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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1999

MAY 30 THROUGH SEPTEMBER 29, 2000

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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Errata

528 U. S. 911, line 27: "176 F. 3d 798" should be "176 F. 3d 493".
528 U. S. 966, line 12: "107 F. 3d 1056" should be "170 F. 3d 1056".
529 U. S. 1062, line 17: "976 A. 2d 134" should be "976 P. 2d 134".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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

RETIRED

BYRON R. WHITE, Associate Justice.

OFFICERS OF THE COURT

JANET RENO, Attorney General.
SETH P. WAXMAN, Solicitor General.
WILLIAM K. SUTER, Clerk.
FRANK D. WAGNER, Reporter of Decisions.
DALE E. BOSLEY, Marshal.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

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

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

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

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, CLARENCE THOMAS, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

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

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

September 30, 1994.

(For next previous allotment, and modifications, see 502 U. S., p. VI, 509 U. S., p. V, and 512 U. S., p. V.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1994 edition.

Cases reported before page 1201 are those decided with opinions of the Court. Cases reported on page 1201 *et seq.* are those in which orders were entered.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1999

HARTFORD UNDERWRITERS INSURANCE CO. *v.* UNION PLANTERS BANK, N. A.

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

No. 99–409. Argued March 20, 2000—Decided May 30, 2000

During attempted reorganization under Chapter 11 of the Bankruptcy Code, debtor Hen House Interstate, Inc., obtained workers' compensation insurance from petitioner Hartford Underwriters. Although Hen House repeatedly failed to make the monthly premium payments required by the policy, Hartford continued to provide insurance. The reorganization ultimately failed, and the court converted the case to a Chapter 7 liquidation proceeding and appointed a trustee. Learning of the bankruptcy proceedings after the conversion, and recognizing that the estate lacked unencumbered funds to pay the premiums owed, Hartford attempted to charge the premiums to respondent bank, a secured creditor, pursuant to 11 U. S. C. § 506(c). The Bankruptcy Court ruled for Hartford, and the District Court affirmed, but the en banc Eighth Circuit reversed, concluding that § 506(c) could not be invoked by an administrative claimant.

Held: Section 506(c) does not provide an administrative claimant of a bankruptcy estate an independent right to seek payment of its claim from property encumbered by a secured creditor's lien. Pp. 4–14.

(a) As an administrative claimant, petitioner is not a proper party to seek recovery under § 506(c), which provides: "The trustee may recover from property securing an allowed secured claim the . . . costs

and expenses of preserving, or disposing of, such property . . . ." The statute appears quite plain in specifying who may use § 506(c)—"[t]he trustee." Although the statutory text does not actually say that persons other than the trustee may not seek recovery under § 506(c), several contextual features support that conclusion. First, a situation in which a statute authorizes specific action and designates a particular party empowered to take it is surely among the least appropriate in which to presume nonexclusivity. Second, the fact that the sole party named—the trustee—has a unique role in bankruptcy proceedings makes it entirely plausible that Congress would provide a power to him and not to others. Further, had Congress intended the provision to be broadly available, it could simply have said so, as it has in describing the parties who could act under other sections of the Code. The Court rejects as unpersuasive petitioner's arguments from § 506(c)'s text: that the use in other Code provisions of "only" or other expressly restrictive language in specifying the parties at issue means that no party in interest is excluded from § 506(c), and that the right of a nontrustee to recover under § 506(c) is evidenced by § 1109. Pp. 4–9.

(b) The Court also rejects arguments based on pre-Code practice and policy considerations that petitioner advances in support of its assertion that § 506(c) is available to parties other than the trustee. It is questionable whether the pre-Code precedents relied on by petitioner establish a bankruptcy practice sufficiently widespread and well recognized to justify the conclusion of implicit adoption by Congress in enacting the Code. In any event, where, as here, the meaning of the Code's text is itself clear, its operation is unimpeded by contrary prior practice. Also unavailing is petitioner's argument that its reading is necessary as a matter of policy, since in some cases the trustee may lack an incentive to pursue payment. It is far from clear that the relevant policy implications favor petitioner's position, and, in any event, achieving a better policy outcome—if what petitioner urges is that—is a task for Congress, not the courts. Pp. 9–14.

177 F. 3d 719, affirmed.

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

G. Eric Brunstad, Jr., argued the cause for petitioner. With him on the briefs were *Patrick J. Trostle* and *Wendi Alper-Pressman.*

Robert H. Brownlee argued the cause for respondent. With him on the brief was *David D. Farrell.**

JUSTICE SCALIA delivered the opinion of the Court.

In this case, we consider whether 11 U. S. C. § 506(c) allows an administrative claimant of a bankruptcy estate to seek payment of its claim from property encumbered by a secured creditor's lien.

I

This case arises out of the bankruptcy proceedings of Hen House Interstate, Inc., which at one time owned or operated several restaurants and service stations, as well as an outdoor-advertising firm. On September 5, 1991, Hen House filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Missouri. As a Chapter 11 debtor-in-possession, Hen House retained possession of its assets and continued operating its business.

Respondent had been Hen House's primary lender.[1] At the time the Chapter 11 petition was filed, it held a security interest in essentially all of Hen House's real and personal property, securing an indebtedness of over $4 million. After the Chapter 11 proceedings were commenced, it agreed to lend Hen House an additional $300,000 to help finance the reorganization. The Bankruptcy Court entered a financing order approving the loan agreement and author-

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**Mark F. Horning, Sidney P. Levinson, Craig A. Berrington,* and *Phillip L. Schwartz* filed a brief for the American Insurance Association et al. as *amici curiae* urging reversal.

Carter G. Phillips and *Shalom L. Kohn* filed a brief for the Commercial Finance Association as *amicus curiae* urging affirmance.

[1] Respondent Union Planters Bank is the successor of Magna Bank, which is in turn the successor of Landmark Bank of Illinois. Hen House was originally indebted to Landmark Bank. For simplicity, we will not distinguish between the various entities.

izing Hen House to use loan proceeds and cash collateral to pay expenses, including workers' compensation expenses.

During the attempted reorganization, Hen House obtained workers' compensation insurance from petitioner Hartford Underwriters (which was unaware of the bankruptcy proceedings). Although the policy required monthly premium payments, Hen House repeatedly failed to make them; Hartford continued to provide insurance nonetheless. The reorganization ultimately failed, and on January 20, 1993, the Bankruptcy Court converted the case to a liquidation proceeding under Chapter 7 and appointed a trustee. At the time of the conversion, Hen House owed Hartford more than $50,000 in unpaid premiums. Hartford learned of Hen House's bankruptcy proceedings after the conversion, in March 1993.

Recognizing that the estate lacked unencumbered funds to pay the premiums, Hartford attempted to charge the premiums to respondent, the secured creditor, by filing with the Bankruptcy Court an "Application for Allowance of Administrative Expense, Pursuant to 11 U. S. C. § 503 and Charge Against Collateral, Pursuant to 11 U. S. C. § 506(c)." The Bankruptcy Court ruled in favor of Hartford, and the District Court and an Eighth Circuit panel affirmed, *In re Hen House Interstate, Inc.*, 150 F. 3d 868 (CA8 1998). The Eighth Circuit subsequently granted en banc review, however, and reversed, concluding that § 506(c) could not be invoked by an administrative claimant. *In re Hen House Interstate, Inc.*, 177 F. 3d 719 (1999). We granted certiorari. 528 U. S. 985 (2000).

II

Petitioner's effort to recover the unpaid premiums involves two provisions, 11 U. S. C. §§ 503(b) and 506(c). Section 503(b) provides that "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commence-

ment of the case," are treated as administrative expenses, which are, as a rule, entitled to priority over prepetition unsecured claims, see §§ 507(a)(1), 726(a)(1), 1129(a)(9)(A). Respondent does not dispute that the cost of the workers' compensation insurance Hen House purchased from petitioner is an administrative expense within the meaning of this provision. Administrative expenses, however, do not have priority over secured claims, see §§ 506, 725–726, 1129(b)(2)(A); *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 378–379 (1988), and because respondent held a security interest in essentially all of the estate's assets, there were no unencumbered funds available to pay even administrative claimants.

Petitioner therefore looked to § 506(c), which constitutes an important exception to the rule that secured claims are superior to administrative claims. That section provides as follows:

> "The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." § 506(c).

Petitioner argued that this provision entitled it to recover from the property subject to respondent's security interest the unpaid premiums owed by Hen House, since its furnishing of workers' compensation insurance benefited respondent by allowing continued operation of Hen House's business, thereby preserving the value of respondent's collateral; or alternatively, that such benefit could be presumed from respondent's consent to the postpetition financing order. Although it was contested below whether, under either theory, the workers' compensation insurance constituted a "benefit to the holder" within the meaning of § 506(c), that issue is not before us here; we assume for purposes of this decision that it did, and consider only whether peti-

tioner—an administrative claimant—is a proper party to seek recovery under § 506(c).[2]

In answering this question, we begin with the understanding that Congress "says in a statute what it means and means in a statute what it says there," *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 254 (1992). As we have previously noted in construing another provision of § 506, when "the statute's language is plain, 'the sole function of the courts' "—at least where the disposition required by the text is not absurd—" 'is to enforce it according to its terms.' " *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989) (quoting *Caminetti* v. *United States*, 242 U. S. 470, 485 (1917)). Here, the statute appears quite plain in specifying who may use § 506(c)—"[t]he trustee." It is true, however, as petitioner notes, that all this actually "says" is that the trustee may seek recovery under the section, not that others may not. The question thus becomes whether it is a proper inference that the trustee is the only party empowered to invoke the provision.[3] We have little difficulty answering yes.

Several contextual features here support the conclusion that exclusivity is intended. First, a situation in which a statute authorizes specific action and designates a particular party empowered to take it is surely among the least appropriate in which to presume nonexclusivity. "Where a

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[2] In addition to seeking recovery under § 506(c), petitioner argued to the Eighth Circuit en banc that it was entitled to recover under the terms of the postpetition financing order itself. Petitioner sought to enforce that order under Federal Rule of Bankruptcy Procedure 7071, which incorporates Federal Rule of Civil Procedure 71 ("When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party . . ."). The Eighth Circuit declined to address this issue, since it had not been raised until the rehearing en banc, *In re Hen House Interstate, Inc.*, 177 F. 3d 719, 724 (1999). We similarly do not reach the issue here.

[3] Debtors-in-possession may also use the section, as they are expressly given the rights and powers of a trustee by 11 U. S. C. § 1107.

statute . . . names the parties granted [the] right to invoke its provisions, . . . such parties only may act." 2A N. Singer, Sutherland on Statutory Construction § 47.23, p. 217 (5th ed. 1992) (internal quotation marks omitted); see also *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 486 (1985). Second, the fact that the sole party named—the trustee—has a unique role in bankruptcy proceedings makes it entirely plausible that Congress would provide a power to him and not to others. Indeed, had no particular parties been specified—had § 506(c) read simply "[t]here may be recovered from property securing an allowed secured claim the reasonable, necessary costs and expenses, etc."—the trustee is the most obvious party who would have been thought empowered to use the provision. It is thus far more sensible to view the provision as answering the question "Who may use the provision?" with "only the trustee" than to view it as simply answering the question "May the trustee use the provision?" with "yes."

Nor can it be argued that the point of the provision was simply to establish that certain costs may be recovered from collateral, and not to say anything about who may recover them. Had that been Congress's intention, it could easily have used the formulation just suggested. Similarly, had Congress intended the provision to be broadly available, it could simply have said so, as it did in describing the parties who could act under other sections of the Code. Section 502(a), for example, provides that a claim is allowed unless "a party in interest" objects, and § 503(b)(4) allows "an entity" to file a request for payment of an administrative expense. The broad phrasing of these sections, when contrasted with the use of "the trustee" in § 506(c), supports the conclusion that entities other than the trustee are not entitled to use § 506(c). *Russello* v. *United States*, 464 U. S. 16, 23 (1983).

Petitioner's primary argument from the text of § 506(c) is that "what matters is that section 506(c) does not say that

'only' a trustee may enforce its provisions." Brief for Petitioner 29. To bolster this argument, petitioner cites other provisions of the Bankruptcy Code that do use "only" or other expressly restrictive language in specifying the parties at issue. See, *e. g.*, § 109(a) ("[O]nly a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title"); § 707(b) (providing that a case may be dismissed for substantial abuse by "the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest"). Petitioner argues that in the absence of such restrictive language, no party in interest is excluded. This theory—that the expression of one thing indicates the inclusion of others unless exclusion is made explicit—is contrary to common sense and common usage. Many provisions of the Bankruptcy Code that do not contain an express exclusion cannot sensibly be read to extend to all parties in interest. See, *e. g.*, § 363(b)(1) (providing that "[t]he trustee, after notice and a hearing, may use, sell, or lease . . . property of the estate"); § 364(a) (providing that "the trustee" may incur debt on behalf of the bankruptcy estate); § 554(a) (giving "the trustee" power to abandon property of the bankruptcy estate).

Petitioner further argues that § 1109 evidences the right of a nontrustee to recover under § 506(c). We are not persuaded. That section, which provides that a "party in interest" "may raise and may appear and be heard on any issue in a case under [Chapter 11]," is by its terms inapplicable here, since petitioner's attempt to use § 506(c) came after the bankruptcy proceeding was converted from Chapter 11 to Chapter 7. In any event, we do not read § 1109(b)'s general provision of a right to be heard as broadly allowing a creditor to pursue substantive remedies that other Code provisions make available only to other specific parties. Cf. 7 L. King, Collier on Bankruptcy ¶ 1109.05 (rev. 15th ed. 1999) ("In general, section 1109 does not bestow any right to usurp the

trustee's role as representative of the estate with respect to the initiation of certain types of litigation that belong exclusively to the estate").

III

Because we believe that by far the most natural reading of § 506(c) is that it extends only to the trustee, petitioner's burden of persuading us that the section must be read to allow its use by other parties is "'exceptionally heavy.'" *Patterson* v. *Shumate*, 504 U. S. 753, 760 (1992) (quoting *Union Bank* v. *Wolas*, 502 U. S. 151, 156 (1991)). To support its proffered reading, petitioner advances arguments based on pre-Code practice and policy considerations. We address these arguments in turn.

A

Section 506(c)'s provision for the charge of certain administrative expenses against lienholders continues a practice that existed under the Bankruptcy Act of 1898, see, *e. g.*, *In re Tyne*, 257 F. 2d 310, 312 (CA7 1958); 4 Collier on Bankruptcy, *supra*, ¶ 506.05[1]. It was not to be found in the text of the Act, but traced its origin to early cases establishing an equitable principle that where a court has custody of property, costs of administering and preserving the property are a dominant charge, see, *e. g.*, *Bronson* v. *La Crosse & Milwaukee R. Co.*, 1 Wall. 405, 410 (1864); *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360, 376 (1908). It was the norm that recovery of costs from a secured creditor would be sought by the trustee, see, *e. g.*, *Textile Banking Co.* v. *Widener*, 265 F. 2d 446, 453–454 (CA4 1959); *Tyne*, *supra*, at 312. Petitioner cites a number of lower court cases, however, in which—without meaningful discussion of the point—parties other than the trustee were permitted to pursue such charges under the Act, sometimes simultaneously with the trustee's pursuit of his own expenses, see, *e. g.*, *First Western Savings and Loan Assn.* v. *Anderson*, 252 F. 2d 544, 547–548 (CA9 1958); *In re Louisville Storage Co.*, 21 F. Supp. 897, 898

(WD Ky. 1936), aff'd, 93 F. 2d 1008 (CA6 1938), but sometimes independently, see *In re Chapman Coal Co.*, 196 F. 2d 779, 780 (CA7 1952); *In re Rotary Tire & Rubber Co.*, 2 F. 2d 364 (CA6 1924). Petitioner also relies on early decisions of this Court allowing individual claimants to seek recovery from secured assets, see *Louisville, E. & St. L. R. Co.* v. *Wilson*, 138 U. S. 501, 506 (1891); *Burnham* v. *Bowen*, 111 U. S. 776, 779, 783 (1884); *New York Dock Co.* v. *S. S. Poznan*, 274 U. S. 117, 121 (1927). *Wilson* and *Burnham* involved equity receiverships, and were not only pre-Code, but predate the Bankruptcy Act of 1898 that the Code replaced; while *New York Dock* was a case arising in admiralty.

