–10345. GEORGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 421 Fed. Appx. 149.

No. 08–10353. RODRIGUEZ-PENA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–10354. BARKER *v.* STANSBERRY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 609.

No. 08–10359. BONILLA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 08–10360. McGLOTHEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 556 F. 3d 698.

No. 08–10364. HOWELL ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 552 F. 3d 709.

No. 08–10366. HAUGABOOK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–10367. IGLESIAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 535 F. 3d 150.

No. 08–10368. GEORGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 773.

No. 08–10370. ALVAREZ-GOMEZ, AKA ALVAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–10377. FRANKLIN-EL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 554 F. 3d 903.

No. 08–10380. VILLALPANDO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 336.

No. 08–10381. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 322 Fed. Appx. 177.

No. 08–10384. KELLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 323 Fed. Appx. 766.

No. 08–10385. RAPLINGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 555 F. 3d 687.

No. 08–10388. CHIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 316 Fed. Appx. 290.

No. 08–10389. COMBS, AKA COMBS-QUARLES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 555 F. 3d 60.

No. 08–10390. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 08–10391. ANDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 3d 348.

No. 08–10392. AHRENDT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 560 F. 3d 69.

No. 08–10395. ZANI *v.* UNITED STATES MARSHALS SERVICE ET AL. C. A. 7th Cir. Certiorari denied.

No. 08–10406. HICKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–10407. HENRY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 310 Fed. Appx. 498.

No. 08–10409. CLARK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 319 Fed. Appx. 46.

No. 08–10410. ESTRADA-MONTALVO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 864.

No. 08–10417. VENTURA-VERA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–10418. TRAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 305.

No. 08–10419. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 871.

No. 08–10423. FRANKLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 320 Fed. Appx. 599.

No. 08–10425. PHILLIPS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 508.

No. 08–10426. ALEMAN-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–10429. HAWKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 554 F. 3d 615.

No. 08–10430. CLEMMONS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 08–10433. DENSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–10436. FORMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 553 F. 3d 585.

No. 08–10437. GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 08–10441. JAMES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 534 F. 3d 868.

No. 08–10446. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 648.

No. 08–10448. WYATT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 561 F. 3d 49.

No. 08–10453. LEBEAU *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 08–10455. LICHTENBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 107.

No. 08–10456. BROOKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 880.

No. 08–10462. COOK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 550 F. 3d 1292.

No. 08–10464. CAREY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 647.

No. 08–10465. CORSO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 3d 921.

No. 08–751. COUNTY OF EL PASO, TEXAS, ET AL. *v.* NAPOLITANO, SECRETARY OF HOMELAND SECURITY, ET AL. D. C. W. D. Tex. Motion of William D. Araiza et al. for leave to file a brief as *amici curiae* granted. Certiorari denied.

Rehearing Denied

No. 08–1061. FAUGHT *v.* STEVENS ET AL., 556 U. S. 1208;
No. 08–1108. HAEG *v.* ALASKA, 556 U. S. 1208;
No. 08–8268. VALE *v.* FLORIDA, 556 U. S. 1134;
No. 08–8348. GOODIE *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 556 U. S. 1155;
No. 08–8616. CASTRO *v.* TEXAS, 556 U. S. 1187;
No. 08–8698. MARTIN *v.* EVANS, WARDEN, 556 U. S. 1188;
No. 08–8785. MURRELL *v.* NORTH CAROLINA, 556 U. S. 1190;
No. 08–8918. ANTONSSON *v.* KAST, 556 U. S. 1211;
No. 08–8985. CASEY-BEICH *v.* UNITED PARCEL SERVICE, INC., 556 U. S. 1193;

No. 08–9125. SMITH *v.* MCKUNE, WARDEN, ET AL., 556 U. S. 1212; and

No. 08–9226. QUINTANA-NAVARETTE *v.* UNITED STATES, 556 U. S. 1197. Petitions for rehearing denied.

JUNE 22, 2009

Dismissal Under Rule 46

No. 08–10522. NORWOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 555 F. 3d 1061.

Certiorari Granted—Vacated and Remanded

No. 08–9364. JOSEPH *v.* UNITED STATES. C. A. 11th 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 *Flores-Figueroa* v. *United States*, 556 U. S. 646 (2009). Reported below: 304 Fed. Appx. 792.

Certiorari Dismissed

No. 08–9617. BURKE *v.* CONNECTICUT RENAISSANCE ET AL.;

No. 08–9640. BURKE *v.* KIRK ET AL.;

No. 08–9642. BURKE *v.* BRARON ET AL.; and

No. 08–9669. BURKE *v.* CONNECTICUT RENAISSANCE ET AL. C. A. 2d Cir. Motions of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–9730. BURKE *v.* ALSO CORNERSTONE ET AL.; and

No. 08–9872. BURKE *v.* DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES ET AL. C. A. 2d Cir. Motions 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.

No. 08–9797. SCHNELLER *v.* CORTES, SECRETARY OF COMMONWEALTH OF PENNSYLVANIA, ET AL. Sup. Ct. Pa. Motion of peti-

tioner 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.

No. 08–9922. GUTIERREZ BRUNO *v.* TEXAS. Ct. Crim. App. Tex. 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.

No. 08–10258. HAYES *v.* UNITED STATES. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–10295. SPURLOCK *v.* DEPARTMENT OF THE ARMY ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 308 Fed. Appx. 666.

Miscellaneous Orders

No. 08M85. JOLLEY *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. Motion for leave to proceed as a veteran granted.

No. 08M86. HARLEY ET UX. *v.* SECURITIES AND EXCHANGE COMMISSION. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 08M87. MATHEW *v.* HOLDER, ATTORNEY GENERAL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 08–9887. SAMPATH *v.* CONCURRENT TECHNOLOGIES. C. A. 3d Cir.;

No. 08–10149. FOSTER *v.* LANSING SCHOOL DISTRICT 158 (two judgments). C. A. 7th Cir.;

No. 08–10276. JACKSON *v.* GEREN, SECRETARY OF THE ARMY. C. A. 5th Cir.; and

No. 08–10382. LUTZ *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 5th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 13, 2009, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 08–10587. IN RE EAMES;

No. 08–10590. IN RE JEREMIAH; and

No. 08–10611. IN RE REVIERE. Petitions for writs of habeas corpus denied.

No. 08–9910. IN RE CAMPBELL. Petition for writ of mandamus denied.

No. 08–9869. IN RE JENKINS. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 08–304. GRAHAM COUNTY SOIL AND WATER CONSERVATION DISTRICT ET AL. *v.* UNITED STATES EX REL. WILSON. C. A. 4th Cir. Certiorari granted. Reported below: 528 F. 3d 292.

No. 08–1175. FLORIDA *v.* POWELL. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 998 So. 2d 531.

No. 08–1224. UNITED STATES *v.* COMSTOCK ET AL. C. A. 4th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 551 F. 3d 274.

Certiorari Denied

No. 08–327. ARIZONA ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 528 F. 3d 652.

No. 08–552. ALI *v.* HOLDER, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 521 F. 3d 737.

No. 08–643. CANALES-MATAMOROS *v.* FILIP, ACTING ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 284 Fed. Appx. 800.

No. 08–792. GRAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 521 F. 3d 514.

No. 08–917. MCSWAIN *v.* WARREN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 287 Fed. Appx. 450.

No. 08–1009. WARE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 845.

No. 08–1043. WILSON ET AL. *v.* LIBBY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 535 F. 3d 697.

No. 08–1052. FAIRBANKS NORTH STAR BOROUGH *v.* UNITED STATES ARMY CORPS OF ENGINEERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 543 F. 3d 586.

No. 08–1053. SUNOCO, INC., ET AL. *v.* MCDONALD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 548 F. 3d 774.

No. 08–1109. PORTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 3d 1088.

No. 08–1149. CUNNINGHAM *v.* UNITED STATES; and
No. 08–10158. THOMAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 554 F. 3d 703.

No. 08–1152. SRIVASTAVA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 540 F. 3d 277.

No. 08–1156. AT&T MOBILITY LLC ET AL. *v.* SHORTS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 552 F. 3d 327.

No. 08–1165. LEVY *v.* STERLING HOLDING CO., LLC, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 544 F. 3d 493.

No. 08–1167. MULLICA WEST, LTD., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 550 F. 3d 1135.

No. 08–1169. CAPITAL ONE BANK (USA), N. A., FKA CAPITAL ONE BANK, ET AL. *v.* COMMISSIONER OF REVENUE OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 453 Mass. 1, 899 N. E. 2d 76.

No. 08–1179. ROGERS ET AL. *v.* ROYAL CARIBBEAN CRUISE LINES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 3d 1148.

No. 08–1194. ARKANSAS CARPENTERS HEALTH AND WELFARE FUND ET AL. *v.* BAYER AG ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 544 F. 3d 1323.

No. 08–1207. GEOFFREY, INC. *v.* COMMISSIONER OF REVENUE OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 453 Mass. 17, 899 N. E. 2d 87.

No. 08–1223. MAXWELL-JOLLY, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES *v.* INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 543 F. 3d 1050.

No. 08–1276. HENDERSON *v.* SONY PICTURES ENTERTAINMENT, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 288 Fed. Appx. 387.

No. 08–1278. MAGNANDONOVAN *v.* CITY OF LOS ANGELES, CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–1279. CIMINI *v.* CIMINI. App. Ct. Mass. Certiorari denied. Reported below: 73 Mass. App. 1112, 898 N. E. 2d 13.

No. 08–1286. HAGY *v.* FINK-HAGY. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 11 N. Y. 3d 716, 902 N. E. 2d 439.

No. 08–1288. BERGIN *v.* MCCALL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 165.

No. 08–1289. SORO *v.* CITIGROUP. C. A. 11th Cir. Certiorari denied. Reported below: 287 Fed. Appx. 57.

No. 08–1296. ST. GERMAIN ET AL. *v.* HOWARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 3d 261.

No. 08–1297. UNITED STATES EX REL. LOWMAN *v.* HILTON HEAD HEALTH SYSTEM, L. P., ET AL. C. A. 4th Cir. Certiorari denied.

No. 08–1299. UMEUGO *v.* BARDEN CORP. C. A. 2d Cir. Certiorari denied. Reported below: 307 Fed. Appx. 514.

No. 08–1302. Oklahoma Oncology & Hematology, P. C., dba Cancer Care Associates *v.* JPMorgan Chase Bank, N. A., et al. C. A. 5th Cir. Certiorari denied.

No. 08–1303. Hamwi *v.* McNeil, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 08–1313. Waterman *v.* Nationwide Mutual Insurance Co. et al. Sup. Ct. Idaho. Certiorari denied. Reported below: 146 Idaho 667, 201 P. 3d 640.