It is questionable whether these precedents establish a bankruptcy practice sufficiently widespread and well recognized to justify the conclusion of implicit adoption by the Code. We have no confidence that the allowance of recovery from collateral by nontrustees is "the type of 'rule' that . . . Congress was aware of when enacting the Code." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S., at 246. Cf. *Dewsnup* v. *Timm*, 502 U. S. 410, 418 (1992) (relying on "clearly established" pre-Code practice); *Kelly* v. *Robinson*, 479 U. S. 36, 46 (1986) (giving weight to pre-Code practice that was "widely accepted" and "established"). In any event, while pre-Code practice "informs our understanding of the language of the Code," *id.*, at 44, it cannot overcome that language. It is a tool of construction, not an extratextual supplement. We have applied it to the construction of provisions which were "subject to interpretation," *id.*, at 50, or contained "ambiguity in the text," *Dewsnup, supra*, at 417. "[W]here the meaning of the Bankruptcy Code's text is itself clear . . . its operation is unimpeded by contrary . . . prior practice," *BFP* v. *Resolution Trust Corporation*, 511 U. S. 531, 546 (1994) (internal quotation marks omitted). See, *e. g.*, *Pennsylvania Dept. of Public Welfare* v. *Davenport*, 495 U. S. 552, 563 (1990); *United States* v. *Ron Pair Enterprises, Inc.*, *supra*, at 245–246.

In this case, we think the language of the Code leaves no room for clarification by pre-Code practice. If § 506(c) provided only that certain costs and expenses could be recovered from property securing a secured claim, without specifying any particular party by whom the recovery could be pursued, the case would be akin to those in which we used prior practice to fill in the details of a pre-Code concept that the Code had adopted without elaboration. See, *e. g.*, *United States* v. *Noland*, 517 U. S. 535, 539 (1996) (looking to pre-Code practice in interpreting Code's reference to "principles of equitable subordination"); *Midlantic Nat. Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494, 501 (1986) (codification of trustee's abandonment power held to incorporate established exceptions). Here, however, it is not the unelaborated concept but only a specifically narrowed one that has been adopted: a rule allowing the charge of costs to secured assets *by the trustee.* Pre-Code practice cannot transform § 506(c)'s reference to "the trustee" to "the trustee and other parties in interest."

B

Finally, petitioner argues that its reading is necessary as a matter of policy, since in some cases the trustee may lack an incentive to pursue payment. Section 506(c) must be open to nontrustees, petitioner asserts, lest secured creditors enjoy the benefit of services without paying for them. Moreover, ensuring that administrative claimants are compensated may also serve purposes beyond the avoidance of unjust enrichment. To the extent that there are circumstances in which the trustee will not use the section although an individual creditor would,[4] allowing suits by nontrustees

[4] The frequency with which such circumstances arise may depend in part on who ultimately receives the recovery obtained by a trustee under § 506(c). Petitioner argues that it goes to the party who provided the services that benefited collateral (assuming that party has not already been compensated by the estate). Respondent argues that this read-

could encourage the provision of postpetition services to debtors on more favorable terms, which would in turn further bankruptcy's goals.

Although these concerns may be valid, it is far from clear that the policy implications favor petitioner's position. The class of cases in which § 506(c) would lie dormant without nontrustee use is limited by the fact that the trustee is obliged to seek recovery under the section whenever his fiduciary duties so require. And limiting § 506(c) to the trustee does not leave those who provide goods or services that benefit secured interests without other means of protecting themselves as against other creditors: They may insist on cash payment, or contract directly with the secured creditor, and may be able to obtain superpriority under § 364(c)(1) or a security interest under §§ 364(c)(2), (3), or § 364(d). And of course postpetition creditors can avoid unnecessary losses simply by paying attention to the status of their accounts, a protection which, by all appearances, petitioner neglected here.

On the other side of the ledger, petitioner's reading would itself lead to results that seem undesirable as a matter of policy. In particular, expanding the number of parties who could use § 506(c) would create the possibility of multiple administrative claimants seeking recovery under the sec-

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ing, like a reading that allows creditors themselves to use § 506(c), upsets the Code's priority scheme by giving administrative claimants who benefit collateral an effective priority over others—allowing, for example, a Chapter 11 administrative creditor (like petitioner) to obtain payment via § 506(c) while Chapter 7 administrative creditors remain unpaid, despite § 726(b)'s provision that Chapter 7 administrative claims have priority over Chapter 11 administrative claims. Thus, respondent asserts that a trustee's recovery under § 506(c) simply goes into the estate to be distributed according to the Code's priority provisions. Since this case does not involve a trustee's recovery under § 506(c), we do not address this question, or the related question whether the trustee may use the provision prior to paying the expenses for which reimbursement is sought, see *In re K & L Lakeland, Inc.*, 128 F. 3d 203, 207, 212 (CA4 1997).

tion. Each such claim would require inquiry into the necessity of the services at issue and the degree of benefit to the secured creditor. Allowing recovery to be sought at the behest of parties other than the trustee could therefore impair the ability of the bankruptcy court to coordinate proceedings, as well as the ability of the trustee to manage the estate. Indeed, if administrative claimants were free to seek recovery on their own, they could proceed even where the trustee himself planned to do so. See, *e. g.*, *In re Bluffton Castings Corp.*, 224 B. R. 902, 904 (Bkrtcy. Ct. ND Ind. 1998).[5] Further, where unencumbered assets were scarce, creditors might attempt to use § 506(c) even though their claim to have benefited the secured creditor was quite weak. The possibility of being targeted for such claims by various administrative claimants could make secured creditors less willing to provide postpetition financing.

In any event, we do not sit to assess the relative merits of different approaches to various bankruptcy problems. It suffices that the natural reading of the text produces the result we announce. Achieving a better policy outcome—if what petitioner urges is that—is a task for Congress, not

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[5] We do not address whether a bankruptcy court can allow other interested parties to act in the trustee's stead in pursuing recovery under § 506(c). *Amici* American Insurance Association and National Union Fire Insurance Co. draw our attention to the practice of some courts of allowing creditors or creditors' committees a derivative right to bring avoidance actions when the trustee refuses to do so, even though the applicable Code provisions, see 11 U. S. C. §§ 544, 545, 547(b), 548(a), 549(a), mention only the trustee. See, *e. g.*, *In re Gibson Group, Inc.*, 66 F. 3d 1436, 1438 (CA6 1995). Whatever the validity of that practice, it has no analogous application here, since petitioner did not ask the trustee to pursue payment under § 506(c) and did not seek permission from the Bankruptcy Court to take such action in the trustee's stead. Petitioner asserted an independent right to use § 506(c), which is what we reject today. Cf. *In re Xonics Photochemical, Inc.*, 841 F. 2d 198, 202–203 (CA7 1988) (holding that creditor had no right to bring avoidance action independently, but noting that it might have been able to seek to bring derivative suit).

the courts. *Kawaauhau* v. *Geiger*, 523 U. S. 57, 64 (1998); *Noland*, 517 U. S., at 541–542, n. 3; *Wolas*, 502 U. S., at 162.

* * *

We have considered the other points urged by petitioner and find them to be without merit. We conclude that 11 U. S. C. § 506(c) does not provide an administrative claimant an independent right to use the section to seek payment of its claim. The judgment of the Eighth Circuit is affirmed.

It is so ordered.

Syllabus

RALEIGH, CHAPTER 7 TRUSTEE FOR THE ESTATE OF STOECKER *v.* ILLINOIS DEPARTMENT OF REVENUE

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

No. 99–387. Argued April 17, 2000—Decided May 30, 2000

While debtor Stoecker was its president, a now-defunct Illinois company purchased a plane out of State and moved it to Illinois. Respondent claims that this purchase was subject to the State's use tax. When such tax is unpaid, respondent issues a Notice of Tax Liability to the taxpayer and may issue a Notice of Penalty Liability against any corporate officer responsible for paying the tax who willfully fails to file the return or make the payment. By the time respondent discovered that the tax was unpaid in this case, the company was defunct and Stoecker was in bankruptcy, with petitioner as his trustee. Respondent filed, *inter alia*, a Notice of Penalty Liability against Stoecker. The fact that there was no affirmative proof that he was responsible for or willfully evaded the payment was not dispositive, for Illinois law shifts the burden of proof, both on production and persuasion, to the responsible officer once a Notice of Penalty Liability is issued. The Seventh Circuit ruled for respondent, holding that the burden of proof remained with petitioner, just as it would have been on Stoecker had the proceedings taken place outside of bankruptcy, and finding that petitioner had not satisfied the burden of persuasion.

Held: When the substantive law creating a tax obligation puts the burden of proof on a taxpayer, the burden of proof on the tax claim in bankruptcy court remains where the substantive law put it (in this case, on the trustee in bankruptcy). Pp. 20–26.

(a) Creditors' entitlements in bankruptcy arise from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary Bankruptcy Code provisions. See *Butner* v. *United States*, 440 U. S. 48, 55. The basic federal rule in bankruptcy is that state law governs the substance of claims. *Id.*, at 57. In this case, Illinois tax law establishes the estate's obligation to respondent, placing the burden of proof on the responsible officer. That burden of proof is a substantive aspect of such a claim, given its importance to the outcome of cases. See, *e. g.*, *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U. S. 267, 271. Tax law is no candidate for exception from the general rule, for the very fact that the

Syllabus

burden has often been shifted to the taxpayer indicates how critical it is. Several compelling rationales for this shift—the government's vital interest in acquiring its revenue, the taxpayer's readier access to the relevant information, and the importance of encouraging voluntary compliance—are powerful justifications not to be disregarded lightly. The Bankruptcy Code makes no provision for altering the burden of proof on a tax claim, and its silence indicates that no change was intended. Pp. 20–22.

(b) The trustee's appeals to Code silence are rejected. The state of pre-Code law does not indicate that the Code is silent because it was predicated on an alteration of the substantive law of obligations once a taxpayer enters bankruptcy. And although *Vanston Bondholders Protective Comm.* v. *Green*, 329 U. S. 156, suggested that "allowance" of claims is a federal matter, that case concerned distribution of assets, not the validity of claims in the first instance, which, *Vanston* specifically states, is to be determined by reference to state law, *id.*, at 161. Nor is the trustee helped by the reference, in *City of New York* v. *Saper*, 336 U. S. 328, 332, to "prov[ing]" government claims in the same manner as other debts, for that reference was to the procedure by which proof of claim was submitted, not to the validity of the claim. Finally, the trustee's argument that the Code-mandated priority enjoyed by taxing authorities over other creditors requires a compensating equality of treatment when it comes to demonstrating validity of claims distorts a bankruptcy court's legitimate powers and begs the question about the relevant principle of equality. Pp. 22–26.

179 F. 3d 546, affirmed.

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

Robert Radasevich argued the cause for petitioner. With him on the briefs were *Phil C. Neal*, *David A. Eide*, and *John W. Guarisco*.

A. Benjamin Goldgar, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *James E. Ryan*, Attorney General, *Joel D. Bertocchi*, Solicitor General, and *James D. Newbold*, Assistant Attorney General.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Waxman*, *Act-*

ing Assistant Attorney General Junghans, Kent L. Jones, Kenneth L. Greene, and *Steven W. Parks.**

JUSTICE SOUTER delivered the opinion of the Court.

The question raised here is who bears the burden of proof on a tax claim in bankruptcy court when the substantive law creating the tax obligation puts the burden on the taxpayer (in this case, the trustee in bankruptcy). We hold that bankruptcy does not alter the burden imposed by the substantive law.

I

The issue of state tax liability in question had its genesis in the purchase of an airplane by Chandler Enterprises, Inc., a now-defunct Illinois company. William J. Stoecker, for whom petitioner Raleigh is the trustee in bankruptcy, was president of Chandler in 1988, when Chandler entered into a lease-purchase agreement for the plane, moved it to Illinois,

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*Briefs of *amici curiae* urging affirmance were filed for the Pension Benefit Guaranty Corporation by *James J. Keightley, William G. Beyer, Israel Goldowitz, Nathaniel Rayle,* and *Charles G. Cole;* for the State of New Mexico et al. by *Patricia A. Madrid,* Attorney General of New Mexico, *Donald F. Harris,* Special Assistant Attorney General, and *James I. Shepard,* joined by the Attorneys General for their respective States as follows: *Janet Napolitano* of Arizona, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.,* of Maryland, *Thomas F. Reilly* of Massachusetts, *Jennifer M. Granholm* of Michigan, *Mike Hatch* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *John J. Farmer, Jr.,* of New Jersey, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, *Christine O. Gregoire* of Washington, and *Gay Woodhouse* of Wyoming; and for the Council of State Governments et al. by *Richard Ruda, James I. Crowley,* and *Steven H. Goldblatt.*

and ultimately took title under the agreement. See *In re Stoecker*, 179 F. 3d 546, 548 (CA7 1999).

According to respondent State Department of Revenue, the transaction was subject to the Illinois use tax, a sales-tax substitute imposed on Illinois residents such as Chandler who buy out of State. If the seller does not remit the tax, the buyer must, and, when buying a plane, must file a return and pay the tax within 30 days after the aircraft enters the State. Ill. Comp. Stat., ch. 35, § 105/10 (1999). Chandler failed to do this.

When the State discovers a failure to file and pay taxes, its Department of Revenue (the respondent here) determines the amount of tax due and issues a Notice of Tax Liability to the taxpayer. §§ 105/12, 120/4. Unless the taxpayer protests within the time provided, the assessment becomes final, though still subject to judicial review in the Illinois circuit court. §§ 120/4, 12.

Illinois law also provides that any corporate officer "who has the control, supervision or responsibility of filing returns and making payment of the amount of any . . . tax . . . who wilfully fails to file the return or make the payment . . . shall be personally liable for a penalty equal to the total amount of tax unpaid by the [corporation]." § 735/3–7. The department determines the amount, and its determination is "prima facie evidence of a penalty due," *ibid.*, though a Notice of Penalty Liability issued under this provision is open to challenge much like the antecedent Notice of Tax Liability.

By the time the department discovered the unpaid tax in this case, Chandler was defunct and Stoecker was in bankruptcy. The department issued both a Notice of Tax Liability against Chandler and a Notice of Penalty Liability against Stoecker. See 179 F. 3d, at 549.

The record evidence about Chandler's operations is minimal. A person named Pluhar acted as its financial officer.

There is no evidence directly addressing Stoecker's role in the filing of Chandler's tax returns or the payment of any taxes, and so no affirmative proof that he either was responsible for or willfully evaded the payment of the use tax, see *id.*, at 550. This evidentiary dearth is not necessarily dispositive, however, due to the provision of Illinois law shifting the burden of proof, on both production and persuasion, to the responsible officer once a Notice of Penalty Liability is issued, see *Branson* v. *Department of Revenue*, 168 Ill. 2d 247, 256–261, 659 N. E. 2d 961, 966–968 (1995). The Court of Appeals for the Seventh Circuit accordingly ruled for the Department of Revenue. 179 F. 3d, at 550.

The Court of Appeals thought the trustee may have satisfied his burden of production by identifying Pluhar as the financial officer but, in any event, had not satisfied his burden of persuasion. Because Stoecker was the president and, as far as the record showed, he and Pluhar were the only officers, each would have been involved in Chandler's tax affairs. *Ibid.* While it is true that failure to pay must be willful (at least grossly negligent) to justify the penalty under Illinois law, see *Branson*, *supra*, at 254–255, 659 N. E. 2d, at 965, and true that Chandler had an opinion letter from a reputable lawyer that no tax was due because of certain details of the lease-purchase agreement, there was no evidence that Stoecker ever saw the letter or relied on it, and nothing else bearing on the issue of willfulness. See 179 F. 3d, at 550–551.

Obviously, the burden of proof was critical to the resolution of the case, which the Department of Revenue won because the Court of Appeals held that the burden remained on the trustee, just as it would have been on the taxpayer had the proceedings taken place outside of bankruptcy. The Courts of Appeals are divided on this point: the Seventh Circuit joined the Third and Fourth Circuits in leaving the burden on the taxpayer. See *Resyn Corp.* v. *United States*,

851 F. 2d 660, 663 (CA3 1988); *In re Landbank Equity Corp.*, 973 F. 2d 265, 270–271 (CA4 1992). The Courts of Appeals for the Fifth, Eighth, Ninth, and Tenth Circuits have come out the other way. See *In re Placid Oil Co.*, 988 F. 2d 554, 557 (CA5 1993); *In re Brown*, 82 F. 3d 801, 804–805 (CA8 1996); *In re Macfarlane*, 83 F. 3d 1041, 1044–1045 (CA9 1996), cert. denied, 520 U. S. 1115 (1997); *In re Fullmer*, 962 F. 2d 1463, 1466 (CA10 1992). We granted certiorari to resolve the issue, 528 U. S. 1068 (2000), and now affirm.

II

Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code. See *Butner* v. *United States*, 440 U. S. 48, 55 (1979); *Vanston Bondholders Protective Comm.* v. *Green*, 329 U. S. 156, 161–162 (1946). The "basic federal rule" in bankruptcy is that state law governs the substance of claims, *Butner*, *supra*, at 57, Congress having "generally left the determination of property rights in the assets of a bankrupt's estate to state law," 440 U. S., at 54 (footnote omitted). "Unless some federal interest requires a different result, there is no reason why [the state] interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Id.*, at 55. In this case, the bankruptcy estate's obligation to the Illinois Department of Revenue is established by that State's tax code, which puts the burden of proof on the responsible officer of the taxpayer, see *Branson*, *supra*, at 260–262, 659 N. E. 2d, at 968.

The scope of the obligation is the issue here. Do the State's right and the taxpayer's obligation include the burden of proof? Our cases point to an affirmative answer. Given its importance to the outcome of cases, we have long held the burden of proof to be a "substantive" aspect of a

claim. See, *e. g.*, *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U. S. 267, 271 (1994); *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 446 (1959); *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 249 (1942). That is, the burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden of proof that normally comes with it.

Tax law is no candidate for exception from this general rule, for the very fact that the burden of proof has often been placed on the taxpayer indicates how critical the burden rule is, and reflects several compelling rationales: the vital interest of the government in acquiring its lifeblood, revenue, see *Arkansas* v. *Farm Credit Servs. of Central Ark.*, 520 U. S. 821, 826 (1997); the taxpayer's readier access to the relevant information, see *United States* v. *Rexach*, 482 F. 2d 10, 16 (CA1), cert. denied, 414 U. S. 1039 (1973); and the importance of encouraging voluntary compliance by giving taxpayers incentives to self-report and to keep adequate records in case of dispute, see *United States* v. *Bisceglia*, 420 U. S. 141, 145 (1975). These are powerful justifications not to be disregarded lightly.[1]

Congress of course may do what it likes with entitlements in bankruptcy, but there is no sign that Congress meant to alter the burdens of production and persuasion on tax claims. The Code in several places, to be sure, establishes particular burdens of proof. See, *e. g.*, 11 U. S. C. §362(g) (relief from automatic stay), §363(*o*) (adequate protection for creditors),

[1] It is true that a trustee may have less access to the facts than a taxpayer with personal knowledge, but the trustee takes custody of the taxpayer's records, see 11 U. S. C. §521(4), and may have greater access to the taxpayer than a creditor. Even if the trustee's advantage is somewhat less than the original taxpayer's, the difference hardly overcomes the compelling justifications for shifting the burden of proof. The government, of course, is in no better position than it ever was, and remains without access to sources of proof when the taxpayer has not kept sufficient documentation.

§ 364(d)(2) (same), § 547(g) (avoidability of preferential transfer), § 1129(d) (confirmation of plan for purpose of avoiding taxes). But the Code makes no provision for altering the burden on a tax claim, and its silence says that no change was intended.[2]

III

The trustee looks for an advantage in the very silence of the Code, however, first by arguing that actual, historical practice favored trustees under the Bankruptcy Act of 1898 and various pre-Code revisions up to the current Code's enactment in 1978. He says that courts operating in the days of the Bankruptcy Act, which was silent on the burden to prove the validity of claims, almost uniformly placed the burden on those seeking a share of the bankruptcy estate. Because the Code generally incorporates pre-Code practice in the absence of explicit revision, the argument goes, and because the Code is silent here, we should follow the pre-Code practice even when this would reverse the burden imposed outside bankruptcy. This tradition makes sense, petitioner urges, because in bankruptcy tax authorities are no longer opposed to the original taxpayer, and the choice is no longer merely whether the tax claim is paid but whether other innocent creditors must share the bankruptcy estate with the taxing government.

We, however, find history less availing to the trustee than he says. While some pre-Code cases put the burden of proof

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[2] The legislative history indicates that the burden of proof on the issue of establishing claims was left to the Rules of Bankruptcy Procedure. See S. Rep. No. 95–989, p. 62 (1978); H. R. Rep. No. 95–595, p. 352 (1977). The Bankruptcy Rules are silent on the burden of proof for claims; while Federal Rule of Bankruptcy Procedure 3001(f) provides that a proof of claim (the name for the proper form for filing a claim against a debtor) is "prima facie evidence of the validity and amount of the claim," this rule does not address the burden of proof when a trustee disputes a claim. The Rules thus provide no additional guidance.

on taxing authorities,[3] others put it on the trustee,[4] and still others cannot be fathomed.[5] This state of things is the end of the argument, for without the weight of solid authority on the trustee's side, we cannot treat the Code as predicated on an alteration of the substantive law of obligations once a taxpayer enters bankruptcy. Cf. *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 381–382 (1988) ("The at best divided [pre-Code] authority . . . removes all cause for wonder that the alleged departure from it should not have been commented upon in the legislative history").

The trustee makes a different appeal to Code silence in pointing to language in *Vanston Bondholders Protective Comm.* v. *Green*, 329 U. S. 156 (1946), suggesting that "allowance" of claims is a federal matter. But "allowance" referred to the ordering of valid claims when that case was decided, see *id.*, at 162–163, and *Vanston*, in fact, concerned

[3] See, *e. g.*, *United States* v. *Sampsell*, 224 F. 2d 721, 722–723 (CA9 1955); *In re Avien, Inc.*, 390 F. Supp. 1335, 1341–1342 (EDNY 1975), aff'd, 532 F. 2d 273 (CA2 1976); *In re Gorgeous Blouse Co.*, 106 F. Supp. 465 (SDNY 1952); see also *In re Highway Constr. Co.*, 105 F. 2d 863, 866 (CA6 1939) (apparently accepting lower court's placement of burden of proof on tax authority).

[4] See, *e. g.*, *In re Uneco, Inc.*, 532 F. 2d 1204, 1207 (CA8 1976); *Paschal* v. *Blieden*, 127 F. 2d 398, 401–402 (CA8 1942); *In re Lang Body Co.*, 92 F. 2d 338, 341 (CA6 1937), cert. denied *sub nom. Hipp* v. *Boyle*, 303 U. S. 637 (1938); *United States* v. *Knox-Powell-Stockton Co.*, 83 F. 2d 423, 425 (CA9), cert. denied, 299 U. S. 573 (1936). Some of these cases, such as *Paschal* and *Lang Body Co.*, appear to confuse the burden of production (which ceases to be relevant upon presentation of a trustee's case) with the burden of persuasion, under tax statutes that shift the entire burden of proof to the taxpayer. Whatever we make of their reasoning, these cases do not follow the rule whose pedigree petitioner wishes to establish.

[5] See, *e. g.*, *Fiori* v. *Rothensies*, 99 F. 2d 922 (CA3 1938) *(per curiam)* (discussing prima facie value of tax authority's claim, but failing to discuss burden of proof); *Dickinson* v. *Riley*, 86 F. 2d 385 (CA8 1936) (resolving claim without reference to burden of proof); *In re Clayton Magazines, Inc.*, 77 F. 2d 852 (CA2 1935) (same).

distribution of assets, not the validity of claims in the first instance, see *In re Highland Superstores, Inc.*, 154 F. 3d 573, 578 (CA6 1998); *Fahs* v. *Martin*, 224 F. 2d 387, 394–395 (CA5 1955). The burden of proof rule in question here bears only on validity, and as to that the *Vanston* opinion specifically states that "[w]hat claims of creditors are valid and subsisting obligations . . . is to be determined by reference to state law." 329 U. S., at 161 (footnote omitted). Nor is the trustee helped by *City of New York* v. *Saper*, 336 U. S. 328, 332 (1949), which mentions "prov[ing]" government claims in the same manner as other debts; the reference was to the procedure by which proof of claim was submitted and not to the validity of the claim. While it is true that federal law has generally evolved to impose the same procedural requirements for claim submission on tax authorities as on other creditors, *ibid.*, nothing in that evolution has touched the underlying laws on the elements sufficient to prove a valid state claim.

Finally, the trustee argues that the Code-mandated priority enjoyed by taxing authorities over other creditors, see 11 U. S. C. §§ 507(a), 503(b)(1)(B), requires a compensating equality of treatment when it comes to demonstrating validity of claims. But we think his argument distorts the legitimate powers of a bankruptcy court and begs the question about the relevant principle of equality.

Bankruptcy courts do indeed have some equitable powers to adjust rights between creditors. See, *e. g.*, § 510(c) (equitable subordination). That is, within the limits of the Code, courts may reorder distributions from the bankruptcy estate, in whole or in part, for the sake of treating legitimate claimants to the estate equitably. But the scope of a bankruptcy court's equitable power must be understood in the light of the principle of bankruptcy law discussed already, that the validity of a claim is generally a function of underlying substantive law. Bankruptcy courts are not authorized in the name of equity to make wholesale substitution

of underlying law controlling the validity of creditors' entitlements, but are limited to what the Bankruptcy Code itself provides. See *United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U. S. 213, 228–229 (1996); *United States* v. *Noland*, 517 U. S. 535, 543 (1996).

Moreover, even on the assumption that a bankruptcy court were to have a free hand, the case for a rule placing the burden of proof uniformly on all bankruptcy creditors is not self-evidently justified by the trustee's invocation of equality. Certainly the trustee has not shown that equal treatment of all bankruptcy creditors in proving debts is more compelling than equal treatment of comparable creditors in and out of bankruptcy. The latter sort of equality can be provided by a bankruptcy court as a matter of course, whereas the trustee's notion of equality could not be uniformly observed consistently with other bankruptcy principles. Consider the case when tax litigation is pending at the time the taxpayer files for bankruptcy. The tax litigation will be subject to an automatic stay, but the stay can be lifted by the bankruptcy court for cause, see 11 U. S. C. § 362(d)(1), which could well include, among other things, a lack of good faith in attempting to avoid tax proceedings, or in attempting to favor private creditors who might escape the disadvantage of a priority tax claim under the trustee's proposed rule. See generally 3 Collier on Bankruptcy ¶ 362.07[6][a], pp. 362–101 to 362–102 (rev. 15th ed. 2000) (noting that bad faith commencement of case justifies lifting stay); *Internal Revenue Service* v. *Bacha*, 166 B. R. 611, 612 (Bkrtcy. Ct. Md. 1993) (lifting automatic stay when bankruptcy filing was attempt to avoid tax proceedings). If the bankruptcy court exercises its discretion to lift the stay, the burden of proof will be on the taxpayer in the pre-existing tax litigation, and a tax liability determination will be final. See 11 U. S. C. § 505(a)(2)(A). We see no reason that Congress would have intended the burden of proof (and consequent vindication of this trustee's vision of equality) to depend on whether

tax authorities have initiated proceedings against a debtor before a bankruptcy filing. Thus, the uncertainty and increased complexity that would be generated by the trustee's position is another reason to stick with the simpler rule, that in the absence of modification expressed in the Bankruptcy Code the burden of proof on a tax claim in bankruptcy remains where the substantive tax law puts it.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Syllabus

UNITED STATES *v.* HUBBELL

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

No. 99–166. Argued February 22, 2000—Decided June 5, 2000

As part of a plea agreement, respondent promised to provide the Independent Counsel investigating matters relating to the Whitewater Development Corporation with information relevant to his investigation. Subsequently, the Independent Counsel served respondent with a subpoena calling for the production of 11 categories of documents before a grand jury in Little Rock, Arkansas. Respondent appeared before that jury, invoked his Fifth Amendment privilege against self-incrimination, and refused to state whether he had the documents. The prosecutor then produced an order obtained pursuant to 18 U. S. C. § 6003(a) directing respondent to respond to the subpoena and granting him immunity to the extent allowed by law. Respondent produced 13,120 pages of documents and testified that those were all of the responsive documents in his control. The Independent Counsel used the documents' contents in an investigation that led to this indictment of respondent on tax and fraud charges. The District Court dismissed the indictment on the ground that the Independent Counsel's use of the subpoenaed documents violated 18 U. S. C. § 6002—which provides for use and derivative-use immunity—because all of the evidence he would offer against respondent at trial derived either directly or indirectly from the testimonial aspects of respondent's immunized act of producing the documents. In vacating and remanding, the Court of Appeals directed the District Court to determine the extent and detail of the Government's knowledge of respondent's financial affairs on the day the subpoena issued. If the Government could not demonstrate with reasonable particularity a prior awareness that the documents sought existed and were in respondent's possession, the indictment was tainted. Acknowledging that he could not satisfy the reasonable particularity standard, the Independent Counsel entered into a conditional plea agreement providing for dismissal of the indictment unless this Court's disposition of the case makes it reasonably likely that respondent's immunity would not pose a significant bar to his prosecution. Because the agreement also provides for the entry of a guilty plea and a sentence should this Court reverse, the case is not moot.

Syllabus

Held: The indictment against respondent must be dismissed. Pp. 34–46.

(a) The Fifth Amendment protects a person from being "compelled in any criminal case to be a witness against himself." The word "witness" limits the relevant category of compelled incriminating communications to those that are "testimonial." In addition, a person such as respondent may be required to produce specific documents containing incriminating assertions of fact or belief because the creation of those documents was not "compelled" within the meaning of the privilege. See *Fisher* v. *United States*, 425 U. S. 391. However, the act of producing subpoenaed documents may have a compelled testimonial aspect. That act, as well as a custodian's compelled testimony about whether he has produced everything demanded, may certainly communicate information about the documents' existence, custody, and authenticity. It is also well settled that compelled testimony communicating information that may lead to incriminating evidence is privileged even if the information itself is not inculpatory. Pp. 34–38.

(b) Section 6002 is constitutional because the scope of the "use and derivative-use" immunity it provides is coextensive with the scope of the constitutional privilege against self-incrimination. *Kastigar* v. *United States*, 406 U. S. 441. When a person is prosecuted for matters related to immunized testimony, the prosecution has an affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of that testimony. *Id.*, at 460. This ensures that the grant of immunity leaves the witness and the Government in substantially the same position as if the witness had claimed his privilege in the grant's absence. The compelled testimony relevant here is not to be found in the contents of the documents produced, but is the testimony inherent in the act of producing those documents. Pp. 38–40.