No. 08–1343. T. C. *v.* Yolo County Department of Employment and Social Services. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 08–1365. Breier *v.* Cooper-Standard Automotive FHS, Inc., fka ITT Automotive, Inc. C. A. 6th Cir. Certiorari denied.

No. 08–1372. Spielbauer *v.* Santa Clara County, California, et al. Sup. Ct. Cal. Certiorari denied. Reported below: 45 Cal. 4th 704, 199 P. 3d 1125.

No. 08–1377. Henderson et al. *v.* Nebraska et al. Sup. Ct. Neb. Certiorari denied. Reported below: 277 Neb. 240, 762 N. W. 2d 1.

No. 08–1383. Blitz Holdings Corp. et al. *v.* Grant Thornton, LLP, et al. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 08–1388. Williams *v.* District of Columbia. Ct. App. D. C. Certiorari denied.

No. 08–1408. Ostrowski *v.* City of New York, New York, et al. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 55 App. Div. 3d 471, 866 N. Y. S. 2d 160.

No. 08–1426. Papa et ux. *v.* Arizona et al. C. A. 9th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 156.

No. 08–1432. Shaub *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 959 A. 2d 973.

No. 08–8655. Vega-Castillo *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 540 F. 3d 1235.

No. 08–8735. TAFT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 238.

No. 08–8891. VELA-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 300 Fed. Appx. 304.

No. 08–9064. VALLES-HIDALGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–9246. O'NEAL *v.* KOZLIK ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–9503. BUDGE *v.* E. M. N. EXPRESS MORTGAGE NATIONWIDE, INC., ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 08–9727. JACKSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 45 Cal. 4th 662, 199 P. 3d 1098.

No. 08–9808. LOPEZ *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 08–9810. JORDAN *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–9815. STOUDEMIRE *v.* PADULA, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 305 Fed. Appx. 142.

No. 08–9821. ASKEW *v.* BLAIR ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–9823. COLON-MONTANEZ *v.* WILSON. C. A. 3d Cir. Certiorari denied.

No. 08–9825. CARMELL *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 317.

No. 08–9828. CARREA *v.* BARNHART ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–9838. SALAZAR *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 665.

No. 08–9840. SMITH *v.* OREGON DEPARTMENT OF CORRECTIONS. Ct. App. Ore. Certiorari denied. Reported below: 219 Ore. App. 192, 182 P. 3d 250.

No. 08–9841. SZANTO *v.* SUPERIOR COURT OF CALIFORNIA, SAN LUIS OBISPO COUNTY (two judgments). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–9845. MOTT *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 896 N. E. 2d 934.

No. 08–9846. WAIVIO *v.* ADVOCATE HEALTH CARE NETWORK ET AL. (three judgments). C. A. 7th Cir. Certiorari denied.

No. 08–9849. POLK *v.* SAPP ET AL. Ct. App. Ky. Certiorari denied.

No. 08–9852. LOVETTE *v.* SCHALIT. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 1 So. 3d 191.

No. 08–9858. SANCHEZ *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 08–9859. ROOKLIDGE *v.* DRIVER AND MOTOR VEHICLE SERVICES BRANCH OF THE OREGON DEPARTMENT OF TRANSPORTATION ET AL. Ct. App. Ore. Certiorari denied. Reported below: 217 Ore. App. 172, 174 P. 3d 1120.

No. 08–9863. ANTHONY *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–9866. THOMPKE *v.* RICHLAND COUNTY, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied.

No. 08–9867. TILLERY *v.* WOODS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9868. JONES *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–9875. CORBIN *v.* UNITED AIRLINES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 292 Fed. Appx. 571.

No. 08–9886. TAYLOR *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 08–9892. ZACKERY *v.* MESROBIAN. C. A. 7th Cir. Certiorari denied. Reported below: 299 Fed. Appx. 598.

No. 08–9893. MARTIN *v.* WARREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9900. BUSTOS *v.* SCHWABE, WILLIAMSON & WYATT, P. C. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 08–9902. COX *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 382 Ill. App. 3d 1215, 967 N. E. 2d 499.

No. 08–9907. ROBINSON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 995 So. 2d 978.

No. 08–9908. PARKER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 382 Ill. App. 3d 1207, 967 N. E. 2d 495.

No. 08–9911. CAMPBELL *v.* STEIN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 976.

No. 08–9924. WILLIAMS *v.* JOHNSON ET AL. C. A. 8th Cir. Certiorari denied.

No. 08–9926. WALKER *v.* CULLIVER, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–9927. SMITH *v.* KYLER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 295 Fed. Appx. 479.

No. 08–9928. DENNIS *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–9929. COHEN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 953 A. 2d 825.

No. 08–9942. SMITH *v.* WASHINGTON MUTUAL BANK FA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 707.

No. 08–9962. BAUMGARTEN *v.* BOARD OF EQUALIZATION OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 711.

No. 08–9988. IVANTCHOUK *v.* HOLDER, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied.

No. 08–10010. PONSON *v.* CORRECTIONS CORPORATION OF AMERICA ET AL. Ct. App. D. C. Certiorari denied. Reported below: 962 A. 2d 942.

No. 08–10057. MCCARTHY *v.* WICK. C. A. 9th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 143.

No. 08–10098. VENTURA *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 2 So. 3d 194.

No. 08–10101. CLARK *v.* NEVADA (two judgments). Sup. Ct. Nev. Certiorari denied.

No. 08–10105. MARSHALL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–10119. DAVIS-JACKSON *v.* FEDERICCI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 306 Fed. Appx. 334.

No. 08–10122. JIMENEZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 997 So. 2d 1056.

No. 08–10145. JUSTICE *v.* ALEXANDER. Ct. App. N. Y. Certiorari denied. Reported below: 12 N. Y. 3d 776, 906 N. E. 2d 1066.

No. 08–10154. SEOW *v.* ERCOLE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 320 Fed. Appx. 46.

No. 08–10167. ROUNDTREE *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 08–10208. ASHANTI *v.* HULICK, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 08–10210. DIAZ *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 313 Fed. Appx. 262.

No. 08–10213. RODEN *v.* AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 24, ET AL. C. A. 7th Cir. Certiorari denied.

No. 08–10217. WAIVIO *v.* BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS AT CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 290 Fed. Appx. 935.

No. 08–10245. HOLLIHAN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 963 A. 2d 567.

No. 08–10253. GOSSAGE *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 165 Wash. 2d 1, 195 P. 3d 525.

No. 08–10275. MARKS *v.* MCKENNA, ATTORNEY GENERAL OF WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 997.

No. 08–10281. TAYLOR *v.* WEST VIRGINIA. Cir. Ct. Mercer County, W. Va. Certiorari denied.

No. 08–10299. SMITH *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 217.

No. 08–10302. BROWDER *v.* ANDERSON ET AL. C. A. 6th Cir. Certiorari denied.

No. 08–10349. HENRY *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 382 Ill. App. 3d 1227, 967 N. E. 2d 504.

No. 08–10369. GRISETTI *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 08–10383. JONES *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 320 Fed. Appx. 738.

No. 08–10394. VIGIL *v.* JONES, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 302 Fed. Appx. 801.

No. 08–10400. HOLZ *v.* RIOS. C. A. 6th Cir. Certiorari denied.

No. 08–10412. KENDRICK *v.* ATTORNEY GRIEVANCE COMMISSION OF MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 08–10447. WASHBURN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 313 Fed. Appx. 940.

No. 08–10459. SPATARO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 293 Fed. Appx. 24.

No. 08–10460. McDaniel *v.* Potter, Postmaster General. C. A. 6th Cir. Certiorari denied.

No. 08–10467. Rivera-Chavez, aka Rivera *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 724.

No. 08–10470. Ennis *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 08–10474. Jones *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 312 Fed. Appx. 559.

No. 08–10478. Smith *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 08–10479. Means *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 08–10481. Phillips *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 278.

No. 08–10482. Morris *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 310 Fed. Appx. 442.

No. 08–10486. Vera-Diaz *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 08–10491. Shaw *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 560 F. 3d 1230.

No. 08–10492. Stevahn *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 313 Fed. Appx. 138.

No. 08–10499. Carringer *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 151.

No. 08–10500. Eskridge *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 282.

No. 08–10501. Caballero *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 08–10502. Galindo *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 319 Fed. Appx. 329.

No. 08–10507. Hardman *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 08–10513. ALEJANDRO-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 561 F. 3d 398.

No. 08–10516. ASHIQ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 913.

No. 08–10520. MADEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 695.

No. 08–10524. VALENCIANO-ESPINOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 696.

No. 08–10527. HALL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 557 F. 3d 15.

No. 08–10528. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 550 F. 3d 1319.

No. 08–10530. RAMIREZ-CARCAMO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 3d 384.

No. 08–10531. SCOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 703.

No. 08–10539. TAFOYA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 557 F. 3d 1121.

No. 08–10544. KOMISARUK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 634.

No. 08–10548. CAMPBELL *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 6th Cir. Certiorari denied.

No. 08–10549. MCCALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–10550. CAMPOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 952.

No. 08–10551. ELLIOT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 327 Fed. Appx. 540.

No. 08–10554. BARRIOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 287 Fed. Appx. 618.

No. 08–10555. DIAZ-TEJADA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 311 Fed. Appx. 494.

No. 08–10557. VALENZUELA-MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 312 Fed. Appx. 697.

No. 08–993. BEST WESTERN ENCINA LODGE & SUITES ET AL. *v.* D'LIL. C. A. 9th Cir. Motion of National Federation of Independent Business Small Business Legal Center for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 538 F. 3d 1031.

No. 08–1018. OHIO *v.* VENEY. Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 120 Ohio St. 3d 176, 897 N. E. 2d 621.

No. 08–9861. ARMANT *v.* KENNEDY ET AL. C. A. 5th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 07–1356. KANSAS *v.* VENTRIS, 556 U. S. 586;

No. 08–7399. MILLER *v.* SMITH, WARDEN, 556 U. S. 1223;

No. 08–8338. HILL *v.* NCO PORTFOLIO MANAGEMENT, 556 U. S. 1155;

No. 08–8539. YOUNG *v.* ILLINOIS, 556 U. S. 1170;

No. 08–8880. THOMAS *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS, 556 U. S. 1192;

No. 08–8914. MIDDLETON *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 556 U. S. 1211;

No. 08–9090. DORSEY *v.* MCKUNE, WARDEN, ET AL., 556 U. S. 1212;

No. 08–9183. SMITH *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES, ET AL., 556 U. S. 1195;

No. 08–9186. JACKSON *v.* MARICOPA COUNTY PUBLIC DEFENDER'S OFFICE, 556 U. S. 1213;

No. 08–9252. BOONE *v.* UNITED STATES, 556 U. S. 1197;

No. 08–9283. ANDERSON *v.* UNITED STATES, 556 U. S. 1198;

No. 08–9337. DANIELS *v.* UNITED STATES, 556 U. S. 1199; and

No. 08–9878. LESANE *v.* UNITED STATES, 556 U. S. 1253. Petitions for rehearing denied.

No. 08–8738. DELPH *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY, 556 U. S. 1189. Motion for leave to file petition for rehearing denied.

JUNE 24, 2009

Dismissal Under Rule 46

No. 08–1281. THIRD DIMENSION SEMICONDUCTOR, INC. *v.* FAIRCHILD SEMICONDUCTOR CORP. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46.

JUNE 29, 2009

Certiorari Granted—Vacated and Remanded

No. 07–10191. CRAGER *v.* OHIO. Sup. Ct. Ohio. Reported below: 116 Ohio St. 3d 369, 879 N. E. 2d 745;

No. 07–10850. PIMENTEL *v.* MASSACHUSETTS. App. Ct. Mass. Reported below: 71 Mass. App. 1103, 879 N. E. 2d 138;

No. 07–11094. BARBA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist.;

No. 07–11183. RIVERA *v.* MASSACHUSETTS. App. Ct. Mass. Reported below: 70 Mass. App. 1116, 877 N. E. 2d 1285; and

No. 08–5958. MORALES *v.* MASSACHUSETTS. App. Ct. Mass. Reported below: 71 Mass. App. 587, 884 N. E. 2d 546. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Melendez-Diaz* v. *Massachusetts*, *ante*, p. 305.

No. 08–40. HIRKO *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Yeager* v. *United States*, *ante*, p. 110. Reported below: 521 F. 3d 367.

No. 08–744. OAKLEY ET AL. *v.* CITY OF MEMPHIS, TENNESSEE. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ricci* v. *DeStefano*, *ante*, p. 557. Reported below: 315 Fed. Appx. 500.

No. 08–1125. PIKE COUNTY JOINT VOCATIONAL SCHOOL DISTRICT ET AL. *v.* KNISLEY ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Safford Unified School Dist. #1* v. *Redding*, *ante*, p. 364.

No. 08–8082. HOWE, AKA HARRIS *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pau-*

peris granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Yeager* v. *United States*, *ante*, p. 110. Reported below: 538 F. 3d 820.

No. 08–9121. BLOMQUIST *v.* UNITED STATES. C. A. 6th 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 *Chambers* v. *United States*, 555 U. S. 122 (2009).

No. 08–9958. MARTINEZ *v.* UNITED STATES. C. A. 5th 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 *Flores-Figueroa* v. *United States*, 556 U. S. 646 (2009). Reported below: 322 Fed. Appx. 384.

Certiorari Dismissed

No. 08–9933. BELL-BOSTON *v.* CAPITOL HILL HYATT REGENCY. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 324 Fed. Appx. 5.

No. 08–9950. BELL-BOSTON *v.* GEORGE WASHINGTON UNIVERSITY HOSPITAL, QUALITY MANAGEMENT DEPARTMENT. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–9999. BELL-BOSTON *v.* SUPERIOR COURT OF THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 321 Fed. Appx. 6.

No. 08–10012. JAFFE *v.* ARIZONA. Ct. App. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–10043. GLASS *v.* FORDNEY ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 08–10605. DEWILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis*

denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 315 Fed. Appx. 81.

No. 08–10674. THOMAS *v.* UNITED STATES. C. A. 7th 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. 08M88. SEALED PETITIONER *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 08M89. PEEBLES *v.* EVANS, WARDEN; and

No. 08M91. MOE *v.* HOLDER, ATTORNEY GENERAL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 08M90. ABELE *v.* NOAH ET AL. Motion for leave to proceed as a veteran denied.

No. 08–205. CITIZENS UNITED *v.* FEDERAL ELECTION COMMISSION. D. C. D. C. [Probable jurisdiction noted, 555 U. S. 1028.] Case restored to the calendar for reargument. Parties are directed to file supplemental briefs addressing the following question: "For the proper disposition of this case, should the Court overrule either or both *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 (1990), and the part of *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93 (2003), which addresses the facial validity of § 203 of the Bipartisan Campaign Reform Act of 2002, 2 U. S. C. § 441b?" Briefs, not to exceed 6,000 words, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, July 24, 2009. *Amicus curiae* briefs, not to exceed 4,500 words, may be filed with the Clerk and served upon counsel to the parties by 2 p.m., Friday, July 31, 2009. Reply briefs, not to exceed 3,000 words, may be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Wednesday, August 19, 2009. Case is set for oral argument at 10 a.m., Wednesday, September 9, 2009.

No. 08–9180. SKLAR ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir.; and

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*For the Court's order making allotment of Justices, see *ante*, p. VI.

No. 08–10110. DOLAN *v.* SUNGARD, DBA SUNGARD SECURITIES FINANCE, LLC. C. A. 1st Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 20, 2009, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 08–9783. IN RE PORTER. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [556 U. S. 1220] denied.

No. 08–10735. IN RE BLACKWELL; and
No. 08–10766. IN RE DALTON. Petitions for writs of habeas corpus denied.

No. 08–10574. IN RE WALLACE. Petition for writ of mandamus denied.

No. 08–9972. IN RE LOPEZ ORTIZ. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 07–11191. BRISCOE ET AL. *v.* VIRGINIA. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 275 Va. 283, 657 S. E. 2d 113.

No. 08–645. ABBOTT *v.* ABBOTT. C. A. 5th Cir. Certiorari granted. Reported below: 542 F. 3d 1081.

No. 08–661. AMERICAN NEEDLE, INC. *v.* NATIONAL FOOTBALL LEAGUE ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 538 F. 3d 736.

No. 08–1200. JERMAN *v.* CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH LPA ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 538 F. 3d 469.

No. 08–1214. GRANITE ROCK CO. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 546 F. 3d 1169.

No. 08–810. CONKRIGHT ET AL. *v.* FROMMERT ET AL. C. A. 2d Cir. Motion of Business Roundtable for leave to file a brief

as *amicus curiae* granted. Certiorari granted. Reported below: 535 F. 3d 111.

No. 08–1196. WEYHRAUCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted limited to the following question: "Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the nondisclosure of material information, in violation of the mail-fraud statute (18 U. S. C. §§ 1341 and 1346), the Government must prove that the defendant violated a disclosure duty imposed by state law." Reported below: 548 F. 3d 1237.

Certiorari Denied

No. 07–1602. DE LA CRUZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 514 F. 3d 121.

No. 07–7577. O'MALEY *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 156 N. H. 125, 932 A. 2d 1.

No. 07–7770. GEIER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 41 Cal. 4th 555, 161 P. 3d 104.

No. 07–8291. WASHINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 498 F. 3d 225.

No. 07–9369. HINOJOS-MENDOZA *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 169 P. 3d 662.

No. 07–10845. MEEKINS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 10 N. Y. 3d 136, 884 N. E. 2d 1019.

No. 07–10908. COSME *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 117 Ohio St. 3d 74, 881 N. E. 2d 864.

No. 07–11127. RAINES *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 362 N. C. 179, 675 S. E. 2d 374.

No. 08–381. SWEET *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 195 N. J. 357, 949 A. 2d 809.

No. 08–576. FIN-AG, INC. *v.* PIPESTONE LIVESTOCK AUCTION MARKET, INC., ET AL. (Reported below: 754 N. W. 2d 29); FIN-AG, INC. *v.* WATERTOWN LIVESTOCK AUCTION, INC., ET AL. (754 N. W.

2d 23); and FIN-AG, INC. *v.* CIMPL'S, INC., ET AL. (754 N. W. 2d 1). Sup. Ct. S. D. Certiorari denied.

No. 08–603. VOS, DIRECTOR, MILLE LACS COUNTY, MINNESOTA, FAMILY SERVICES AND WELFARE DEPARTMENT, ET AL. *v.* BARG. Sup. Ct. Minn. Certiorari denied. Reported below: 752 N. W. 2d 52.

No. 08–626. LEVEL 3 COMMUNICATIONS, LLC *v.* CITY OF ST. LOUIS, MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 540 F. 3d 794.

No. 08–640. FEDERAL INSURANCE CO. ET AL. *v.* KINGDOM OF SAUDI ARABIA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 3d 71.

No. 08–730. AMERICAN BANKERS ASSN. ET AL. *v.* BROWN, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 3d 1214.

No. 08–759. SPRINT TELEPHONY PCS, L. P. *v.* SAN DIEGO COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 543 F. 3d 571.

No. 08–785. AGASINO *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–803. ALFIERI ET AL. *v.* CONKRIGHT ET AL.; and
No. 08–826. PIETROWSKI ET AL. *v.* CONKRIGHT ET AL. C. A. 2d Cir. Certiorari denied.

No. 08–852. ILLIG ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 274 Fed. Appx. 883.

No. 08–863. STRATMAN *v.* SALAZAR, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 3d 1161.

No. 08–951. TAVORY *v.* NTP, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 297 Fed. Appx. 986.

No. 08–1113. MCKNIGHT ET AL. *v.* GENERAL MOTORS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 550 F. 3d 519.

No. 08–1123. ChevronTexaco Corp. et al. *v.* Republic of Ecuador et al. C. A. 2d Cir. Certiorari denied. Reported below: 296 Fed. Appx. 124.

No. 08–1129. Pinnick et al. *v.* Corboy & Demetrio, P. C., et al. Sup. Ct. Ill. Certiorari denied.

No. 08–1130. Truth et al. *v.* Kent School District et al.; and

No. 08–1268. Kent School District et al. *v.* Truth et al. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 3d 634.

No. 08–1201. Able Time, Inc. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 3d 824.

No. 08–1202. IMS Health, Inc., et al. *v.* Ayotte, Attorney General of New Hampshire. C. A. 1st Cir. Certiorari denied. Reported below: 550 F. 3d 42.

No. 08–1203. Quanta Computer, Inc., et al. *v.* Ricoh Co., Ltd. C. A. Fed. Cir. Certiorari denied. Reported below: 550 F. 3d 1325.

No. 08–1206. Andrews et ux. *v.* Chevy Chase Bank. C. A. 7th Cir. Certiorari denied. Reported below: 545 F. 3d 570.

No. 08–1212. Boudreaux et al. *v.* Louisiana Department of Transportation et al. Ct. App. N. Y. Certiorari denied. Reported below: 11 N. Y. 3d 321, 897 N. E. 2d 1056.

No. 08–1233. Brookshire Brothers Holding, Inc., et al. *v.* Dayco Productions, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 554 F. 3d 595.

No. 08–1244. Nixon, Governor of Missouri, et al. *v.* Phelps-Roper. C. A. 8th Cir. Certiorari denied. Reported below: 545 F. 3d 685.

No. 08–1254. Zurich American Insurance Co. *v.* Lexington Coal Co., LLC. C. A. 6th Cir. Certiorari denied. Reported below: 536 F. 3d 683.