(c) The fact that the Government does not intend to use the act of production in respondent's criminal trial leaves open the separate question whether it has already made "derivative use" of the testimonial aspect of that act in obtaining the indictment and preparing for trial. It clearly has. It is apparent from the subpoena's text that the prosecutor needed respondent's assistance both to identify potential sources of information and to produce those sources. It is undeniable that providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories could provide a prosecutor with a lead to incriminating evidence or a link in the chain of evidence needed to prosecute. Indeed, that is what happened here: The documents sought by one grand jury to see if respondent had violated a plea agreement led to the return of an indictment by another grand jury for offenses apparently unrelated to that agreement. The testimonial aspect of respondent's act of production was the first step in a chain

of evidence leading to this prosecution. Thus, the Court cannot accept the Government's submission that respondent's immunity did not preclude its derivative use of the produced documents because its possession of the documents was the fruit only of the simple physical act of production. In addition, the Government misreads *Fisher* v. *United States*, 425 U. S., at 411, and ignores *United States* v. *Doe*, 465 U. S. 605, in arguing that the communicative aspect of respondent's act of production is insufficiently testimonial to support a privilege claim because the existence and possession of ordinary business records is a "foregone conclusion." Unlike the circumstances in *Fisher*, the Government has shown no prior knowledge of either the existence or the whereabouts of the documents ultimately produced here. In *Doe*, the Court found that the act of producing several broad categories of general business records would involve testimonial self-incrimination. Pp. 40–46.

167 F. 3d 552, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 49. REHNQUIST, C. J., filed a dissenting statement, *post*, p. 49.

Ronald J. Mann argued the cause for the United States. With him on the briefs were *Robert W. Ray*, *Paul Rosenzweig*, *David G. Barger*, and *Karl N. Gellert*.

Deputy Solicitor General Dreeben argued the cause for the United States Department of Justice as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Robinson*, and *Malcolm L. Stewart*.

John W. Nields, Jr., argued the cause for respondent. With him on the brief was *Laura S. Shores*.*

JUSTICE STEVENS delivered the opinion of the Court.

The two questions presented concern the scope of a witness' protection against compelled self-incrimination: (1) whether the Fifth Amendment privilege[1] protects a

**Ellen S. Podgor* and *Lisa Kemler* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

[1] "No person . . . shall be compelled in any criminal case to be a witness against himself." U. S. Const., Amdt. 5.

witness from being compelled to disclose the existence of incriminating documents that the Government is unable to describe with reasonable particularity; and (2) if the witness produces such documents pursuant to a grant of immunity, whether 18 U. S. C. § 6002 prevents the Government from using them to prepare criminal charges against him.[2]

I

This proceeding arises out of the second prosecution of respondent, Webster Hubbell, commenced by the Independent Counsel appointed in August 1994 to investigate possible violations of federal law relating to the Whitewater Development Corporation. The first prosecution was terminated pursuant to a plea bargain. In December 1994, respondent pleaded guilty to charges of mail fraud and tax evasion arising out of his billing practices as a member of an Arkansas law firm from 1989 to 1992, and was sentenced to 21 months in prison. In the plea agreement, respondent promised to provide the Independent Counsel with "full, complete, accurate, and truthful information" about matters relating to the Whitewater investigation.

The second prosecution resulted from the Independent Counsel's attempt to determine whether respondent had vio-

[2] Section 6002 provides: "Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) a court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

"and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

lated that promise. In October 1996, while respondent was incarcerated, the Independent Counsel served him with a subpoena *duces tecum* calling for the production of 11 categories of documents before a grand jury sitting in Little Rock, Arkansas. See Appendix, *infra.* On November 19, he appeared before the grand jury and invoked his Fifth Amendment privilege against self-incrimination. In response to questioning by the prosecutor, respondent initially refused "to state whether there are documents within my possession, custody, or control responsive to the Subpoena." App. 62. Thereafter, the prosecutor produced an order, which had previously been obtained from the District Court pursuant to 18 U. S. C. § 6003(a),[3] directing him to respond to the subpoena and granting him immunity "to the extent allowed by law."[4] Respondent then produced 13,120 pages of documents and records and responded to a series of questions that established that those were all of the documents in his custody or control that were responsive to the commands in the subpoena, with the exception of a few documents he claimed were shielded by the attorney-client and attorney work-product privileges.

The contents of the documents produced by respondent provided the Independent Counsel with the information that led to this second prosecution. On April 30, 1998, a grand jury in the District of Columbia returned a 10-count indictment charging respondent with various tax-related crimes and mail and wire fraud.[5] The District Court dismissed the

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[3] Section 6003(a) authorizes a district court to issue an order requiring an "individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination." The effect of such an order is covered by § 6002, quoted in n. 2, *supra.*

[4] *In re Grand Jury Proceedings,* No. GJ–96–3 (ED Ark., Nov. 14, 1996), App. 60–61.

[5] Several of the counts in the indictment also named three other defendants. Those charges are not relevant because (a) they have been dismissed with prejudice, and (b) the Fifth Amendment privilege asserted

indictment relying, in part, on the ground that the Independent Counsel's use of the subpoenaed documents violated § 6002 because all of the evidence he would offer against respondent at trial derived either directly or indirectly from the testimonial aspects of respondent's immunized act of producing those documents.[6] 11 F. Supp. 2d 25, 33–37 (DC 1998). Noting that the Independent Counsel had admitted that he was not investigating tax-related issues when he issued the subpoena, and that he had " 'learned about the unreported income and other crimes from studying the records' contents,' " the District Court characterized the subpoena as "the quintessential fishing expedition." *Id.*, at 37.

The Court of Appeals vacated the judgment and remanded for further proceedings. 167 F. 3d 552 (CADC 1999). The majority concluded that the District Court had incorrectly relied on the fact that the Independent Counsel did not have prior knowledge of the contents of the subpoenaed documents. The question the District Court should have addressed was the extent of the Government's independent knowledge of the documents' existence and authenticity, and of respondent's possession or control of them. It explained:

> "On remand, the district court should hold a hearing in which it seeks to establish the extent and detail of the [G]overnment's knowledge of Hubbell's financial affairs (or of the paperwork documenting it) on the day the subpoena issued. It is only then that the court will be in a position to assess the testimonial value of Hubbell's response to the subpoena. Should the Independent Counsel prove capable of demonstrating with reasonable

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by respondent would not, in any event, affect the charges against those other defendants.

[6] As an independent basis for dismissal, the District Court also concluded that the Independent Counsel had exceeded his jurisdiction under the Ethics in Government Act of 1978, as amended by the Independent Counsel Reauthorization Act of 1994, 28 U. S. C. §§ 591–599. That holding was reversed by the Court of Appeals and is not at issue here.

> particularity a prior awareness that the exhaustive litany of documents sought in the subpoena existed and were in Hubbell's possession, then the wide distance evidently traveled from the subpoena to the substantive allegations contained in the indictment would be based upon legitimate intermediate steps. To the extent that the information conveyed through Hubbell's compelled act of production provides the necessary linkage, however, the indictment deriving therefrom is tainted." *Id.*, at 581.

In the opinion of the dissenting judge, the majority failed to give full effect to the distinction between the contents of the documents and the limited testimonial significance of the act of producing them. In his view, as long as the prosecutor could make use of information contained in the documents or derived therefrom without any reference to the fact that respondent had produced them in response to a subpoena, there would be no improper use of the testimonial aspect of the immunized act of production. In other words, the constitutional privilege and the statute conferring use immunity would only shield the witness from the use of any information resulting from his subpoena response "beyond what the prosecutor would receive if the documents appeared in the grand jury room or in his office unsolicited and unmarked, like manna from heaven."[7] *Id.*, at 602.

On remand, the Independent Counsel acknowledged that he could not satisfy the "reasonable particularity" standard prescribed by the Court of Appeals and entered into a conditional plea agreement with respondent. In essence, the agreement provides for the dismissal of the charges unless this Court's disposition of the case makes it reasonably likely that respondent's "act [of] production immunity" would not

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[7] Over the dissent of four judges, the Court of Appeals denied a suggestion for rehearing en banc. App. to Pet. for Cert. 142a–143a.

pose a significant bar to his prosecution. App. 106–107. The case is not moot, however, because the agreement also provides for the entry of a guilty plea and a sentence that will not include incarceration if we should reverse and issue an opinion that is sufficiently favorable to the Government to satisfy that condition. *Ibid.* Despite that agreement, we granted the Independent Counsel's petition for a writ of certiorari in order to determine the precise scope of a grant of immunity with respect to the production of documents in response to a subpoena. 528 U. S. 926 (1999). We now affirm.

II

It is useful to preface our analysis of the constitutional issue with a restatement of certain propositions that are not in dispute. The term "privilege against self-incrimination" is not an entirely accurate description of a person's constitutional protection against being "compelled in any criminal case to be a witness against himself."

The word "witness" in the constitutional text limits the relevant category of compelled incriminating communications to those that are "testimonial" in character.[8] As Justice Holmes observed, there is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct

[8] "It is consistent with the history of and the policies underlying the Self-Incrimination Clause to hold that the privilege may be asserted only to resist compelled explicit or implicit disclosures of incriminating information. Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source. See *Andresen* v. *Maryland*, 427 U. S. 463, 470–471 (1976); 8 Wigmore § 2250; E. Griswold, The Fifth Amendment Today 2–3 (1955)." *Doe* v. *United States*, 487 U. S. 201, 212 (1988).

that may be incriminating.[9] Thus, even though the act may provide incriminating evidence, a criminal suspect may be compelled to put on a shirt,[10] to provide a blood sample[11] or handwriting exemplar,[12] or to make a recording of his voice.[13] The act of exhibiting such physical characteristics is not the same as a sworn communication by a witness that relates either express or implied assertions of fact or belief. *Pennsylvania* v. *Muniz*, 496 U. S. 582, 594–598 (1990). Similarly, the fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return,[14] maintaining required records,[15] or reporting an accident,[16] does not clothe such required conduct with the testimonial privilege.[17]

More relevant to this case is the settled proposition that a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not "compelled"

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[9] "A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof." *Holt* v. *United States*, 218 U. S. 245, 252–253 (1910).

[10] *Ibid.*

[11] *Schmerber* v. *California*, 384 U. S. 757 (1966).

[12] *Gilbert* v. *California*, 388 U. S. 263 (1967).

[13] *United States* v. *Wade*, 388 U. S. 218 (1967).

[14] *United States* v. *Sullivan*, 274 U. S. 259 (1927).

[15] *Shapiro* v. *United States*, 335 U. S. 1 (1948).

[16] *California* v. *Byers*, 402 U. S. 424 (1971).

[17] "The Court has on several occasions recognized that the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws." *Baltimore City Dept. of Social Servs.* v. *Bouknight*, 493 U. S. 549, 556 (1990).

within the meaning of the privilege. Our decision in *Fisher* v. *United States*, 425 U. S. 391 (1976), dealt with summonses issued by the Internal Revenue Service (IRS) seeking working papers used in the preparation of tax returns. Because the papers had been voluntarily prepared prior to the issuance of the summonses, they could not be "said to contain compelled testimonial evidence, either of the taxpayers or of anyone else." Accordingly, the taxpayer could not "avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else." *Id.*, at 409–410; see also *United States* v. *Doe*, 465 U. S. 605 (1984).[18] It is clear, therefore, that respondent Hubbell could not avoid compliance with the subpoena served on him merely because the demanded documents contained incriminating evidence, whether written by others or voluntarily prepared by himself.

On the other hand, we have also made it clear that the act of producing documents in response to a subpoena may have a compelled testimonial aspect. We have held that "the act of production" itself may implicitly communicate "statements of fact." By "producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic."[19]

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[18] "Respondent does not contend that he prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. The fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled. We therefore hold that the contents of those records are not privileged." *United States* v. *Doe*, 465 U. S., at 611–612 (footnote omitted).

[19] "The issue presented in those cases was whether the act of producing subpoenaed documents, not itself the making of a statement, might nonetheless have some protected testimonial aspects. The Court concluded that the act of production could constitute protected testimonial communication because it might entail implicit statements of fact: by producing

Moreover, as was true in this case, when the custodian of documents responds to a subpoena, he may be compelled to take the witness stand and answer questions designed to determine whether he has produced everything demanded by the subpoena.[20] The answers to those questions, as well as the act of production itself, may certainly communicate information about the existence, custody, and authenticity of the documents. Whether the constitutional privilege protects the answers to such questions, or protects the act of production itself, is a question that is distinct from the question whether the unprotected contents of the documents themselves are incriminating.

Finally, the phrase "in any criminal case" in the text of the Fifth Amendment might have been read to limit its coverage to compelled testimony that is used against the defendant in the trial itself. It has, however, long been settled that its protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence. Thus, a half century ago we held

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documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic. *United States* v. *Doe*, 465 U. S., at 613, and n. 11; *Fisher*, 425 U. S., at 409–410; *id.*, at 428, 432 (concurring opinions). See *Braswell* v. *United States*, [487 U. S.,] at 104; [*id.*,] at 122 (dissenting opinion). Thus, the Court made clear that the Fifth Amendment privilege against self-incrimination applies to acts that imply assertions of fact.

". . . An examination of the Court's application of these principles in other cases indicates the Court's recognition that, in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Doe* v. *United States*, 487 U. S., at 209–210 (footnote omitted).

[20] See App. 62–70. Thus, for example, after respondent had been duly sworn by the grand jury foreman, the prosecutor called his attention to paragraph A of the Subpoena Rider (reproduced in the Appendix, *infra*, at 46) and asked whether he had produced "all those documents." App. 65.

that a trial judge had erroneously rejected a defendant's claim of privilege on the ground that his answer to the pending question would not itself constitute evidence of the charged offense. As we explained:

> "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951).

Compelled testimony that communicates information that may "lead to incriminating evidence" is privileged even if the information itself is not inculpatory. *Doe* v. *United States*, 487 U. S. 201, 208, n. 6 (1988). It is the Fifth Amendment's protection against the prosecutor's use of incriminating information derived directly or indirectly from the compelled testimony of the respondent that is of primary relevance in this case.

III

Acting pursuant to 18 U. S. C. § 6002, the District Court entered an order compelling respondent to produce "any and all documents" described in the grand jury subpoena and granting him "immunity to the extent allowed by law." App. 60–61. In *Kastigar* v. *United States*, 406 U. S. 441 (1972), we upheld the constitutionality of § 6002 because the scope of the "use and derivative-use" immunity that it provides is coextensive with the scope of the constitutional privilege against self-incrimination.

The protection against the derivative use of compelled testimony distinguishes § 6002 from the 1868 statute that had been held invalid in *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892), because it merely provided "use" immunity, as well as from the more recent federal statutes that broadly provide "transactional" immunity. In *Kastigar* the petitioners argued that, under our reasoning in *Counselman*, nothing less

than full transactional immunity from prosecution for any offense to which compelled testimony relates could suffice to supplant the privilege. In rejecting that argument, we stressed the importance of § 6002's "explicit proscription" of the use in any criminal case of "'testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information).'" 406 U. S., at 453. We particularly emphasized the critical importance of protection against a future prosecution "'based on knowledge and sources of information obtained from the compelled testimony.'" *Id.*, at 454 (quoting *Ullmann* v. *United States*, 350 U. S. 422, 437 (1956)).[21]

We also rejected the petitioners' argument that derivative-use immunity under § 6002 would not obviate the risk that the prosecutor or other law enforcement officials may use compelled testimony to obtain leads, names of witnesses, or other information not otherwise available to support a prosecution. That argument was predicated on the incorrect assumption that the derivative-use prohibition would prove impossible to enforce. But given that the statute contains a "comprehensive safeguard" in the form of a "sweeping proscription of any use, direct or indirect, of the

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[21] "Our holding is consistent with the conceptual basis of *Counselman*. The *Counselman* statute, as construed by the Court, was plainly deficient in its failure to prohibit the use against the immunized witness of evidence derived from his compelled testimony. The Court repeatedly emphasized this deficiency, noting that the statute:

"'could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding . . .' 142 U. S., at 564;

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"and that it:

"'affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.' 142 U. S., at 586." *Kastigar* v. *United States*, 406 U. S., at 453–454.

compelled testimony and any information derived therefrom," we concluded that a person who is prosecuted for matters related to testimony he gave under a grant of immunity does not have the burden of proving that his testimony was improperly used. Instead, we held that the statute imposes an affirmative duty on the prosecution, not merely to show that its evidence is not tainted by the prior testimony, but "to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.*, at 460.[22] Requiring the prosecution to shoulder this burden ensures that the grant of immunity has "le[ft] the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a grant of immunity." *Id.*, at 458–459 (internal quotation marks and footnote omitted).

The "compelled testimony" that is relevant in this case is not to be found in the contents of the documents produced in response to the subpoena. It is, rather, the testimony inherent in the act of producing those documents. The disagreement between the parties focuses entirely on the significance of that testimonial aspect.

IV

The Government correctly emphasizes that the testimonial aspect of a response to a subpoena *duces tecum* does nothing

[22] "A person accorded this immunity under 18 U. S. C. § 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. As stated in *Murphy* [v. *Waterfront Comm'n of N. Y. Harbor*, 378 U. S. 52 (1964)]:

"'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' *[Id.,]* at 79 n. 18.

"This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.*, at 460.

more than establish the existence, authenticity, and custody of items that are produced. We assume that the Government is also entirely correct in its submission that it would not have to advert to respondent's act of production in order to prove the existence, authenticity, or custody of any documents that it might offer in evidence at a criminal trial; indeed, the Government disclaims any need to introduce any of the documents produced by respondent into evidence in order to prove the charges against him. It follows, according to the Government, that it has no intention of making improper "use" of respondent's compelled testimony.

The question, however, is not whether the response to the subpoena may be introduced into evidence at his criminal trial. That would surely be a prohibited "use" of the immunized act of production. See *In re Sealed Case*, 791 F. 2d 179, 182 (CADC 1986) (Scalia, J.). But the fact that the Government intends no such use of the act of production leaves open the separate question whether it has already made "derivative use" of the testimonial aspect of that act in obtaining the indictment against respondent and in preparing its case for trial. It clearly has.

It is apparent from the text of the subpoena itself that the prosecutor needed respondent's assistance both to identify potential sources of information and to produce those sources. See Appendix, *infra*. Given the breadth of the description of the 11 categories of documents called for by the subpoena, the collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions. The assembly of literally hundreds of pages of material in response to a request for "any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to" an individual or members of his family during a 3-year period, Appendix, *infra*, at 46–49, is the functional equivalent of the preparation of an answer to either a detailed written

interrogatory or a series of oral questions at a discovery deposition. Entirely apart from the contents of the 13,120 pages of materials that respondent produced in this case, it is undeniable that providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories could provide a prosecutor with a "lead to incriminating evidence," or "a link in the chain of evidence needed to prosecute."

Indeed, the record makes it clear that that is what happened in this case. The documents were produced before a grand jury sitting in the Eastern District of Arkansas in aid of the Independent Counsel's attempt to determine whether respondent had violated a commitment in his first plea agreement. The use of those sources of information eventually led to the return of an indictment by a grand jury sitting in the District of Columbia for offenses that apparently are unrelated to that plea agreement. What the District Court characterized as a "fishing expedition" did produce a fish, but not the one that the Independent Counsel expected to hook. It is abundantly clear that the testimonial aspect of respondent's act of producing subpoenaed documents was the first step in a chain of evidence that led to this prosecution. The documents did not magically appear in the prosecutor's office like "manna from heaven." They arrived there only after respondent asserted his constitutional privilege, received a grant of immunity, and—under the compulsion of the District Court's order—took the mental and physical steps necessary to provide the prosecutor with an accurate inventory of the many sources of potentially incriminating evidence sought by the subpoena. It was only through respondent's truthful reply to the subpoena[23] that the Government re-

[23] See Stuntz, Self-incrimination and Excuse, 88 Colum. L. Rev. 1227, 1228–1229, 1256–1259, 1277–1279 (1988) (discussing the conceptual link between truthtelling and the privilege in the document production context); Alito, Documents and the Privilege Against Self-Incrimination, 48 U. Pitt. L. Rev. 27, 47 (1986); 8 J. Wigmore, Evidence § 2264, p. 379 (J. McNaugh-

ceived the incriminating documents of which it made "substantial use . . . in the investigation that led to the indictment." Brief for United States 3.

For these reasons, we cannot accept the Government's submission that respondent's immunity did not preclude its derivative use of the produced documents because its "possession of the documents [was] the fruit *only* of a simple physical act—the act of producing the documents." *Id.*, at 29. It was unquestionably necessary for respondent to make extensive use of "the contents of his own mind" in identifying the hundreds of documents responsive to the requests in the subpoena. See *Curcio* v. *United States*, 354 U. S. 118, 128 (1957); *Doe* v. *United States*, 487 U. S., at 210. The assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox. *Id.*, at 210, n. 9. The Government's anemic view of respondent's act of production as a mere physical act that is principally nontestimonial in character and can be entirely divorced from its "implicit" testimonial aspect so as to constitute a "legitimate, wholly independent source" (as required by *Kastigar*) for the documents produced simply fails to account for these realities.

In sum, we have no doubt that the constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence. That constitutional privilege has the same application to the testimonial aspect of a response to a subpoena seeking discovery of those sources. Before the District Court, the Government arguably conceded that respondent's act of production in this case had a testimonial aspect that entitled him to respond to the subpoena by asserting his privilege against self-incrimination. See 167 F. 3d, at 580 (noting District

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ton rev. 1961) (describing a subpoena *duces tecum* as "process relying on [the witness'] moral responsibility for truthtelling").

Court's finding that "Hubbell's compelled act of production required him to make communications as to the existence, possession, and authenticity of the subpoenaed documents"). On appeal and again before this Court, however, the Government has argued that the communicative aspect of respondent's act of producing ordinary business records is insufficiently "testimonial" to support a claim of privilege because the existence and possession of such records by any businessman is a "foregone conclusion" under our decision in *Fisher* v. *United States*, 425 U. S., at 411. This argument both misreads *Fisher* and ignores our subsequent decision in *United States* v. *Doe*, 465 U. S. 605 (1984).

As noted in Part II, *supra*, *Fisher* involved summonses seeking production of working papers prepared by the taxpayers' accountants that the IRS knew were in the possession of the taxpayers' attorneys. 425 U. S., at 394. In rejecting the taxpayers' claim that these documents were protected by the Fifth Amendment privilege, we stated:

> "It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment. The papers belong to the *accountant*, were prepared by him, and are the kind usually prepared by an accountant working on the tax returns of his client. Surely the Government is in no way relying on the 'truthtelling' of the *taxpayer* to prove the existence of or his access to the documents. . . . The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." *Id.*, at 411 (emphases added).

Whatever the scope of this "foregone conclusion" rationale, the facts of this case plainly fall outside of it. While in *Fisher* the Government already knew that the documents were in the attorneys' possession and could independently

confirm their existence and authenticity through the accountants who created them, here the Government has not shown that it had any prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced by respondent. The Government cannot cure this deficiency through the overbroad argument that a businessman such as respondent will always possess general business and tax records that fall within the broad categories described in this subpoena. The *Doe* subpoenas also sought several broad categories of general business records, yet we upheld the District Court's finding that the act of producing those records would involve testimonial self-incrimination. 465 U. S., at 612–614, and n. 13.

Given our conclusion that respondent's act of production had a testimonial aspect, at least with respect to the existence and location of the documents sought by the Government's subpoena, respondent could not be compelled to produce those documents without first receiving a grant of immunity under § 6003. As we construed § 6002 in *Kastigar*, such immunity is coextensive with the constitutional privilege. *Kastigar* requires that respondent's motion to dismiss the indictment on immunity grounds be granted unless the Government proves that the evidence it used in obtaining the indictment and proposed to use at trial was derived from legitimate sources "wholly independent" of the testimonial aspect of respondent's immunized conduct in assembling and producing the documents described in the subpoena. The Government, however, does not claim that it could make such a showing. Rather, it contends that its prosecution of respondent must be considered proper unless someone—presumably respondent—shows that "there is some substantial relation between the compelled testimonial communications implicit in the act of production (as opposed to the act of production standing alone) and some aspect of the information used in the investigation or the evidence presented at trial." Brief for United States 9. We could not accept

this submission without repudiating the basis for our conclusion in *Kastigar* that the statutory guarantee of use and derivative-use immunity is as broad as the constitutional privilege itself. This we are not prepared to do.

Accordingly, the indictment against respondent must be dismissed. The judgment of the Court of Appeals is affirmed.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

On October 31, 1996, upon application by the Independent Counsel, a subpoena was issued commanding respondent to appear and testify before the grand jury of the United States District Court for the Eastern District of Arkansas on November 19, 1996, and to bring with him various documents described in a "Subpoena Rider" as follows:

"A. Any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to Webster Hubbell, his wife, or children from January 1, 1993 to the present, including but not limited to the identity of employers or clients of legal or any other type of work.

"B. Any and all documents reflecting, referring, or relating to any direct or indirect sources of money of other things of value received by or provided to Webster Hubbell, his wife, or children from January 1, 1993 to the present, including but not limited to billing memoranda, draft statements, bills, final statements, and/or bills for work performed or time billed from January 1, 1993 to the present.

"C. Copies of all bank records of Webster Hubbell, his wife, or children for all accounts from January 1, 1993 to the present, including but not limited to all statements, registers and ledgers, cancelled checks, deposit items, and wire transfers.

"D. Any and all documents reflecting, referring, or relating to time worked or billed by Webster Hubbell from

January 1, 1993 to the present, including but not limited to original time sheets, books, notes, papers, and/or computer records.

"E. Any and all documents reflecting, referring, or relating to expenses incurred by and/or disbursements of money by Webster Hubbell during the course of any work performed or to be performed by Mr. Hubbell from January 1, 1993 to the present.

"F. Any and all documents reflecting, referring, or relating to Webster Hubbell's schedule of activities, including but not limited to any and all calendars, day-timers, time books, appointment books, diaries, records of reverse telephone toll calls, credit card calls, telephone message slips, logs, other telephone records, minutes, databases, electronic mail messages, travel records, itineraries, tickets for transportation of any kind, payments, bills, expense backup documentation, schedules, and/or any other document or database that would disclose Webster Hubbell's activities from January 1, 1993 to the present.

"G. Any and all documents reflecting, referring, or relating to any retainer agreements or contracts for employment of Webster Hubbell, his wife, or his children from January 1, 1993 to the present.

"H. Any and all tax returns and tax return information, including but not limited to all W–2s, form 1099s, schedules, draft returns, work papers, and backup documents filed, created or held by or on behalf of Webster Hubbell, his wife, his children, and/or any business in which he, his wife, or his children holds or has held an interest, for the tax years 1993 to the present.

"I. Any and all documents reflecting, referring, or relating to work performed or to be performed or on behalf of the City of Los Angeles, California, the Los Angeles Department of Airports or any other Los Angeles municipal Governmental entity, Mary Leslie, and/or Alan S. Arkatov, including but not limited to correspondence, retainer agree-

ments, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail, bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or other records of financial transactions.

"J. Any and all documents reflecting, referring, or relating to work performed or to be performed by Webster Hubbell, his wife, or his children on the recommendation, counsel or other influence of Mary Leslie and/or Alan S. Arkatov, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail, bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or other records of financial transactions.

"K. Any and all documents related to work performed or to be performed for or on behalf of Lippo Ltd. (formerly Public Finance (H. K.) Ltd.), the Lippo Group, the Lippo Bank, Mochtar Riady, James Riady, Stephen Riady, John Luen Wai Lee, John Huang, Mark W. Grobmyer, C. Joseph Giroir, Jr., or any affiliate, subsidiary, or corporation owned or controlled by or related to the aforementioned entities or individuals, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail, bank

deposit items, cashier's checks, traveler's checks, wire transfer records and/or other records of financial transactions." App. 47–49.

CHIEF JUSTICE REHNQUIST dissents and would reverse the judgment of the Court of Appeals in part, for the reasons given by Judge Williams in his dissenting opinion in that court, 167 F. 3d 552, 597 (CADC 1999).

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring.

Our decision today involves the application of the act-of-production doctrine, which provides that persons compelled to turn over incriminating papers or other physical evidence pursuant to a subpoena *duces tecum* or a summons may invoke the Fifth Amendment privilege against self-incrimination as a bar to production only where the act of producing the evidence would contain "testimonial" features. See *ante*, at 34–38. I join the opinion of the Court because it properly applies this doctrine, but I write separately to note that this doctrine may be inconsistent with the original meaning of the Fifth Amendment's Self-Incrimination Clause. A substantial body of evidence suggests that the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of any incriminating evidence. In a future case, I would be willing to reconsider the scope and meaning of the Self-Incrimination Clause.

I

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The key word at issue in this case is "witness." The Court's opinion, relying on prior cases, essentially defines "witness" as a person who provides testimony, and thus restricts the Fifth Amendment's ban to only those com-

munications "that are 'testimonial' in character." *Ante,* at 34. None of this Court's cases, however, has undertaken an analysis of the meaning of the term at the time of the founding. A review of that period reveals substantial support for the view that the term "witness" meant a person who gives or furnishes evidence, a broader meaning than that which our case law currently ascribes to the term. If this is so, a person who responds to a subpoena *duces tecum* would be just as much a "witness" as a person who responds to a subpoena *ad testificandum.*[1]

Dictionaries published around the time of the founding included definitions of the term "witness" as a person who gives or furnishes evidence. Legal dictionaries of that period defined "witness" as someone who "gives evidence in a cause." 2 G. Jacob, A New Law-Dictionary (8th ed. 1762); 2 T. Cunningham, New and Complete Law-Dictionary (2d ed. 1771); T. Potts, A Compendious Law Dictionary 612 (1803); 6 G. Jacob, The Law-Dictionary 450 (T. Tomlins 1st American ed. 1811). And a general dictionary published earlier in the century similarly defined "witness" as "a giver of evidence." J. Kersey, A New English Dictionary (1702). The term "witness" apparently continued to have this meaning at least until the first edition of Noah Webster's dictionary, which defined it as "[t]hat which furnishes evidence or proof." An American Dictionary of the English Language (1828). See also J. Story, Commentaries on the Constitution of the United States § 931 (1833) (using phrases "to give evidence" and "to furnish evidence" in explanation of the Self-Incrimination Clause). See generally Nagareda, Compul-

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[1] Even if the term "witness" in the Fifth Amendment referred to someone who provides testimony, as this Court's recent cases suggest without historical analysis, it may well be that at the time of the founding a person who turned over documents would be described as providing testimony. See *Amey* v. *Long,* 9 East. 472, 484, 103 Eng. Rep. 653, 658 (K. B. 1808) (referring to documents requested by subpoenas *duces tecum* as "written . . . testimony").

sion "to be a witness" and the Resurrection of *Boyd*, 74 N. Y. U. L. Rev. 1575, 1608–1609 (1999).[2]

Such a meaning of "witness" is consistent with, and may help explain, the history and framing of the Fifth Amendment. The 18th-century common-law privilege against self-incrimination protected against the compelled production of incriminating physical evidence such as papers and documents. See Morgan, The Privilege against Self-Incrimination, 34 Minn. L. Rev. 1, 34 (1949); Nagareda, *supra*, at 1618–1623. Several 18th-century cases explicitly recognized such a self-incrimination privilege. See *Roe* v. *Harvey*, 4 Burr. 2484, 2489, 98 Eng. Rep. 302, 305 (K. B. 1769); *King* v. *Purnell*, 1 Black. 37, 42, 96 Eng. Rep. 20, 23 (K. B. 1748); *King* v. *Cornelius*, 2 Str. 1210, 1211, 93 Eng. Rep. 1133, 1134 (K. B. 1744); *Queen* v. *Mead*, 2 LD. Raym. 927, 92 Eng. Rep. 119 (K. B. 1703); *King* v. *Worsenham*, 1 LD. Raym. 705, 91 Eng. Rep. 1370 (K. B. 1701). And this Court has noted that, for generations before the framing, "one cardinal rule of the court of chancery [wa]s never to decree a discovery which might tend to convict the party of a crime." *Boyd* v. *United States*, 116 U. S. 616, 631 (1886). See also *Counselman* v. *Hitchcock*, 142 U. S. 547, 563–564 (1892) ("It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make

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[2] Further, it appears that the phrases "gives evidence" and "furnishes evidence" were not simply descriptions of the act of providing testimony. For example, in *King* v. *Purnell*, 1 Black. 37, 96 Eng. Rep. 20 (K. B. 1748), the phrase "furnish evidence" is repeatedly used to refer to the compelled production of books, records, and archives in response to a government request. *Id.*, at 40, 41, 42, 96 Eng. Rep., at 21, 22, 23. See also, *e. g.*, *King* v. *Cornelius*, 2 Str. 1210, 1211, 93 Eng. Rep. 1133, 1134 (K. B. 1744) (compelling discovery of books "is in effect obliging a defendant . . . to furnish evidence against himself"); 1 T. Cunningham, New and Complete Law-Dictionary (2d ed. 1771) (evidence "signifies generally all proof, be it testimony of men, records or writings"); 1 G. Jacob, The Law-Dictionary (T. Tomlins ed. 1797) (defining "evidence" as "[p]roof by testimony of witnesses, on oath; or by writings or records").

disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures").