No. 08–1304. Franklin County Power of Illinois, LLC, fka Enviropower of Illinois, LLC, et al. *v.* Sierra Club. C. A. 7th Cir. Certiorari denied. Reported below: 546 F. 3d 918.

No. 08–1308. HING *v.* HING. C. A. 4th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 708.

No. 08–1311. PULLIAM ET AL. *v.* BANK OF AMERICA ET AL. Ct. App. Ky. Certiorari denied.

No. 08–1312. FOSTER *v.* GRANITE BROADCASTING CORP. C. A. 2d Cir. Certiorari denied.

No. 08–1316. MAYO *v.* CITIBANK SOUTH DAKOTA, N. A. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 383 Ill. App. 3d 1157, 968 N. E. 2d 223.

No. 08–1318. SCHNEIDER *v.* RYLAND GROUP. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 381 Ill. App. 3d 1143, 966 N. E. 2d 607.

No. 08–1327. HARRIS-BRUNSON *v.* JENKINS. Super. Ct. Gwinnet County, Ga. Certiorari denied.

No. 08–1329. FIA CARD SERVICES, N. A., SUCCESSOR IN INTEREST TO MBNA CORP. *v.* PARKS, TRUSTEE. C. A. 10th Cir. Certiorari denied. Reported below: 550 F. 3d 1251.

No. 08–1339. OSTERBUR *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 32.

No. 08–1342. MORRISSEY ET AL. *v.* LESNIAK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 587.

No. 08–1382. BUSHATI ET AL. *v.* HOLDER, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 310 Fed. Appx. 883.

No. 08–1390. LANDERS ET AL., EXECUTORS OF THE ESTATE OF LANDERS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED *v.* SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 545 F. 3d 98.

No. 08–1398. CARY ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 552 F. 3d 1373.

No. 08–1411. ROSE *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 384 Ill. App. 3d 937, 894 N. E. 2d 156.

No. 08–1416. MOORMAN *v.* UNUMPROVIDENT CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 760.

No. 08–1419. EWING *v.* DISTRICT COURT OF MAINE ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 964 A. 2d 644.

No. 08–1420. COALITION OF WATERSHED TOWNS ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 552 F. 3d 216.

No. 08–1442. BESTOR *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. D. C. Cir. Certiorari denied.

No. 08–1480. UDDIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 551 F. 3d 176.

No. 08–1481. VALLEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 304 Fed. Appx. 916.

No. 08–8242. CASAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 325.

No. 08–8259. BLAYLOCK *v.* TEXAS. Ct. App. Tex., 10th Dist. Certiorari denied. Reported below: 259 S. W. 3d 202.

No. 08–8440. BEN-YISRAYL *v.* LEVENHAGEN, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 540 F. 3d 542.

No. 08–8726. DEAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 938 A. 2d 751.

No. 08–8992. MALOUF *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–9181. REA-HERRERA, AKA REA, AKA PENA, AKA GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 08–9391. VINCENT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 08–9454. BROWN *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 11 So. 3d 933.

No. 08–9550. BELISLE *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 11 So. 3d 323.

No. 08–9580. IZAGUIRRE-MEZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 309 Fed. Appx. 842.

No. 08–9678. WOETKO ET VIR *v.* WELT ET AL. Sup. Ct. N. J. Certiorari denied.

No. 08–9931. STREATER *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 08–9936. K'NAPP *v.* KNOWLES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 295 Fed. Appx. 161.

No. 08–9943. WARD *v.* ILLINOIS DEPARTMENT OF CORRECTIONS. Sup. Ct. Ill. Certiorari denied.

No. 08–9946. JONES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 08–9947. OSBORNE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 08–9951. BENGE *v.* DELOY, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 08–9952. BURTON *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–9953. BOSTIC *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 08–9956. CASSELL *v.* FIRST CENTURY BANK, N. A. Cir. Ct. Wyoming County, W. Va. Certiorari denied.

No. 08–9957. LEWIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–9964. ZIBBELL ET UX. *v.* MICHIGAN DEPARTMENT OF HUMAN SERVICES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 313 Fed. Appx. 843.

No. 08–9968. ARIZMENDI *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–9969. ARIZMENDI *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–9970. ARIZMENDI *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 08–9974. GRAHAM *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–9980. SONACHANSINGH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 52 App. Div. 3d 1022, 859 N. Y. S. 2d 782.

No. 08–9982. SOKOLSKY *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 08–9987. PERRY *v.* PERRY (two judgments). C. A. 9th Cir. Certiorari denied.

No. 08–10001. SAUNDERS *v.* KELLY, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 08–10006. SLOVINEC *v.* AMERICAN UNIVERSITY. C. A. D. C. Cir. Certiorari denied.

No. 08–10009. OUELLETTE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 3 So. 3d 1257.

No. 08–10021. WILLIAMS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 966 A. 2d 349.

No. 08–10023. JEE HYUN SONG *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 08–10024. DAVIS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 2 So. 3d 952.

No. 08–10034. BALLARD *v.* SIMIEN ET AL. C. A. 5th Cir. Certiorari denied.

No. 08–10035. BUTLER *v.* HOWES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–10039. WILLIFORD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 386 Ill. App. 3d 1120, 970 N. E. 2d 624.

No. 08–10044. HENDRICKSON *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 165 Wash. 2d 474, 198 P. 3d 1029.

No. 08–10048. MEADOR *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied.

No. 08–10051. EDDINS *v.* MITRISH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–10054. EVANS *v.* MCDANIELS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 08–10058. MILES *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 08–10060. SANDOVAL NAJERA *v.* MARTEL, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–10062. WHEETLEY *v.* BLOOM ET VIR. Ct. App. Mich. Certiorari denied.

No. 08–10065. BROCK *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 08–10066. BURTON *v.* BARRETT, DIRECTOR, SAN JACINTO COUNTY COMMUNITY SUPERVISION DEPARTMENT. C. A. 5th Cir. Certiorari denied.

No. 08–10069. CLAUSEN *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 999 So. 2d 690.

No. 08–10097. TRAVIS *v.* KNIGHT, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 08–10103. SWEENEY *v.* YATES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–10121. RUBIO *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 08–10124. PANTANELLI *v.* STATE FARM FIRE & CASUALTY CO. C. A. 5th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 290.

No. 08–10126. LAY *v.* MCDONNELL. C. A. 4th Cir. Certiorari denied.

No. 08–10130. BYARS *v.* WASHINGTON MUTUAL BANK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 303 Fed. Appx. 211.

No. 08–10159. ISLAND *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 385 Ill. App. 3d 316, 896 N. E. 2d 802.

No. 08–10173. VEGTER *v.* CANADA LIFE ASSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 248.

No. 08–10181. VALDEZ *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 181.

No. 08–10200. MARLIN *v.* PROSPER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 08–10202. MORNINGSTAR *v.* HANEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 08–10207. AKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 312 Fed. Appx. 197.

No. 08–10218. CONNER *v.* LIONS GATE ENTERTAINMENT CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 669.

No. 08–10224. DEAN *v.* NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS. Super. Ct. N. H., Merrimack County. Certiorari denied.

No. 08–10226. MOORE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 383 Ill. App. 3d 1144, 968 N. E. 2d 218.

No. 08–10229. WEAVER *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 981 So. 2d 508.

No. 08–10231. ACKERMAN ET VIR *v.* UNION SECURITY INSURANCE CO., FKA FORTIS BENEFITS INSURANCE CO. C. A. 6th Cir. Certiorari denied.

No. 08–10233. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 383 Ill. App. 3d 1145, 968 N. E. 2d 218.

No. 08–10239. COUCH *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 999 So. 2d 649.

No. 08–10317. RICHARDSON *v.* KANSAS DEPARTMENT OF CORRECTIONS ET AL. C. A. 10th Cir. Certiorari denied.

No. 08–10322. RAILEY *v.* WEBB, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 540 F. 3d 393.

No. 08–10452. MOSELEY *v.* BRANKER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 550 F. 3d 312.

No. 08–10463. EL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 309 Fed. Appx. 517.

No. 08–10468. NEWBURY *v.* MAINE. C. A. 1st Cir. Certiorari denied.

No. 08–10494. DIGGS *v.* PLILER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 289 Fed. Appx. 152.

No. 08–10536. DIGIANNI *v.* BLOOMBERG, MAYOR OF THE CITY OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 311 Fed. Appx. 492.

No. 08–10562. GREGORY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 848.

No. 08–10566. BIERI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 575.

No. 08–10568. ALONZA-MENDOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 82.

No. 08–10570. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 930.

No. 08–10573. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 317 Fed. Appx. 944.

No. 08–10579. WINDER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 557 F. 3d 1129.

No. 08–10580. ZGRZEPSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 323 Fed. Appx. 177.

No. 08–10581. WOLFSON *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied.

No. 08–10589. GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 312 Fed. Appx. 606.

No. 08–10598. DIAZ-SANTANA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–10599. SALAZAR-RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 561 F. 3d 398.

No. 08–10601. VILLEGAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 554 F. 3d 894.

No. 08–10602. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 312 Fed. Appx. 641.

No. 08–10608. RAMEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 312 Fed. Appx. 647.

No. 08–10609. SENAT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 313 Fed. Appx. 250.

No. 08–10610. RIDEOUT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–10613. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 558 F. 3d 193.

No. 08–10615. BIGGINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 304 Fed. Appx. 785.

No. 08–10621. CAZAREZ CASTILLO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 789.

No. 08–10622. BISHOP *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 380.

No. 08–10623. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 313 Fed. Appx. 703.

No. 08–10627. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 313 Fed. Appx. 372.

No. 08–10628. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 557 F. 3d 297.

No. 08–10630. BEDELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 311 Fed. Appx. 461.

No. 08–10633. MCCONNELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 326 Fed. Appx. 218.

No. 08–10637. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 312 Fed. Appx. 691.

No. 08–10638. JOHNSON, AKA WISE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 320 Fed. Appx. 552.

No. 08–10642. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 768.

No. 08–10648. SIFFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 330 Fed. Appx. 46.

No. 08–10649. RIVERA-MARRERO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 08–10651. CALDWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 08–10653. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 08–10654. WARRANT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 85.

No. 08–10655. WARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 561 F. 3d 414.

No. 08–10656. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 301 Fed. Appx. 508.

No. 08–10657. CARDENAS-LUNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 312 Fed. Appx. 603.

No. 08–10660. ANCELMO-SANTOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 315 Fed. Appx. 621.

No. 08–10663. WALKER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 545 F. 3d 1081.

No. 08–10669. KINGCADE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 562 F. 3d 794.

No. 08–10677. LITTLEHEAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 84.

No. 08–10688. BELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 555 F. 3d 535.

No. 08–448. CABLE NEWS NETWORK, INC., ET AL. *v.* CSC HOLDINGS, INC., ET AL. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 536 F. 3d 121.