Against this common-law backdrop, the privilege against self-incrimination was enshrined in the Virginia Declaration of Rights in 1776. See Moglen, The Privilege in British North America: The Colonial Period to the Fifth Amendment, in The Privilege against Self-Incrimination: Its Origins and Development 133–134 (R. Helmholz et al. eds. 1997). That document provided that no one may "be compelled to give evidence against himself." Virginia Declaration of Rights § 8 (1776), in 1 The Bill of Rights: A Documentary History 235 (B. Schwartz ed. 1971). Following Virginia's lead, seven of the other original States included specific provisions in their Constitutions granting a right against compulsion "to give evidence" or "to furnish evidence." See Pennsylvania Declaration of Rights, Art. IX (1776) ("give"), *id.*, at 265; Delaware Declaration of Rights § 15 (1776) ("give"), *id.*, at 278; Maryland Declaration of Rights, Art. XX (1776) ("give"), *id.*, at 282; North Carolina Declaration of Rights, Art. VII (1776) ("give"), *id.*, at 287; Vermont Declaration of Rights, Ch. I, Art. X (1777) ("give"), *id.*, at 323; Massachusetts Declaration of Rights, Pt. 1, Art. XII (1780) ("furnish"), *id.*, at 342; New Hampshire Bill of Rights, Art. XV (1783) ("furnish"), *id.*, at 377. And during ratification of the Federal Constitution, the four States that proposed bills of rights put forward draft proposals employing similar wording for a federal constitutional provision guaranteeing the right against compelled self-incrimination. Each of the proposals broadly sought to protect a citizen from "be[ing] compelled to give evidence against himself." Virginia Proposal (June 27, 1788), 2 *id.*, at 841; New York Proposed Amendments (July 26, 1788), *id.*, at 913; North Carolina Proposed Declaration of Rights (Aug. 1, 1788), *id.*, at 967; Rhode Island Proposal (May 29, 1790) (same suggestion made following the drafting of the Fifth Amendment), in N. Cogan, The Complete Bill of Rights 327 (1997). See also,

e. g., The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents (Dec. 13, 1787) (same suggestion), in 2 Schwartz, *supra*, at 665; 2 Debates on the Federal Constitution 111 (J. Elliot 2d ed. 1854) (Mr. Holmes, Mass., Jan. 30, 1788) (objecting that nothing prohibits compelling a person "to furnish evidence against himself"). Similarly worded proposals to protect against compelling a person "to furnish evidence" against himself came from prominent voices outside the conventions. See The Federal Farmer No. 6 (1787), in Cogan, *supra*, at 333; Letter of Brutus, No. 2 (1788), in 1 Schwartz, *supra*, at 508.

In response to such calls, James Madison penned the Fifth Amendment. In so doing, Madison substituted the phrase "to be a witness" for the proposed language "to give evidence" and "to furnish evidence." But it seems likely that Madison's phrasing was synonymous with that of the proposals. The definitions of the word "witness" and the background history of the privilege against self-incrimination, both discussed above, support this view. And this may explain why Madison's unique phrasing—phrasing that none of the proposals had suggested—apparently attracted no attention, much less opposition, in Congress, the state legislatures that ratified the Bill of Rights, or anywhere else. See 3 W. LaFave, J. Israel, & N. King, Criminal Procedure 290–291 (2d ed. 1999). In fact, the only Member of the First Congress to address self-incrimination during the debates on the Bill of Rights treated the phrases as synonymous, restating Madison's formulation as a ban on forcing one "to give evidence against himself." 1 Annals of Cong. 753–754 (J. Gales ed. 1834) (statement of Rep. Laurance).[3]

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[3] Representative Laurance was no stranger to the Self-Incrimination Clause; he was responsible for the limiting phrase "in any criminal case," which was added to the Clause without any recorded opposition. See L. Levy, Origins of the Fifth Amendment, The Right Against Self-Incrimination 424–427 (1968). In support of this suggestion, Laurance

In addition, a broad definition of the term "witness"—one who gives evidence—is consistent with the same term (albeit in plural form) in the Sixth Amendment's Compulsory Process Clause.[4] That Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." Soon after the adoption of the Bill of Rights, Chief Justice Marshall had occasion to interpret the Compulsory Process Clause while presiding over the treason trial of Aaron Burr. *United States* v. *Burr*, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807). Burr moved for the issuance of a subpoena *duces tecum* to obtain from President Jefferson a letter that was said to incriminate Burr. The Government objected, arguing that compulsory process under the Sixth Amendment permits a defendant to secure a sub-

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noted that, absent such a restriction, the Fifth Amendment was "a general declaration, in some degree contrary to laws passed." 1 Annals of Cong. 753 (J. Gales ed. 1834). Two prominent commentators have suggested that "laws passed" likely refers to § 15 of the Judiciary Act of 1789 (then in the process of passage). See Levy, *supra*, at 425–426; Moglen, The Privilege in British North America: The Colonial Period to the Fifth Amendment, in The Privilege against Self-Incrimination: Its Origins and Development 258, n. 109 (R. Helmholz et al. eds. 1997). Section 15 provided that federal courts "shall have power in the trial of actions at law . . . to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." Judiciary Act of 1789, 1 Stat. 82. Section 15's grant of power to compel discovery in civil cases would have been inconsistent with an unrestricted Self-Incrimination Clause, but only if the term "witness" in that Clause included persons who provide such physical evidence as "books" and "writings." Laurance's assertion thus suggests that the Framers believed the Self-Incrimination Clause offered protection against such compelled production.

[4] A broad view of the term "witness" in the compulsory process context dates back at least to the beginning of the 18th century. See Act of May 31, 1718, ch. 236, § 4, 1 Laws of Pennsylvania 112 (J. Bioren ed. 1810) (speaking of witnesses "be[ing] admitted to [be] depose[d], *or* give any manner of evidence" (emphasis added)).

poena *ad testificandum,* but not a subpoena *duces tecum. Id.*, at 34. The Chief Justice dismissed the argument, holding that the right to compulsory process includes the right to secure papers—in addition to testimony—material to the defense. *Id.*, at 34–35. This Court has subsequently expressed agreement with this view of the Sixth Amendment. See *United States* v. *Nixon,* 418 U. S. 683, 711 (1974). Although none of our opinions has focused upon the precise language or history of the Compulsory Process Clause, a narrow definition of the term "witness" as a person who testifies seems incompatible with *Burr*'s holding. And if the term "witnesses" in the Compulsory Process Clause has an encompassing meaning, this provides reason to believe that the term "witness" in the Self-Incrimination Clause has the same broad meaning. Yet this Court's recent Fifth Amendment act-of-production cases implicitly rest upon an assumption that this term has different meanings in adjoining provisions of the Bill of Rights.[5]

II

This Court has not always taken the approach to the Fifth Amendment that we follow today. The first case interpreting the Self-Incrimination Clause—*Boyd* v. *United States*—was decided, though not explicitly, in accordance with the understanding that "witness" means one who gives evidence. In *Boyd,* this Court unanimously held that the Fifth Amendment protects a defendant against compelled production of books and papers. 116 U. S., at 634–635; *id.*, at 638–639 (Miller, J., concurring in judgment). And the Court linked its interpretation of the Fifth Amendment to the common-

[5] Accepting the definition of "witness" as one who gives or furnishes evidence would also be compatible with my previous call for a reconsideration of the phrase "witnesses against him" in the Confrontation Clause of the Sixth Amendment. See *White* v. *Illinois,* 502 U. S. 346, 365 (1992) (opinion concurring in part and concurring in judgment).

law understanding of the self-incrimination privilege. *Id.*, at 631–632.

But this Court's decision in *Fisher* v. *United States*, 425 U. S. 391 (1976), rejected this understanding, permitting the Government to force a person to furnish incriminating physical evidence and protecting only the "testimonial" aspects of that transfer. *Id.*, at 408. In so doing, *Fisher* not only failed to examine the historical backdrop to the Fifth Amendment, it also required—as illustrated by extended discussion in the opinions below in this case—a difficult parsing of the act of responding to a subpoena *duces tecum*.

None of the parties in this case has asked us to depart from *Fisher*, but in light of the historical evidence that the Self-Incrimination Clause may have a broader reach than *Fisher* holds, I remain open to a reconsideration of that decision and its progeny in a proper case.[6]

[6] To hold that the Government may not compel a person to produce incriminating evidence (absent an appropriate grant of immunity) does not necessarily answer the question whether (and, if so, when) the Government may secure that same evidence through a search or seizure. The lawfulness of such actions, however, would be measured by the Fourth Amendment rather than the Fifth.

Syllabus

TROXEL ET VIR *v.* GRANVILLE

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 99–138. Argued January 12, 2000—Decided June 5, 2000

Washington Rev. Code § 26.10.160(3) permits "[a]ny person" to petition for visitation rights "at any time" and authorizes state superior courts to grant such rights whenever visitation may serve a child's best interest. Petitioners Troxel petitioned for the right to visit their deceased son's daughters. Respondent Granville, the girls' mother, did not oppose all visitation, but objected to the amount sought by the Troxels. The Superior Court ordered more visitation than Granville desired, and she appealed. The State Court of Appeals reversed and dismissed the Troxels' petition. In affirming, the State Supreme Court held, *inter alia*, that § 26.10.160(3) unconstitutionally infringes on parents' fundamental right to rear their children. Reasoning that the Federal Constitution permits a State to interfere with this right only to prevent harm or potential harm to the child, it found that § 26.10.160(3) does not require a threshold showing of harm and sweeps too broadly by permitting any person to petition at any time with the only requirement being that the visitation serve the best interest of the child.

Held: The judgment is affirmed.

137 Wash. 2d 1, 969 P. 2d 21, affirmed.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE GINSBURG, and JUSTICE BREYER, concluded that § 26.10.160(3), as applied to Granville and her family, violates her due process right to make decisions concerning the care, custody, and control of her daughters. Pp. 63–75.

(a) The Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests," *Washington* v. *Glucksberg*, 521 U. S. 702, 720, including parents' fundamental right to make decisions concerning the care, custody, and control of their children, see, *e. g.*, *Stanley* v. *Illinois*, 405 U. S. 645, 651. Pp. 63–66.

(b) Washington's breathtakingly broad statute effectively permits a court to disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interest. A parent's estimation of the child's best interest is accorded no deference. The State Supreme Court had the oppor-

tunity, but declined, to give § 26.10.160(3) a narrower reading. A combination of several factors compels the conclusion that § 26.10.160(3), as applied here, exceeded the bounds of the Due Process Clause. First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. There is a presumption that fit parents act in their children's best interests, *Parham* v. *J. R.*, 442 U. S. 584, 602; there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children, see, *e. g.*, *Reno* v. *Flores*, 507 U. S. 292, 304. The problem here is not that the Superior Court intervened, but that when it did so, it gave no special weight to Granville's determination of her daughters' best interests. More importantly, that court appears to have applied the opposite presumption, favoring grandparent visitation. In effect, it placed on Granville the burden of *disproving* that visitation would be in her daughters' best interest and thus failed to provide any protection for her fundamental right. The court also gave no weight to Granville's having assented to visitation even before the filing of the petition or subsequent court intervention. These factors, when considered with the Superior Court's slender findings, show that this case involves nothing more than a simple disagreement between the court and Granville concerning her children's best interests, and that the visitation order was an unconstitutional infringement on Granville's right to make decisions regarding the rearing of her children. Pp. 67–73.

(c) Because the instant decision rests on § 26.10.160(3)'s sweeping breadth and its application here, there is no need to consider the question whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation or to decide the precise scope of the parental due process right in the visitation context. There is also no reason to remand this case for further proceedings. The visitation order clearly violated the Constitution, and the parties should not be forced into additional litigation that would further burden Granville's parental right. Pp. 73–75.

JUSTICE SOUTER concluded that the Washington Supreme Court's second reason for invalidating its own state statute—that it sweeps too broadly in authorizing any person at any time to request (and a judge to award) visitation rights, subject only to the State's particular best-interests standard—is consistent with this Court's prior cases. This ends the case, and there is no need to decide whether harm is required or to consider the precise scope of a parent's right or its necessary protections. Pp. 75–79.

Syllabus

JUSTICE THOMAS agreed that this Court's recognition of a fundamental right of parents to direct their children's upbringing resolves this case, but concluded that strict scrutiny is the appropriate standard of review to apply to infringements of fundamental rights. Here, the State lacks a compelling interest in second-guessing a fit parent's decision regarding visitation with third parties. P. 80.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and GINSBURG and BREYER, JJ., joined. SOUTER, J., *post*, p. 75, and THOMAS, J., *post*, p. 80, filed opinions concurring in the judgment. STEVENS, J., *post*, p. 80, SCALIA, J., *post*, p. 91, and KENNEDY, J., *post*, p. 93, filed dissenting opinions.

Mark D. Olson argued the cause for petitioners. With him on the briefs was *Eric Schnapper*.

Catherine W. Smith argued the cause for respondent. With her on the brief was *Howard M. Goodfriend*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Washington et al. by *Christine O. Gregoire*, Attorney General of Washington, and *Maureen A. Hart*, Senior Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Mark Pryor* of Arkansas, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Earl I. Anzai* of Hawaii, *Carla J. Stovall* of Kansas, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *John J. Farmer, Jr.*, of New Jersey, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, and *Paul G. Summers* of Tennessee; for AARP et al. by *Rochelle Bobroff*, *Bruce Vignery*, and *Michael Schuster;* for Grandparents United for Children's Rights, Inc., by *Judith Sperling Newton* and *Carol M. Gapen;* for the National Conference of State Legislatures et al. by *Richard Ruda* and *James I. Crowley;* and for the Grandparent Caregiver Law Center of the Brookdale Center on Aging.

Briefs of *amici curiae* urging affirmance were filed for the American Academy of Matrimonial Lawyers by *Barbara Ellen Handschu* and *Sanford K. Ain;* for the American Center for Law and Justice by *Jay Alan Sekulow*, *Colby May*, *Vincent McCarthy*, and *John P. Tuskey;* for the American Civil Liberties Union et al. by *Matthew A. Coles*, *Michael P. Adams*, *Catherine Weiss*, and *Steven R. Shapiro;* for the Coalition for the Restoration of Parental Rights by *Karen A. Wyle;* for the Institute for Justice et al. by *William H. Mellor*, *Clint Bolick*, and *Scott G. Bullock;* for the Center for the Original Intent of the Constitution by *Michael P. Farris;* for the Christian Legal Society et al. by *Kimberlee Wood Colby*, *Gregory S. Baylor*, and *Carl H. Esbeck;* for the Lambda Legal Defense

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE GINSBURG, and JUSTICE BREYER join.

Section 26.10.160(3) of the Revised Code of Washington permits "[a]ny person" to petition a superior court for visitation rights "at any time," and authorizes that court to grant such visitation rights whenever "visitation may serve the best interest of the child." Petitioners Jenifer and Gary Troxel petitioned a Washington Superior Court for the right to visit their grandchildren, Isabelle and Natalie Troxel. Respondent Tommie Granville, the mother of Isabelle and Natalie, opposed the petition. The case ultimately reached the Washington Supreme Court, which held that § 26.10.160(3) unconstitutionally interferes with the fundamental right of parents to rear their children.

I

Tommie Granville and Brad Troxel shared a relationship that ended in June 1991. The two never married, but they had two daughters, Isabelle and Natalie. Jenifer and Gary Troxel are Brad's parents, and thus the paternal grandparents of Isabelle and Natalie. After Tommie and Brad separated in 1991, Brad lived with his parents and regularly brought his daughters to his parents' home for weekend visitation. Brad committed suicide in May 1993. Although the Troxels at first continued to see Isabelle and Natalie on a regular basis after their son's death, Tommie Granville in-

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and Education Fund et al. by *Patricia M. Logue*, *Ruth E. Harlow*, and *Beatrice Dohrn;* for the Society of Catholic Social Scientists by *Stephen M. Krason* and *Richard W. Garnett;* and for Debra Hein by *Stuart M. Wilder.*

Briefs of *amici curiae* were filed for the Center for Children's Policy Practice & Research at the University of Pennsylvania by *Barbara Bennett Woodhouse;* for the Domestic Violence Project, Inc./Safe House (Michigan) et al. by *Anne L. Argiroff* and *Ann L. Routt;* for the National Association of Counsel for Children by *Robert C. Fellmeth* and *Joan Hollinger;* and for the Northwest Women's Law Center et al. by *Cathy J. Zavis.*

formed the Troxels in October 1993 that she wished to limit their visitation with her daughters to one short visit per month. *In re Smith*, 137 Wash. 2d 1, 6, 969 P. 2d 21, 23–24 (1998); *In re Troxel*, 87 Wash. App. 131, 133, 940 P. 2d 698, 698–699 (1997).

In December 1993, the Troxels commenced the present action by filing, in the Washington Superior Court for Skagit County, a petition to obtain visitation rights with Isabelle and Natalie. The Troxels filed their petition under two Washington statutes, Wash. Rev. Code §§ 26.09.240 and 26.10.160(3) (1994). Only the latter statute is at issue in this case. Section 26.10.160(3) provides: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." At trial, the Troxels requested two weekends of overnight visitation per month and two weeks of visitation each summer. Granville did not oppose visitation altogether, but instead asked the court to order one day of visitation per month with no overnight stay. 87 Wash. App., at 133–134, 940 P. 2d, at 699. In 1995, the Superior Court issued an oral ruling and entered a visitation decree ordering visitation one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays. 137 Wash. 2d, at 6, 969 P. 2d, at 23; App. to Pet. for Cert. 76a–78a.

Granville appealed, during which time she married Kelly Wynn. Before addressing the merits of Granville's appeal, the Washington Court of Appeals remanded the case to the Superior Court for entry of written findings of fact and conclusions of law. 137 Wash. 2d, at 6, 969 P. 2d, at 23. On remand, the Superior Court found that visitation was in Isabelle's and Natalie's best interests:

> "The Petitioners [the Troxels] are part of a large, central, loving family, all located in this area, and the Peti-

> tioners can provide opportunities for the children in the areas of cousins and music.
>
> ". . . The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefitted from spending quality time with the Petitioners, provided that that time is balanced with time with the childrens' *[sic]* nuclear family. The court finds that the childrens' *[sic]* best interests are served by spending time with their mother and stepfather's other six children." App. 70a.

Approximately nine months after the Superior Court entered its order on remand, Granville's husband formally adopted Isabelle and Natalie. *Id.*, at 60a–67a.

The Washington Court of Appeals reversed the lower court's visitation order and dismissed the Troxels' petition for visitation, holding that nonparents lack standing to seek visitation under § 26.10.160(3) unless a custody action is pending. In the Court of Appeals' view, that limitation on nonparental visitation actions was "consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the care, custody, and management of their children." 87 Wash. App., at 135, 940 P. 2d, at 700 (internal quotation marks omitted). Having resolved the case on the statutory ground, however, the Court of Appeals did not expressly pass on Granville's constitutional challenge to the visitation statute. *Id.*, at 138, 940 P. 2d, at 701.

The Washington Supreme Court granted the Troxels' petition for review and, after consolidating their case with two other visitation cases, affirmed. The court disagreed with the Court of Appeals' decision on the statutory issue and found that the plain language of § 26.10.160(3) gave the Troxels standing to seek visitation, irrespective of whether a custody action was pending. 137 Wash. 2d, at 12, 969 P.

2d, at 26–27. The Washington Supreme Court nevertheless agreed with the Court of Appeals' ultimate conclusion that the Troxels could not obtain visitation of Isabelle and Natalie pursuant to § 26.10.160(3). The court rested its decision on the Federal Constitution, holding that § 26.10.160(3) unconstitutionally infringes on the fundamental right of parents to rear their children. In the court's view, there were at least two problems with the nonparental visitation statute. First, according to the Washington Supreme Court, the Constitution permits a State to interfere with the right of parents to rear their children only to prevent harm or potential harm to a child. Section 26.10.160(3) fails that standard because it requires no threshold showing of harm. *Id.*, at 15–20, 969 P. 2d, at 28–30. Second, by allowing "'any person' to petition for forced visitation of a child at 'any time' with the only requirement being that the visitation serve the best interest of the child," the Washington visitation statute sweeps too broadly. *Id.*, at 20, 969 P. 2d, at 30. "It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision." *Ibid.*, 969 P. 2d, at 31. The Washington Supreme Court held that "[p]arents have a right to limit visitation of their children with third persons," and that between parents and judges, "the parents should be the ones to choose whether to expose their children to certain people or ideas." *Id.*, at 21, 969 P. 2d, at 31. Four justices dissented from the Washington Supreme Court's holding on the constitutionality of the statute. *Id.*, at 23–43, 969 P. 2d, at 32–42.

We granted certiorari, 527 U. S. 1069 (1999), and now affirm the judgment.

II

The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and

grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. U. S. Dept. of Commerce, Bureau of Census, Current Population Reports, 1997 Population Profile of the United States 27 (1998). Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role. For example, in 1998, approximately 4 million children—or 5.6 percent of all children under age 18—lived in the household of their grandparents. U. S. Dept. of Commerce, Bureau of Census, Current Population Reports, Marital Status and Living Arrangements: March 1998 (Update), p. *i* (1998).

The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family. Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties. The States' nonparental visitation statutes are further supported by a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons—for example, their grandparents. The extension of statutory rights in this area to persons other than a child's parents, however, comes with an obvious cost. For example, the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship. Contrary to JUSTICE STEVENS' accusation, our description of state nonparental visitation statutes in these terms, of course, is not meant to suggest that "children are so much chattel." *Post,* at 89 (dissenting opinion). Rather, our terminology is intended to highlight the fact that these

statutes can present questions of constitutional import. In this case, we are presented with just such a question. Specifically, we are asked to decide whether § 26.10.160(3), as applied to Tommie Granville and her family, violates the Federal Constitution.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." *Washington* v. *Glucksberg*, 521 U. S. 702, 719 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.*, at 720; see also *Reno* v. *Flores*, 507 U. S. 292, 301–302 (1993).

The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer* v. *Nebraska*, 262 U. S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*, at 535. We returned to the subject in *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary

function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*, at 166.

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, *e. g.*, *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); *Wisconsin* v. *Yoder*, 406 U. S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quilloin* v. *Walcott*, 434 U. S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham* v. *J. R.*, 442 U. S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Santosky* v. *Kramer*, 455 U. S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg*, *supra*, at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad. According to the statute's text, "*[a]ny person* may petition the court for visitation rights *at any time*," and the court may grant such visitation rights whenever "visitation may serve *the best interest of the child*." § 26.10.160(3) (emphases added). That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests. The Washington Supreme Court had the opportunity to give § 26.10.160(3) a narrower reading, but it declined to do so. See, *e. g.*, 137 Wash. 2d, at 5, 969 P. 2d, at 23 ("[The statute] allow[s] any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm"); *id.*, at 20, 969 P. 2d, at 30 ("[The statute] allow[s] 'any person' to petition for forced visitation of a child at 'any time' with the only requirement being that the visitation serve the best interest of the child").

Turning to the facts of this case, the record reveals that the Superior Court's order was based on precisely the type of mere disagreement we have just described and nothing more. The Superior Court's order was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters. To be sure, this case involves a visitation petition filed by grandparents soon after the death of their son—the father of Isabelle and Natalie—but the combination of several factors here compels our conclusion that § 26.10.160(3), as applied, exceeded the bounds of the Due Process Clause.

First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children. As this Court explained in *Parham:*

> "[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." 442 U. S., at 602 (alteration in original) (internal quotation marks and citations omitted).

Accordingly, so long as a parent adequately cares for his or her children (*i. e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the

best decisions concerning the rearing of that parent's children. See, *e. g.*, *Flores*, 507 U. S., at 304.

The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption. In reciting its oral ruling after the conclusion of closing arguments, the Superior Court judge explained:

> "The burden is to show that it is in the best interest of the children to have some visitation and some quality time with their grandparents. I think in most situations a commonsensical approach [is that] it is normally in the best interest of the children to spend quality time with the grandparent, unless the grandparent, *[sic]* there are some issues or problems involved wherein the grandparents, their lifestyles are going to impact adversely upon the children. That certainly isn't the case here from what I can tell." Verbatim Report of Proceedings in *In re Troxel*, No. 93–3–00650–7 (Wash. Super. Ct., Dec. 14, 19, 1994), p. 213 (hereinafter Verbatim Report).

The judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely." In effect, the judge placed on Granville, the fit custodial parent, the burden of *disproving* that visitation would be in the best interest of her daughters. The judge reiterated moments later: "I think [visitation with the Troxels] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children." *Id.*, at 214.

The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. See *Parham*, *supra*, at 602. In that respect, the court's pre-

sumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters. Cf., *e. g.*, Cal. Fam. Code Ann. § 3104(e) (West 1994) (rebuttable presumption that grandparent visitation is not in child's best interest if parents agree that visitation rights should not be granted); Me. Rev. Stat. Ann., Tit. 19A, § 1803(3) (1998) (court may award grandparent visitation if in best interest of child and "would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child"); Minn. Stat. § 257.022(2)(a)(2) (1998) (court may award grandparent visitation if in best interest of child and "such visitation would not interfere with the parent-child relationship"); Neb. Rev. Stat. § 43–1802(2) (1998) (court must find "by clear and convincing evidence" that grandparent visitation "will not adversely interfere with the parent-child relationship"); R. I. Gen. Laws § 15–5–24.3(a)(2)(v) (Supp. 1999) (grandparent must rebut, by clear and convincing evidence, presumption that parent's decision to refuse grandparent visitation was reasonable); Utah Code Ann. § 30–5–2(2)(e) (1998) (same); *Hoff* v. *Berg*, 595 N. W. 2d 285, 291–292 (N. D. 1999) (holding North Dakota grandparent visitation statute unconstitutional because State has no "compelling interest in presuming visitation rights of grandparents to an unmarried minor are in the child's best interests and forcing parents to accede to court-ordered grandparental visitation unless the parents are first able to prove such visitation is not in the best interests of their minor child"). In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.

Finally, we note that there is no allegation that Granville ever sought to cut off visitation entirely. Rather, the present dispute originated when Granville informed the Troxels that she would prefer to restrict their visitation with Isabelle and Natalie to one short visit per month and special holidays. See 87 Wash. App., at 133, 940 P. 2d, at 699; Verbatim Report 12. In the Superior Court proceedings Granville did not oppose visitation but instead asked that the duration of any visitation order be shorter than that requested by the Troxels. While the Troxels requested two weekends per month and two full weeks in the summer, Granville asked the Superior Court to order only one day of visitation per month (with no overnight stay) and participation in the Granville family's holiday celebrations. See 87 Wash. App., at 133, 940 P. 2d, at 699; Verbatim Report 9 ("Right off the bat we'd like to say that our position is that grandparent visitation is in the best interest of the children. It is a matter of how much and how it is going to be structured") (opening statement by Granville's attorney). The Superior Court gave no weight to Granville's having assented to visitation even before the filing of any visitation petition or subsequent court intervention. The court instead rejected Granville's proposal and settled on a middle ground, ordering one weekend of visitation per month, one week in the summer, and time on both of the petitioning grandparents' birthdays. See 87 Wash. App., at 133–134, 940 P. 2d, at 699; Verbatim Report 216–221. Significantly, many other States expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party. See, *e. g.*, Miss. Code Ann. § 93–16–3(2)(a) (1994) (court must find that "the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child"); Ore. Rev. Stat. § 109.121(1)(a)(B) (1997) (court may award visitation if the "custodian of the child has denied the grandparent reasonable opportunity to visit the child"); R. I. Gen. Laws §§ 15–5–

24.3(a)(2)(iii)–(iv) (Supp. 1999) (court must find that parents prevented grandparent from visiting grandchild and that "there is no other way the petitioner is able to visit his or her grandchild without court intervention").

Considered together with the Superior Court's reasons for awarding visitation to the Troxels, the combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters. The Washington Superior Court failed to accord the determination of Granville, a fit custodial parent, any material weight. In fact, the Superior Court made only two formal findings in support of its visitation order. First, the Troxels "are part of a large, central, loving family, all located in this area, and the [Troxels] can provide opportunities for the children in the areas of cousins and music." App. 70a. Second, "[t]he children would be benefitted from spending quality time with the [Troxels], provided that that time is balanced with time with the childrens' *[sic]* nuclear family." *Ibid.* These slender findings, in combination with the court's announced presumption in favor of grandparent visitation and its failure to accord significant weight to Granville's already having offered meaningful visitation to the Troxels, show that this case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests. The Superior Court's announced reason for ordering one week of visitation in the summer demonstrates our conclusion well: "I look back on some personal experiences . . . . We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out." Verbatim Report 220–221. As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right

of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made. Neither the Washington nonparental visitation statute generally—which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted—nor the Superior Court in this specific case required anything more. Accordingly, we hold that § 26.10.160(3), as applied in this case, is unconstitutional.