No. 08–1089. WINKELMAN ET AL. *v.* PARMA CITY SCHOOL DISTRICT. C. A. 6th Cir. Motion of American Occupational Therapy Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 294 Fed. Appx. 997.

Rehearing Denied

No. 08–1045. TAYLOR *v.* TODD ET AL., 556 U. S. 1183;

No. 08–1118. KONARSKI ET AL. *v.* CITY OF TUCSON, ARIZONA, ET AL., 556 U. S. 1236;

No. 08–7832. SPEED *v.* UNITED STATES, 556 U. S. 1185;

No. 08–8664. MELVIN *v.* UNITED STATES, 556 U. S. 1239;

No. 08–8861. RAIHALA *v.* CASS COUNTY DISTRICT JUDGE, 556 U. S. 1210;

No. 08–8983. SMITH *v.* BERGHUIS, WARDEN, 556 U. S. 1223;

No. 08–9001. SUTTON *v.* NORTH CAROLINA DEPARTMENT OF LABOR, 556 U. S. 1193;

No. 08–9017. CURRY *v.* CITY OF MANSFIELD, OHIO, ET AL., 556 U. S. 1212;

No. 08–9126. STEWART *v.* CHANDLER, WARDEN, 556 U. S. 1212;

No. 08–9175. SPINDLE *v.* EXECUTIVE BRANCH OF THE UNITED STATES ET AL., 556 U. S. 1195;

No. 08–9177. SCIPPIO *v.* UNITED STATES, 556 U. S. 1203;

No. 08–9215. CLANTON *v.* MUIRFIELD HOLDINGS, LTD., ET AL., 556 U. S. 1225;

No. 08–9225. STONE *v.* CHASE, WARDEN, 556 U. S. 1243;

No. 08–9258. JONES *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL., 556 U. S. 1244;

No. 08–9294. DONONOVAN, AKA DONOVAN *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 556 U. S. 1225;

No. 08–9305. STACKHOUSE *v.* PENNSYLVANIA, 556 U. S. 1213;

No. 08–9350. HOLDER *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS, ET AL., 556 U. S. 1200;

No. 08–9457. VAN DANIELS *v.* UNITED STATES, 556 U. S. 1214; and

No. 08–9739. CONARD *v.* UNITED STATES, 556 U. S. 1250. Petitions for rehearing denied.

JULY 8, 2009

Dismissal Under Rule 46

No. 08–1369. HI-SHEAR TECHNOLOGY CORP. *v.* UNITED SPACE ALLIANCE, LLC. Dist. Ct. App. Fla., 5th Dist. Certiorari dismissed under this Court's Rule 46.1. Reported below: 1 So. 3d 195.

JULY 13, 2009

Miscellaneous Order

No. 09–21 (09A19). POWELL *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, granted pending the disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

JULY 14, 2009

Certiorari Denied

No. 09–5256 (09A54). FAUTENBERRY *v.* MITCHELL, WARDEN. C. A. 6th Cir. 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: 571 F. 3d 1341.

JULY 15, 2009

Dismissal Under Rule 46

No. 08–10675. STRICKLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 556 F. 3d 1069.

JULY 24, 2009

Dismissal Under Rule 46

No. 08–11080. KUEHNE *v.* UNITED STATES. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 547 F. 3d 667.

JULY 27, 2009

Miscellaneous Orders

No. 08A1167. VANMETER *v.* BURSON ET AL. Ct. Sp. App. Md. Application for stay, addressed to JUSTICE BREYER and referred to the Court, denied.

No. D–2453. IN RE DISCIPLINE OF SUTLEY. Laurence P. Sutley, of Summerdale, Ala., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2454. IN RE DISCIPLINE OF COLVIN. Ira Benjamin Colvin, of Columbus, Ohio, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2455. IN RE DISCIPLINE OF THOMPSON. Stephen W. Thompson, of Camden, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2456. IN RE DISCIPLINE OF FEINMAN. Jeffrey B. Feinman, of Cherry Hill, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 08–240. MAC'S SHELL SERVICE, INC., ET AL. *v.* SHELL OIL PRODUCTS CO. LLC ET AL.; and

No. 08–372. SHELL OIL PRODUCTS CO. LLC ET AL. *v.* MAC'S SHELL SERVICE, INC., ET AL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 903.] Motion of the parties to amend the briefing schedule granted. Petitioners in No. 08–372 will file an opening brief on or before August 21, 2009. Petitioners in No. 08–240 will file a response brief on or before September 30, 2009. Petitioners in No. 08–372 will file a reply brief on or before October 30, 2009. Petitioners in No. 08–240 will file a supplemental brief on or before November 13, 2009.

No. 08–680. MARYLAND *v.* SHATZER. Ct. App. Md. [Certiorari granted, 555 U. S. 1152.] Motion of the Solicitor General for

leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 08–1119. MILAVETZ, GALLOP & MILAVETZ, P. A., ET AL. *v.* UNITED STATES; and

No. 08–1225. UNITED STATES *v.* MILAVETZ, GALLOP & MILAVETZ, P. A., ET AL. C. A. 8th Cir. [Certiorari granted, 556 U. S. 1281.] Motion of the parties to amend the briefing schedule and expand the word limits granted. Petitioners in No. 08–1119 will file an opening brief, not to exceed 20,000 words, on or before August 25, 2009. Petitioner in No. 08–1225 will file a response brief, not to exceed 20,000 words, on or before October 21, 2009. Petitioners in No. 08–1119 will file a reply brief, not to exceed 10,000 words, on or before November 20, 2009.

No. 08–1196. WEYHRAUCH *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, *ante*, p. 934.] Motion of petitioner to modify the question presented denied.

No. 08–6925. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 555 U. S. 1169.] Motion of petitioner for leave to file volume II of the joint appendix under seal granted.

Rehearing Denied

No. 07–1529. MONTEJO *v.* LOUISIANA, 556 U. S. 778;

No. 08–961. MCKINNEY ET AL., JOINTLY AND SEVERALLY *v.* PARSONS, 556 U. S. 1257;

No. 08–1105. MCLEOD *v.* MICHIGAN DEPARTMENT OF TREASURY, 556 U. S. 1222;

No. 08–1138. AUREUS HOLDINGS, LTD., ET AL. *v.* CITY OF DETROIT, MICHIGAN, ET AL., 556 U. S. 1236;

No. 08–1195. OTTERSON *v.* PENNSYLVANIA, 556 U. S. 1238;

No. 08–1239. TUCKER *v.* MONTANA EX REL. BULLOCK, ATTORNEY GENERAL OF MONTANA, ET AL., 556 U. S. 1238;

No. 08–1333. MCRAE *v.* EVANS, 556 U. S. 1283;

No. 08–1347. KRAMER ET UX. *v.* KUBICKA ET UX., 556 U. S. 1270;

No. 08–8363. KING *v.* LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS ET AL., 556 U. S. 1210;

No. 08–8487. GAREY *v.* UNITED STATES, 556 U. S. 1258;

No. 08–8615. CASTRO *v.* TEXAS, 556 U. S. 1187;

No. 08–8647. GLOVER *v.* MCMASTER, ATTORNEY GENERAL OF SOUTH CAROLINA, ET AL., 556 U. S. 1188;

No. 08–8704. SERRANO *v.* GARCIA ET AL., 556 U. S. 1188;

No. 08–8722. PAIGE *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 556 U. S. 1189;

No. 08–8912. SAYERS *v.* VIRGINIA, 556 U. S. 1192;

No. 08–8991. MONACELLI *v.* FLORIDA, 556 U. S. 1223;

No. 08–9007. TRAN *v.* SAFECO INSURANCE CO. ET AL., 556 U. S. 1223;

No. 08–9034. WILLIAMS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 556 U. S. 1224;

No. 08–9053. HINDMAN *v.* HEALY ET AL., 556 U. S. 1194;

No. 08–9080. VARGAS *v.* DILLARD'S DEPARTMENT STORE, INC., 556 U. S. 1240;

No. 08–9109. BUTLER *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 556 U. S. 1241;

No. 08–9209. TAYLOR ET UX. *v.* MARION COUNTY SUPERIOR COURT NUMBER SEVEN ET AL., 556 U. S. 1242;

No. 08–9213. MANLEY-SALAAM *v.* DIARRA, 556 U. S. 1196;

No. 08–9247. OLIVER *v.* UNITED STATES, 556 U. S. 1197;

No. 08–9251. ALLEN-PLOWDEN *v.* NATIONAL HEALTH CARE OF SUMTER ET AL., 556 U. S. 1244;

No. 08–9278. WALKER *v.* FELKER, WARDEN, 556 U. S. 1244;

No. 08–9299. REID *v.* MOORE, WARDEN, 556 U. S. 1245;

No. 08–9308. EGAN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 556 U. S. 1225;

No. 08–9432. PARNELL *v.* HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, ET AL., 556 U. S. 1246;

No. 08–9449. STALEY *v.* GEORGIA, 556 U. S. 1270;

No. 08–9452. LEE *v.* A & W PRITCHARD ENTERPRISES, INC., ET AL., 556 U. S. 1246;

No. 08–9492. WILLIS *v.* OFFICE OF PERSONNEL MANAGEMENT, 556 U. S. 1226;

No. 08–9501. SHARPE *v.* UNITED STATES, 556 U. S. 1215;

No. 08–9524. ZACHARIE *v.* CALIFORNIA, 556 U. S. 1271;

No. 08–9532. OPARAJI *v.* NORTH EAST AUTO-MARINE TERMINAL ET AL., 556 U. S. 1247;

No. 08–9563. MERCER *v.* CHERVENAK ET AL., 556 U. S. 1272;

No. 08–9571. ELLISON *v.* BLACK ET AL., 556 U. S. 1284;

No. 08–9595. MacKenzie et al. *v.* Department of Justice et al., 556 U. S. 1226;

No. 08–9600. DiStasio *v.* Ohio, 556 U. S. 1248;

No. 08–9629. Fan *v.* Roe et al., 556 U. S. 1248;

No. 08–9631. Olin *v.* United States, 556 U. S. 1248;

No. 08–9718. Vierra *v.* Cochise County, Arizona, et al., *ante*, p. 907;

No. 08–9745. Britton *v.* United States et al., 556 U. S. 1250;

No. 08–9760. Kissi *v.* United States, 556 U. S. 1250;

No. 08–9778. Cox *v.* Gilson, Warden, 556 U. S. 1273;

No. 08–9862. Bagley *v.* City of Tampa, Florida, *ante*, p. 909;

No. 08–9891. Schotz *v.* United States, 556 U. S. 1253;

No. 08–9923. Dade *v.* United States, 556 U. S. 1264;

No. 08–9961. Downs *v.* United States, 556 U. S. 1264; and

No. 08–10320. Adams *v.* United States, *ante*, p. 911. Petitions for rehearing denied.

July 29, 2009

Dismissal Under Rule 46

No. 09–82. Sandoz Pharmaceuticals Corp., nka Novartis Pharmaceuticals Corp. *v.* Gunderson, Administrator of the Estate of Gunderson, et al. Sup. Ct. Ky. Certiorari dismissed under this Court's Rule 46.1. Reported below: 279 S. W. 3d 93.

July 30, 2009

Miscellaneous Order

No. 08–911. Kucana *v.* Holder, Attorney General. C. A. 7th Cir. [Certiorari granted, 556 U. S. 1207.] Amanda Cohen Leiter, Esq., of Washington, D. C., is invited to brief and argue this case, as *amicus curiae*, in support of the judgment below.

August 17, 2009

Dismissal Under Rule 46

No. 09–5301. Wright *v.* United States. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 315 Fed. Appx. 497.

*Miscellaneous Orders**

No. 08A1088. THOMAS *v.* UNITED STATES. Application for bail, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. 08A1162. MARTINI *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 09A39. BUDDHI *v.* HOLDER, ATTORNEY GENERAL. C. A. 7th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 08–205. CITIZENS UNITED *v.* FEDERAL ELECTION COMMISSION. D. C. D. C. [Probable jurisdiction noted, 555 U. S. 1028.] Motion of Senator Mitch McConnell for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of the Solicitor General for divided argument granted. A total of 80 minutes is allotted for oral argument to be divided as follows: 30 minutes to appellant, 10 minutes to Senator Mitch McConnell, 30 minutes to appellee, and 10 minutes to Senator John McCain et al.

No. 08–678. MOHAWK INDUSTRIES, INC. *v.* CARPENTER. C. A. 11th Cir. [Certiorari granted, 555 U. S. 1152.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 08–1443. IN RE DAVIS. Motions of NAACP et al. and Bob Barr et al. for leave to file briefs as *amici curiae* granted. Petition for writ of habeas corpus transferred to the United States District Court for the Southern District of Georgia for hearing and determination. The District Court should receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence. JUSTICE SOTOMAYOR took no part in the consideration or decision of these motions and this petition.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

JUSTICE SCALIA's dissent is wrong in two respects. First, he assumes as a matter of fact that petitioner Davis is guilty of the

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*For the Court's order making allotment of Justices, see *ante,* p. VII.

murder of Officer MacPhail. He does this even though seven of the State's key witnesses have recanted their trial testimony; several individuals have implicated the State's principal witness as the shooter; and "*no* court," state or federal, "has ever conducted a hearing to assess the reliability of the score of [postconviction] affidavits that, if reliable, would satisfy the threshold showing for a truly persuasive demonstration of actual innocence," 565 F. 3d 810, 827 (CA11 2009) (Barkett, J., dissenting) (internal quotation marks omitted). The substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing. Simply put, the case is sufficiently "exceptional" to warrant utilization of this Court's Rule 20.4(a), 28 U. S. C. § 2241(b), and our original habeas jurisdiction. See *Byrnes* v. *Walker*, 371 U. S. 937 (1962); *Chaapel* v. *Cochran*, 369 U. S. 869 (1962).

Second, JUSTICE SCALIA assumes as a matter of law that, "[e]ven if the District Court were to be persuaded by Davis's affidavits, it would have no power to grant relief" in light of 28 U. S. C. § 2254(d)(1). *Post*, at 955. For several reasons, however, this transfer is by no means "a fool's errand." *Post*, at 957. The District Court may conclude that § 2254(d)(1) does not apply, or does not apply with the same rigidity, to an original habeas petition such as this. See *Felker* v. *Turpin*, 518 U. S. 651, 663 (1996) (expressly leaving open the question whether and to what extent the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to original petitions). The court may also find it relevant to the AEDPA analysis that Davis is bringing an "actual innocence" claim. See, *e. g.*, *Triestman* v. *United States*, 124 F. 3d 361, 377–380 (CA2 1997) (discussing "serious" constitutional concerns that would arise if AEDPA were interpreted to bar judicial review of certain actual innocence claims); Pet. for Writ of Habeas Corpus 20–22 (arguing that Congress intended actual innocence claims to have special status under AEDPA). Even if the court finds that § 2254(d)(1) applies in full, it is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence. Alternatively, the court may find in such a case that the statute's text is satisfied, because decisions of this Court clearly support the proposition that it "would be an atrocious violation of our Constitution and the principles upon which it is based" to execute an innocent

person. 565 F. 3d, at 830 (Barkett, J., dissenting); cf. *Teague* v. *Lane*, 489 U. S. 288, 311–313 (1989) (plurality opinion).

JUSTICE SCALIA would pretermit all of these unresolved legal questions on the theory that we must treat even the most robust showing of actual innocence identically on habeas review to an accusation of minor procedural error. Without briefing or argument, he concludes that Congress chose to foreclose relief and that the Constitution permits this. But imagine a petitioner in Davis' situation who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man. The dissent's reasoning would allow such a petitioner to be put to death nonetheless. The Court correctly refuses to endorse such reasoning.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

Today this Court takes the extraordinary step—one not taken in nearly 50 years—of instructing a district court to adjudicate a state prisoner's petition for an original writ of habeas corpus. The Court proceeds down this path even though every judicial and executive body that has examined petitioner's stale claim of innocence has been unpersuaded, and (to make matters worst) even though it would be impossible for the District Court to grant any relief. Far from demonstrating, as this Court's Rule 20.4(a) requires, "exceptional circumstances" that "warrant the exercise of the Court's discretionary powers," petitioner's claim is a sure loser. Transferring his petition to the District Court is a confusing exercise that can serve no purpose except to delay the State's execution of its lawful criminal judgment. I respectfully dissent.

Eighteen years ago, after a trial untainted by constitutional defect, a unanimous jury found petitioner Troy Anthony Davis guilty of the murder of Mark Allen MacPhail. The evidence showed that MacPhail, an off-duty police officer, was shot multiple times after responding to the beating of a homeless man in a restaurant parking lot. *Davis* v. *State*, 263 Ga. 5, 5–6, 426 S. E. 2d 844, 845–846, cert. denied, 510 U. S. 950 (1993). Davis admits that he was present during the beating of the homeless man, but he maintains that it was one of his companions who shot Officer MacPhail. It is this claim of "actual innocence"—the same defense Davis raised at trial but now allegedly supported by new corroborating affidavits—that Davis raises as grounds for relief.

And (presumably) it is this claim that the Court wants the District Court to adjudicate once the petition is transferred.

Even if the District Court were to be persuaded by Davis's affidavits, it would have no power to grant relief. Federal courts may order the release of convicted state prisoners only in accordance with the restrictions imposed by the Antiterrorism and Effective Death Penalty Act of 1996. See *Felker* v. *Turpin*, 518 U. S. 651, 662 (1996). Insofar as it applies to the present case, that statute bars the issuance of a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . 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).

The Georgia Supreme Court rejected petitioner's "actual-innocence" claim on the merits, denying his extraordinary motion for a new trial. Davis can obtain relief only if that determination was contrary to, or an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of the United States." It most assuredly was not. This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is "actually" innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged "actual innocence" is constitutionally cognizable. See *Herrera* v. *Collins*, 506 U. S. 390, 400–401, 416–417 (1993); see also *House* v. *Bell*, 547 U. S. 518, 555 (2006); *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, *ante*, at 71–72. A state court cannot possibly have contravened, or even unreasonably applied, "clearly established Federal law, as determined by the Supreme Court of the United States," by rejecting a type of claim that the Supreme Court has not once accepted as valid.

JUSTICE STEVENS says that we need not be deterred by the limitations that Congress has placed on federal courts' authority to issue the writ, because we cannot rule out the possibility that the District Court might find those limitations unconstitutional as applied to actual-innocence claims. *Ante*, at 953 (concurring opinion). (This is not a possibility that Davis has raised, but one that JUSTICE STEVENS has imagined.) But acknowledging that possibility would make a nullity of § 2254(d)(1). There is no sound

basis for distinguishing an actual-innocence claim from any other claim that is alleged to have produced a wrongful conviction. If the District Court here can ignore § 2254(d)(1) on the theory that otherwise Davis's actual-innocence claim would (unconstitutionally) go unaddressed, the same possibility would exist for *any* claim going beyond "clearly established Federal law."

The existence of that possibility is incompatible with the many cases in which we have reversed lower courts for their failure to apply § 2254(d)(1), with no consideration of constitutional entitlement. See, *e. g.*, *Knowles* v. *Mirzayance*, 556 U. S. 111, 122 (2009); *Wright* v. *Van Patten*, 552 U. S. 120, 125–126 (2008) *(per curiam)*; *Carey* v. *Musladin*, 549 U. S. 70, 76–77 (2006). We have done so because the argument that the Constitution requires federal-court screening of all state convictions for constitutional violations is frivolous. For much of our history, federal habeas review was not available even for those state convictions claimed to be in violation of clearly established federal law. See *Stone* v. *Powell*, 428 U. S. 465, 474–476 (1976); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 465–466 (1963); L. Yackle, Postconviction Remedies § 19 (1981). It seems to me improper to grant the extraordinary relief of habeas corpus on the possibility that we have approved—indeed, directed—the disregard of constitutional imperatives in the past. If we have new-found doubts regarding the constitutionality of § 2254(d)(1), we should hear Davis's application and resolve that question (if necessary) ourselves.*

Transferring this case to a court that has no power to grant relief is strange enough. It becomes stranger still when one realizes that the allegedly new evidence we shunt off to be examined by the District Court has already been considered (and rejected) multiple times. Davis's postconviction "actual-innocence" claim is not new. Most of the evidence on which it is based is almost a decade old. A State Supreme Court, a State Board of Pardons and Paroles, and a Federal Court of Appeals have all considered

*JUSTICE STEVENS' other arguments as to why § 2254(d)(1) might be inapplicable—that it does not apply to original petitions filed in this Court (even though its text covers all federal habeas petitions), and that it contains an exception (not to be found in its text) for claims of actual innocence—do not warrant response.

the evidence Davis now presents and found it lacking. (I do not rely upon the similar conclusion of the Georgia trial court, since unlike the others that court relied substantially upon Georgia evidentiary rules rather than the unpersuasiveness of the evidence Davis brought forward. See App. to Pet. for Writ of Habeas Corpus 57a–63a.)

The Georgia Supreme Court "look[ed] beyond bare legal principles that might otherwise be controlling to the core question of whether a jury presented with Davis's allegedly-new testimony would probably find him not guilty or give him a sentence other than death." *Davis* v. *State*, 283 Ga. 438, 447, 660 S. E. 2d 354, 362 (2008). After analyzing each of Davis's proffered affidavits and comparing them with the evidence adduced at trial, it concluded that it was not probable that they would produce a different result. See *id.*, at 440–447, 660 S. E. 2d, at 358–363.

When Davis sought clemency before the Georgia Board of Pardons and Paroles, that tribunal stayed his execution and "spent more than a year studying and considering [his] case." Brief in Opposition 14–15 (statement of Board of Pardons and Paroles). It "gave Davis' attorneys an opportunity to present every witness they desired to support their allegation that there is doubt as to Davis' guilt"; it "heard each of these witnesses and questioned them closely." *Id.*, at 15. It "studied the voluminous trial transcript, the police investigation report and the initial statements of the witnesses," and "had certain physical evidence retested and Davis interviewed." *Ibid.* "After an exhaustive review of all available information regarding the Troy Davis case and after considering all possible reasons for granting clemency, the Board . . . determined that clemency is not warranted." *Ibid.*

After reviewing the record, the Eleventh Circuit came to a conclusion "wholly consonant with the repeated conclusions of the state courts and the State Board of Pardons and Paroles." 565 F. 3d 810, 825 (2009). "When we view all of this evidence as a whole, we cannot honestly say that Davis can establish by clear and convincing evidence that a jury would not have found him guilty of Officer MacPhail's murder." *Id.*, at 826.

Today, without explanation and without any meaningful guidance, this Court sends the District Court for the Southern District of Georgia on a fool's errand. That court is directed to consider evidence of actual innocence which has been reviewed and rejected at least three times, and which, even if adequate to

persuade the District Court, cannot (as far as anyone knows) form the basis for any relief. I truly do not see how the District Court can discern what is expected of it. If this Court thinks it possible that capital convictions obtained in full compliance with law can never be final, but are always subject to being set aside by federal courts for the reason of "actual innocence," it should set this case on our own docket so that we can (if necessary) resolve that question. Sending it to a district court that "might" be authorized to provide relief, but then again "might" be reversed if it did so, is not a sensible way to proceed.

Certiorari Denied

No. 09–5935 (09A171). GETSY *v.* STRICKLAND, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS, JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR would grant the application for stay of execution. Reported below: 577 F. 3d 309.

Rehearing Denied

No. 08–310. POLAR TANKERS, INC. *v.* CITY OF VALDEZ, ALASKA, *ante,* p. 1;

No. 08–1098. MADSEN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* JPMORGAN CHASE BANK, N. A., 556 U. S. 1282;

No. 08–1217. KEATING *v.* ABBOTT ET AL., 556 U. S. 1269;

No. 08–1220. HENDERSON *v.* ROBERTSON ET AL., 556 U. S. 1282;

No. 08–1259. WEISS ET UX. *v.* EL AL ISRAEL AIRLINES, *ante,* p. 904;

No. 08–1276. HENDERSON *v.* SONY PICTURES ENTERTAINMENT, INC., ET AL., *ante,* p. 920;

No. 08–1289. SORO *v.* CITIGROUP, *ante,* p. 920;

No. 08–1292. ACOSTA *v.* CITY OF PHOENIX, ARIZONA, *ante,* p. 905;

No. 08–1298. KRUEGER *v.* MINNESOTA, *ante,* p. 905;

No. 08–1308. HING *v.* HING, *ante,* p. 937;

No. 08–1362. BADWAL *v.* BUIE ET AL., *ante,* p. 905;

No. 08–1399. HENDRICKSON ET UX. *v.* UNITED STATES, *ante,* p. 905;

No. 08–1426. Papa et ux. *v.* Arizona et al., *ante*, p. 921;

No. 08–8110. Hernandez Doble *v.* Puerto Rico, 556 U. S. 1209;

No. 08–9159. Howard *v.* INOVA Health Care Services, 556 U. S. 1284;

No. 08–9264. Hunt *v.* Wolfenbarger, Warden, 556 U. S. 1244;

No. 08–9311. Lillard *v.* Service Solutions Corp. et al., 556 U. S. 1259;

No. 08–9377. Dunkle *v.* Virginia, 556 U. S. 1260;

No. 08–9423. Kelley *v.* Humble Independent School District, 556 U. S. 1246;

No. 08–9438. Hillary *v.* McNeil, Secretary, Florida Department of Corrections, et al., 556 U. S. 1246;

No. 08–9530. Allen *v.* Florida, 556 U. S. 1247;

No. 08–9539. Wang *v.* State University of New York Health Sciences Center at Stony Brook, et al., 556 U. S. 1272;

No. 08–9658. Steward *v.* International Longshoremen's Association, Local No. 1408, 556 U. S. 1262;

No. 08–9678. Woetko et vir *v.* Welt et al., *ante*, p. 939;

No. 08–9699. Walker *v.* Robinson, *ante*, p. 906;

No. 08–9736. Snipes *v.* McNeil, Secretary, Florida Department of Corrections, 556 U. S. 1273;

No. 08–9804. Timmon *v.* Wood et al., 556 U. S. 1273;

No. 08–9850. Looney et ux. *v.* Campbell et al., 556 U. S. 1263;

No. 08–9875. Corbin *v.* United Airlines et al., *ante*, p. 923;

No. 08–9881. Smith *v.* Duffey, Warden, 556 U. S. 1287;

No. 08–9910. In re Campbell, *ante*, p. 918;

No. 08–9929. Cohen *v.* Pennsylvania, *ante*, p. 924;

No. 08–9952. Burton *v.* California et al., *ante*, p. 939;

No. 08–9968. Arizmendi *v.* Texas, *ante*, p. 939;

No. 08–10050. Doyle *v.* Cella et al., 556 U. S. 1287;

No. 08–10055. Karnofel *v.* DWYCO Xerox Office Center, 556 U. S. 1287;

No. 08–10082. Rudd, aka Aziz *v.* Werholtz, Secretary, Kansas Department of Corrections, et al., *ante*, p. 909;

No. 08–10163. Feldhacker *v.* Bakewell, Warden, et al., *ante*, p. 909;

No. 08–10226. Moore *v.* Illinois, *ante*, p. 942;

No. 08–10287. MILLER *v.* UNITED STATES, *ante*, p. 910;

No. 08–10302. BROWDER *v.* ANDERSON ET AL., *ante*, p. 926;

No. 08–10412. KENDRICK *v.* ATTORNEY GRIEVANCE COMMISSION OF MARYLAND, *ante*, p. 926;

No. 08–10460. MCDANIEL *v.* POTTER, POSTMASTER GENERAL, *ante*, p. 927;

No. 08–10485. IN RE TORRES, *ante*, p. 902;

No. 08–10590. IN RE JEREMIAH, *ante*, p. 918; and

No. 08–10627. DAVIS *v.* UNITED STATES, *ante*, p. 944. Petitions for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of these petitions.

No. 08–1236. GIMBEL *v.* CALIFORNIA ET AL., 556 U. S. 1289. Petition for rehearing denied. JUSTICE BREYER and JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 08–9058. MARTIN *v.* OFFICE OF PERSONNEL MANAGEMENT, 556 U. S. 1173. Motion for leave to file petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this motion.

AUGUST 19, 2009

Certiorari Denied

No. 09–5778 (09A141). MAREK *v.* FLORIDA. Sup. Ct. Fla. 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: 8 So. 3d 1123.

No. 09–5943 (09A173). MAREK *v.* FLORIDA. Sup. Ct. Fla. 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: 14 So. 3d 985.

No. 09–5998 (09A190). MAREK *v.* MCNEIL, SECRETARY, FLORIDA 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.

AUGUST 24, 2009

Dismissal Under Rule 46

No. 08–1513. CENTER FOR AUTO SAFETY ET AL. *v.* CHRYSLER LLC ET AL. C. A. 2d Cir. Certiorari dismissed as to Center for

Auto Safety, Consumer Action, Consumers for Auto Reliability and Safety, National Association of Consumer Advocates, and Public Citizen under this Court's Rule 46. Reported below: 576 F. 3d 108.

August 27, 2009

Dismissal Under Rule 46

No. 08–1513. Lovitz et al. *v.* Chrysler LLC et al. C. A. 2d Cir. Certiorari dismissed as to Ad Hoc Committee of Consumer-Victims of Chrysler LLC under this Court's Rule 46. Reported below: 576 F. 3d 108.

August 28, 2009

Dismissal Under Rule 46

No. 08–1513. Lovitz et al. *v.* Chrysler LLC et al. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 576 F. 3d 108.

September 4, 2009

Miscellaneous Orders

No. 09A130. Chumpia *v.* Wells Fargo Home Mortgage. Chancery Ct. Tenn., 30th Jud. Dist. Application for stay, addressed to Justice Sotomayor and referred to the Court, denied.

No. 09A137. Rehberger *v.* Henry County, Georgia, et al. C. A. 11th Cir. Application for stay, addressed to Justice Sotomayor and referred to the Court, denied.

No. 08–103. Reed Elsevier, Inc., et al. *v.* Muchnick et al. C. A. 2d Cir. [Certiorari granted, 555 U. S. 1211.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Justice Sotomayor took no part in the consideration or decision of this motion.

No. 08–205. Citizens United *v.* Federal Election Commission. D. C. D. C. [Probable jurisdiction noted, 555 U. S. 1028.] Motion of Wyoming Liberty Group et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 08–351. Alvarez, Cook County State's Attorney *v.* Smith et al. C. A. 7th Cir. [Certiorari granted, 555 U. S.

1169.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 08–472. SALAZAR, SECRETARY OF THE INTERIOR, ET AL. *v.* BUONO. C. A. 9th Cir. [Certiorari granted, 555 U. S. 1169.] Motion of Veterans of Foreign Wars of the United States et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 08–559. MCDANIEL, WARDEN, ET AL. *v.* BROWN. C. A. 9th Cir. [Certiorari granted, 555 U. S. 1152.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 08–651. PADILLA *v.* KENTUCKY. Sup. Ct. Ky. [Certiorari granted, 555 U. S. 1169.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 08–1065. POTTAWATTAMIE COUNTY, IOWA, ET AL. *v.* MCGHEE ET AL. C. A. 8th Cir. [Certiorari granted, 556 U. S. 1181.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 08–1107. HERTZ CORP. *v.* FRIEND ET AL. C. A. 9th Cir. [Certiorari granted, 556 U. S. 1281.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 08–7412. GRAHAM *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. [Certiorari granted, 556 U. S. 1220.] Motion of petitioner for leave to file volume III of the joint appendix under seal granted.

Rehearing Denied

No. 08–1250. QUIROZ ARRATIA *v.* HOLDER, ATTORNEY GENERAL, 556 U. S. 1269;

No. 08–9267. HARRIS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 556 U. S. 1244;

No. 08–9373. RICHARDSON *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 556 U. S. 1260;

No. 08–9584. LEE *v.* NEW YORK, 556 U. S. 1284;

No. 08–9622. HIEBER *v.* STEARNS, 556 U. S. 1285;

No. 08–9733. BROWN *v.* BAGLEY, WARDEN, ET AL., 556 U. S. 1249;

No. 08–9924. WILLIAMS *v.* JOHNSON ET AL., *ante*, p. 924;

No. 08–10006. SLOVINEC *v.* AMERICAN UNIVERSITY, *ante*, p. 940;

No. 08–10035. BUTLER *v.* HOWES, WARDEN, *ante*, p. 940;

No. 08–10114. AUSTIN *v.* CASKEY, WARDEN, *ante*, p. 909;

No. 08–10119. DAVIS-JACKSON *v.* FEDERICCI ET AL., *ante*, p. 925;

No. 08–10124. PANTANELLI *v.* STATE FARM FIRE & CASUALTY CO., *ante*, p. 941;

No. 08–10126. LAY *v.* MCDONNELL, *ante*, p. 941;

No. 08–10181. VALDEZ *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL., *ante*, p. 942;

No. 08–10204. JAMES *v.* UNITED STATES, 556 U. S. 1288; and

No. 08–10231. ACKERMAN ET VIR *v.* UNION SECURITY INSURANCE CO., FKA FORTIS BENEFITS INSURANCE CO., *ante*, p. 942. Petitions for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of these petitions.

SEPTEMBER 9, 2009

Dismissal Under Rule 46

No. 09–5502. JAMES *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 556 F. 3d 1062.

SEPTEMBER 11, 2009

Miscellaneous Order

No. 09A234. SCHWARZENEGGER, GOVERNOR OF CALIFORNIA, ET AL. *v.* COLEMAN ET AL. D. C. E. D. Cal. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. In denying the stay, the Court takes note of the fact that the three-judge District Court has indicated that its final order will not be implemented until this Court has had the opportunity to review the District Court's decree.

SEPTEMBER 14, 2009

Certiorari Denied

No. 09–6401 (09A253). BROOM *v.* OHIO. Sup. Ct. Ohio. 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: 123 Ohio St. 3d 114, 914 N. E. 2d 392.

SEPTEMBER 15, 2009

Rehearing Denied

No. 09–6401. BROOM *v.* OHIO, *ante* this page. Petition for rehearing denied.

SEPTEMBER 22, 2009

Miscellaneous Orders

No. 09A275. COLEMAN *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. 09A276. COLEMAN *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

SEPTEMBER 23, 2009

Miscellaneous Order

No. 08–9991 (09A9). MOSLEY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending the disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

SEPTEMBER 24, 2009

Dismissal Under Rule 46

No. 09–221. IN RE ANNEX BOOKS, INC., ET AL. Petition for writ of mandamus dismissed under this Court's Rule 46.

SEPTEMBER 30, 2009

Miscellaneous Orders

No. 08–724. SMITH, WARDEN *v.* SPISAK. C. A. 6th Cir. [Certiorari granted, 555 U. S. 1169.] Motion of respondent for appointment of counsel granted. Michael J. Benza, Esq., of Chagrin Falls, Ohio, is appointed to serve as counsel for respondent in this case.

No. 08–970. PERDUE, GOVERNOR OF GEORGIA, ET AL. *v.* KENNY A., BY HIS NEXT FRIEND WINN, ET AL. C. A. 11th Cir. [Certiorari granted, 556 U. S. 1165.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 08–1065. POTTAWATTAMIE COUNTY, IOWA, ET AL. *v.* MCGHEE ET AL. C. A. 8th Cir. [Certiorari granted, 556 U. S. 1181.] Motion of petitioners to allow Stephen S. Sanders to argue *pro hac vice* granted.

Certiorari Granted

No. 08–974. LEWIS ET AL. *v.* CITY OF CHICAGO, ILLINOIS. C. A. 7th Cir. Certiorari granted. Reported below: 528 F. 3d 488.

No. 08–1301. CARR *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. Reported below: 551 F. 3d 578.

No. 08–1322. ASTRUE, COMMISSIONER OF SOCIAL SECURITY *v.* RATLIFF. C. A. 8th Cir. Certiorari granted. Reported below: 540 F. 3d 800.

No. 08–1402. BERGHUIS, WARDEN *v.* SMITH. C. A. 6th Cir. Certiorari granted. Reported below: 543 F. 3d 326.

No. 08–1521. MCDONALD ET AL. *v.* CITY OF CHICAGO, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 567 F. 3d 856.

No. 08–1555. SAMANTAR *v.* YOUSUF ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 552 F. 3d 371.

No. 08–1470. BERGHUIS, WARDEN *v.* THOMPKINS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pau-*

peris granted. Certiorari granted. Reported below: 547 F. 3d 572.

No. 08–1498. HOLDER, ATTORNEY GENERAL, ET AL. *v.* HUMANITARIAN LAW PROJECT ET AL.; and

No. 09–89. HUMANITARIAN LAW PROJECT ET AL. *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 552 F. 3d 916.

No. 08–1529. MIGLIACCIO ET AL. *v.* CASTANEDA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CASTANEDA, ET AL.; and

No. 08–1547. HENNEFORD *v.* CASTANEDA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CASTANEDA, ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 546 F. 3d 682.

No. 08–1569. UNITED STATES *v.* O'BRIEN ET AL. C. A. 1st Cir. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 542 F. 3d 921.

OCTOBER 2, 2009

Dismissal Under Rule 46

No. 09–103. BOSTON SCIENTIFIC SCIMED, INC., ET AL. *v.* CORDIS CORP. ET AL. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 554 F. 3d 982.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 966 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE
IN CHAMBERS

O'BRIEN, SUPERINTENDENT, OLD COLONY CORRECTIONAL CENTER *v.* O'LAUGHLIN

ON APPLICATION FOR STAY

No. 09A194. Decided August 26, 2009

Massachusetts' application to stay a First Circuit mandate granting respondent habeas relief and ordering his release is denied, but the District Court is ordered to determine bail and other conditions of release. The presumption of release pending appeal where a petitioner has been granted habeas relief has not been overcome here by the traditional stay factors. It is not reasonably likely that four Justices would vote to grant certiorari, and there is not a fair prospect that this Court will reverse the decision below. Nor do the remaining factors—which weigh respondent's liberty interest against the Commonwealth's interests in continuing custody, preventing respondent's flight, and preventing danger to the public—counsel in favor of a stay. The parties have agreed to eight release conditions but disagree as to the amount of bail to be imposed. The bail imposed must be a practicable amount that respondent can reasonably be expected to raise.

JUSTICE BREYER, Circuit Justice.

This case arises on an application made to me in my capacity as Circuit Justice. The Commonwealth of Massachusetts seeks a stay of the mandate or, in the alternative, imposition of bail and other conditions on the release of respondent. Respondent was convicted in state court for burglary and assault offenses arising from the severe beating of a woman in her home. On appeal, his convictions were reversed for insufficient evidence by the intermediate appellate court and then reinstated by the Supreme Judicial Court. Respondent then filed a petition for a writ of habeas corpus in the

District Court. The District Court denied the petition. The Court of Appeals reversed the District Court, granted respondent's habeas petition, and ordered respondent's immediate and unconditional release. 568 F. 3d 287 (CA1 2009). The Court of Appeals denied the Commonwealth's motion for a stay of the mandate or, in the alternative, for the imposition of bail and eight other conditions of release.

The Commonwealth now applies to me for the same relief. Respondent opposes the application for a stay. With respect to bail and the other eight proposed conditions of release, respondent opposes only the Commonwealth's request for $100,000 in bail. Respondent asserts that his family and friends will be able to raise only $10,000 on his behalf.

There is a presumption of release pending appeal where a petitioner has been granted habeas relief. See *Hilton* v. *Braunskill*, 481 U. S. 770, 774 (1987); Fed. Rule App. Proc. 23(c); this Court's Rule 36.3(b). However, this presumption can be overcome if the traditional factors regulating the issuance of a stay weigh in favor of granting a stay. These factors are: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits, which, in this context, means that it is reasonably likely that four Justices of this Court will vote to grant the petition for writ of certiorari, and that, if they do so vote, there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Hilton*, *supra*, at 776; *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (Brennan, J., in chambers).

With respect to the first factor, the Commonwealth has not yet filed a petition for certiorari, but has indicated what its arguments will be when it does file a petition. Having examined the Commonwealth's tentative arguments, I do not find it reasonably likely that four Justices of this Court would

vote to grant a petition for certiorari to decide this case, or that there is a fair prospect that this Court will reverse the decision below. The remaining factors weigh respondent's liberty interest in release against the Commonwealth's interests in continuing custody and preventing respondent's flight, as well as the interest in preventing danger to the public. The Commonwealth's interest in continuing custody is strong given that respondent has a lengthy remaining sentence extending to 2050. However, the Commonwealth has made no showing that he poses an especial flight risk or danger to the public. Respondent's liberty interest in release is particularly substantial given that it is not reasonably likely that this Court would grant a petition for certiorari filed by the Commonwealth. In sum, principally because of the unlikelihood that certiorari will be granted in this case, I do not find that the presumption in favor of release is overcome by the traditional stay factors. I will therefore deny the Commonwealth's application for a stay.

I will, however, order imposition of bail and other conditions of release to be determined by the District Court. As I have said, the parties agree as to eight of the Commonwealth's proposed conditions of release. The bail imposed must be a practicable amount that respondent can reasonably be expected to raise. Absent further order from this Court or the undersigned, the conditions and bail determined by the District Court shall remain in effect until the deadline for filing a petition for certiorari has passed or, if such a petition is filed, until final resolution of the case by this Court. See this Court's Rule 36.4.

Accordingly, the application for a stay is denied. The stay issued on August 24, 2009, is hereby vacated.

It is so ordered.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 2006, 2007, AND 2008

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	2006	**2007**	**2008**	**2006**	**2007**	**2008**	**2006**	**2007**	**2008**	**2006**	**2007**	**2008**
Number of cases on dockets	6	5	4	2,069	1,969	1,941	8,181	7,628	7,021	10,256	9,602	8,966
Number disposed of during term	1	1	1	1,714	1,624	1,612	7,180	6,749	6,209	8,895	8,374	7,822
Number remaining on dockets	5	4	3	355	345	329	1,001	879	812	1,361	1,228	1,144

	TERMS		
	2006	**2007**	**2008**
Cases argued during term	78	[1] 75	87
Number disposed of by full opinions	74	72	83
Number disposed of by per curiam opinions	4	2	3
Number set for reargument	0	0	1
Cases granted review this term	77	95	87
Cases reviewed and decided without oral argument	280	208	95
Total cases to be available for argument at outset of following term	28	47	[2] 48

[1] Includes No. 06–1275 which was argued on October 29, 2007, and dismissed on December 28, 2007.

[2] Includes No. 08–205 which is scheduled to be reargued on September 9, 2009.

JULY 14, 2009

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