Because we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." *Post*, at 101 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.* See, *e. g.*, *Fair-*

*All 50 States have statutes that provide for grandparent visitation in some form. See Ala. Code § 30–3–4.1 (1989); Alaska Stat. Ann. § 25.20.065 (1998); Ariz. Rev. Stat. Ann. § 25–409 (1994); Ark. Code Ann. § 9–13–103 (1998); Cal. Fam. Code Ann. § 3104 (West 1994); Colo. Rev. Stat. § 19–1–117 (1999); Conn. Gen. Stat. § 46b–59 (1995); Del. Code Ann., Tit. 10, § 1031(7) (1999); Fla. Stat. § 752.01 (1997); Ga. Code Ann. § 19–7–3 (1991); Haw. Rev. Stat. § 571–46.3 (1999); Idaho Code § 32–719 (1999); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Ind. Code § 31–17–5–1 (1999); Iowa Code § 598.35 (1999); Kan. Stat. Ann. § 38–129 (1993); Ky. Rev. Stat. Ann. § 405.021 (Baldwin 1990); La. Rev. Stat. Ann. § 9:344 (West Supp. 2000); La. Civ. Code Ann., Art. 136 (West Supp. 2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998);

banks v. *McCarter*, 330 Md. 39, 49–50, 622 A. 2d 121, 126–127 (1993) (interpreting best-interest standard in grandparent visitation statute normally to require court's consideration of certain factors); *Williams* v. *Williams*, 256 Va. 19, 501 S. E. 2d 417, 418 (1998) (interpreting Virginia nonparental visitation statute to require finding of harm as condition precedent to awarding visitation).

Justice Stevens criticizes our reliance on what he characterizes as merely "a guess" about the Washington courts' interpretation of § 26.10.160(3). *Post*, at 82 (dissenting opinion). Justice Kennedy likewise states that "[m]ore specific guidance should await a case in which a State's highest court has considered all of the facts in the course of elaborating the protection afforded to parents by the laws of the State and by the Constitution itself." *Post*, at 102 (dissenting opinion). We respectfully disagree. There is no need to hypothesize about how the Washington courts *might* apply § 26.10.160(3) because the Washington Superior Court *did* apply the statute in this very case. Like the Washington Supreme Court, then, we are presented with an actual visitation order and the reasons why the Superior Court believed

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Md. Fam. Law Code Ann. § 9–102 (1999); Mass. Gen. Laws § 119:39D (1996); Mich. Comp. Laws Ann. § 722.27b (West Supp. 1999); Minn. Stat. § 257.022 (1998); Miss. Code Ann. § 93–16–3 (1994); Mo. Rev. Stat. § 452.402 (Supp. 1999); Mont. Code Ann. § 40–9–102 (1997); Neb. Rev. Stat. § 43–1802 (1998); Nev. Rev. Stat. § 125C.050 (Supp. 1999); N. H. Rev. Stat. Ann. § 458:17–d (1992); N. J. Stat. Ann. § 9:2–7.1 (West Supp. 1999–2000); N. M. Stat. Ann. § 40–9–2 (1999); N. Y. Dom. Rel. Law § 72 (McKinney 1999); N. C. Gen. Stat. §§ 50–13.2, 50–13.2A (1999); N. D. Cent. Code § 14–09–05.1 (1997); Ohio Rev. Code Ann. §§ 3109.051, 3109.11 (Supp. 1999); Okla. Stat., Tit. 10, § 5 (Supp. 1999); Ore. Rev. Stat. § 109.121 (1997); 23 Pa. Cons. Stat. §§ 5311–5313 (1991); R. I. Gen. Laws §§ 15–5–24 to 15–5–24.3 (Supp. 1999); S. C. Code Ann. § 20–7–420(33) (Supp. 1999); S. D. Codified Laws § 25–4–52 (1999); Tenn. Code Ann. §§ 36–6–306, 36–6–307 (Supp. 1999); Tex. Fam. Code Ann. § 153.433 (Supp. 2000); Utah Code Ann. § 30–5–2 (1998); Vt. Stat. Ann., Tit. 15, §§ 1011–1013 (1989); Va. Code Ann. § 20–124.2 (1995); W. Va. Code §§ 48–2B–1 to 48–2B–7 (1999); Wis. Stat. §§ 767.245, 880.155 (1993–1994); Wyo. Stat. Ann. § 20–7–101 (1999).

entry of the order was appropriate in this case. Faced with the Superior Court's application of § 26.10.160(3) to Granville and her family, the Washington Supreme Court chose not to give the statute a narrower construction. Rather, that court gave § 26.10.160(3) a literal and expansive interpretation. As we have explained, that broad construction plainly encompassed the Superior Court's application of the statute. See *supra*, at 67.

There is thus no reason to remand the case for further proceedings in the Washington Supreme Court. As JUSTICE KENNEDY recognizes, the burden of litigating a domestic relations proceeding can itself be "so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated." *Post*, at 101. In this case, the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without a doubt already substantial. As we have explained, it is apparent that the entry of the visitation order in this case violated the Constitution. We should say so now, without forcing the parties into additional litigation that would further burden Granville's parental right. We therefore hold that the application of § 26.10.160(3) to Granville and her family violated her due process right to make decisions concerning the care, custody, and control of her daughters.

Accordingly, the judgment of the Washington Supreme Court is affirmed.

It is so ordered.

JUSTICE SOUTER, concurring in the judgment.

I concur in the judgment affirming the decision of the Supreme Court of Washington, whose facial invalidation of its own state statute is consistent with this Court's prior cases addressing the substantive interests at stake. I would say no more. The issues that might well be presented by reviewing a decision addressing the specific application of the

state statute by the trial court, *ante*, at 68–73, are not before us and do not call for turning any fresh furrows in the "treacherous field" of substantive due process. *Moore* v. *East Cleveland*, 431 U. S. 494, 502 (1977) (opinion of Powell, J.).

The Supreme Court of Washington invalidated its state statute based on the text of the statute alone, not its application to any particular case.[1] Its ruling rested on two independently sufficient grounds: the failure of the statute to require harm to the child to justify a disputed visitation order, *In re Smith*, 137 Wash. 2d 1, 17, 969 P. 2d 21, 29 (1998), and the statute's authorization of "any person" at "any time" to petition for and to receive visitation rights subject only to a free-ranging best-interests-of-the-child standard, *id.*, at 20–21, 969 P. 2d, at 30–31. *Ante*, at 63. I see no error in the second reason, that because the state statute authorizes any person at any time to request (and a judge to award) visitation rights, subject only to the State's particular best-

[1] The Supreme Court of Washington made its ruling in an action where three separate cases, including the Troxels', had been consolidated. *In re Smith*, 137 Wash. 2d 1, 6–7, 969 P. 2d 21, 23–24 (1998). The court also addressed two statutes, Wash. Rev. Code § 26.10.160(3) (Supp. 1996) and former Wash. Rev. Code § 26.09.240 (1994), 137 Wash. 2d, at 7, 969 P. 2d, at 24, the latter of which is not even at issue in this case. See Brief for Petitioners 6, n. 9; see also *ante*, at 61. Its constitutional analysis discussed only the statutory language and neither mentioned the facts of any of the three cases nor reviewed the records of their trial court proceedings below. 137 Wash. 2d, at 13–21, 969 P. 2d, at 27–31. The decision invalidated both statutes without addressing their application to particular facts: "We conclude petitioners have standing but, *as written*, the statutes violate the parents' constitutionally protected interests. These statutes allow any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm." *Id.*, at 5, 969 P. 2d, at 23 (emphasis added); see also *id.*, at 21, 969 P. 2d, at 31 ("RCW 26.10.160(3) and former RCW 26.09.240 impermissibly interfere with a parent's fundamental interest in the care, custody and companionship of the child" (citations and internal quotation marks omitted)).

interests standard, the state statute sweeps too broadly and is unconstitutional on its face. Consequently, there is no need to decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections.

We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment. See, *e. g., Meyer* v. *Nebraska*, 262 U. S. 390, 399, 401 (1923); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925); *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972); *Wisconsin* v. *Yoder*, 406 U. S. 205, 232 (1972); *Quilloin* v. *Walcott*, 434 U. S. 246, 255 (1978); *Parham* v. *J. R.*, 442 U. S. 584, 602 (1979); *Santosky* v. *Kramer*, 455 U. S. 745, 753 (1982); *Washington* v. *Glucksberg*, 521 U. S. 702, 720 (1997). As we first acknowledged in *Meyer*, the right of parents to "bring up children," 262 U. S., at 399, and "to control the education of their own" is protected by the Constitution, *id.*, at 401. See also *Glucksberg*, *supra*, at 761 (SOUTER, J., concurring in judgment).

On the basis of this settled principle, the Supreme Court of Washington invalidated its statute because it authorized a contested visitation order at the intrusive behest of any person at any time subject only to a best-interests-of-the-child standard. In construing the statute, the state court explained that the "any person" at "any time" language was to be read literally, 137 Wash. 2d, at 10–11, 969 P. 2d, at 25–27, and that "[m]ost notably the statut[e] do[es] not require the petitioner to establish that he or she has a substantial relationship with the child," *id.*, at 20–21, 969 P. 2d, at 31. Although the statute speaks of granting visitation rights whenever "visitation may serve the best interest of the child," Wash. Rev. Code § 26.10.160(3) (1994), the state court authoritatively read this provision as placing hardly any limit on a court's discretion to award visitation rights. As the court understood it, the specific best-interests provision in the

statute would allow a court to award visitation whenever it thought it could make a better decision than a child's parent had done. See 137 Wash. 2d, at 20, 969 P. 2d, at 31 ("It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision").[2] On that basis in part, the Supreme Court of Washington invalidated the State's own statute: "Parents have a right to limit visitation of their children with third persons." *Id.*, at 21, 969 P. 2d, at 31.

Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child, but *Meyer*'s repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by "any party" at "any time" a judge believed he "could make a 'better' decision"[3] than the objecting parent had done. The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child's social companions is not essentially different from the designation of the adults who will influence the child in school. Even a State's considered judgment about the preferable political and religious character of schoolteachers is not entitled

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[2] As JUSTICE O'CONNOR points out, the best-interests provision "contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge." *Ante*, at 67.

[3] Cf. *Chicago* v. *Morales*, 527 U. S. 41, 71 (1999) (BREYER, J., concurring in part and concurring in judgment) ("The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications").

to prevail over a parent's choice of private school. *Pierce*, *supra*, at 535 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"). It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent.[4] To say the least (and as the Court implied in *Pierce*), parental choice in such matters is not merely a default rule in the absence of either governmental choice or the government's designation of an official with the power to choose for whatever reason and in whatever circumstances.

Since I do not question the power of a State's highest court to construe its domestic statute and to apply a demanding standard when ruling on its facial constitutionality,[5] see *Chicago* v. *Morales*, 527 U. S. 41, 55, n. 22 (1999) (opinion of STEVENS, J.), this for me is the end of the case. I would simply affirm the decision of the Supreme Court of Washington that its statute, authorizing courts to grant visitation rights to any person at any time, is unconstitutional. I therefore respectfully concur in the judgment.

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[4] The Supreme Court of Washington invalidated the broadly sweeping statute at issue on similarly limited reasoning: "Some parents and judges will not care if their child is physically disciplined by a third person; some parents and judges will not care if a third person teaches the child a religion inconsistent with the parents' religion; and some judges and parents will not care if the child is exposed to or taught racist or sexist beliefs. But many parents and judges will care, and, between the two, the parents should be the ones to choose whether to expose their children to certain people or ideas." 137 Wash. 2d, at 21, 969 P. 2d, at 31 (citation omitted).

[5] This is the pivot between JUSTICE KENNEDY's approach and mine.

JUSTICE THOMAS, concurring in the judgment.

I write separately to note that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision. As a result, I express no view on the merits of this matter, and I understand the plurality as well to leave the resolution of that issue for another day.*

Consequently, I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. Our decision in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. The opinions of the plurality, JUSTICE KENNEDY, and JUSTICE SOUTER recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties. On this basis, I would affirm the judgment below.

JUSTICE STEVENS, dissenting.

The Court today wisely declines to endorse either the holding or the reasoning of the Supreme Court of Washington. In my opinion, the Court would have been even wiser to deny certiorari. Given the problematic character of the trial court's decision and the uniqueness of the Washington statute, there was no pressing need to review a State Su-

*This case also does not involve a challenge based upon the Privileges and Immunities Clause and thus does not present an opportunity to reevaluate the meaning of that Clause. See *Saenz* v. *Roe*, 526 U. S. 489, 527–528 (1999) (THOMAS, J., dissenting).

preme Court decision that merely requires the state legislature to draft a better statute.

Having decided to address the merits, however, the Court should begin by recognizing that the State Supreme Court rendered a federal constitutional judgment holding a state law invalid on its face. In light of that judgment, I believe that we should confront the federal questions presented directly. For the Washington statute is not made facially invalid either because it may be invoked by too many hypothetical plaintiffs, or because it leaves open the possibility that someone may be permitted to sustain a relationship with a child without having to prove that serious harm to the child would otherwise result.

I

In response to Tommie Granville's federal constitutional challenge, the State Supreme Court broadly held that Wash. Rev. Code § 26.10.160(3) (Supp. 1996) was invalid on its face under the Federal Constitution.[1] Despite the nature of this judgment, JUSTICE O'CONNOR would hold that the Washington visitation statute violated the Due Process Clause of the Fourteenth Amendment only as applied. *Ante*, at 65, 67, 73 (plurality opinion). I agree with JUSTICE SOUTER, *ante*, at 75–76, and n. 1 (opinion concurring in judgment), that this approach is untenable.

The task of reviewing a trial court's application of a state statute to the particular facts of a case is one that should be performed in the first instance by the state appellate courts. In this case, because of their views of the Federal Constitution, the Washington state appeals courts have yet to decide whether the trial court's findings were adequate under the

[1] The State Supreme Court held that, "as written, the statutes violate the parents' constitutionally protected interests." *In re Smith*, 137 Wash. 2d 1, 5, 969 P. 2d 21, 23 (1998).

statute.[2] Any as-applied critique of the trial court's judgment that this Court might offer could only be based upon a guess about the state courts' application of that State's statute, and an independent assessment of the facts in this case—both judgments that we are ill-suited and ill-advised to make.[3]

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[2] As the dissenting judge on the state appeals court noted, "[t]he trial court here was not presented with any guidance as to the proper test to be applied in a case such as this." *In re Troxel*, 87 Wash. App. 131, 143, 940 P. 2d 698, 703 (1997) (opinion of Ellington, J.). While disagreeing with the appeals court majority's conclusion that the state statute was constitutionally infirm, Judge Ellington recognized that despite this disagreement, the appropriate result would not be simply to affirm. Rather, because there had been no definitive guidance as to the proper construction of the statute, "[t]he findings necessary to order visitation over the objections of a parent are thus not in the record, and I would remand for further proceedings." *Ibid.*

[3] Unlike JUSTICE O'CONNOR, *ante*, at 69–70, I find no suggestion in the trial court's decision in this case that the court was applying any presumptions at all in its analysis, much less one in favor of the grandparents. The first excerpt JUSTICE O'CONNOR quotes from the trial court's ruling, *ante*, at 69, says nothing one way or another about *who* bears the burden under the statute of demonstrating "best interests." There is certainly no indication of a presumption *against* the parents' judgment, only a "'commonsensical'" estimation that, usually but not always, visiting with grandparents can be good for children. *Ibid.* The second quotation, "'I think [visitation] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children,'" *ibid.*, sounds as though the judge has simply concluded, based on the evidence before him, that visitation in this case would be in the best interests of both girls. Verbatim Report of Proceedings in *In re Troxel*, No. 93–3–00650–7 (Wash. Super. Ct., Dec. 14, 1994), p. 214. These statements do not provide us with a definitive assessment of the law the court applied regarding a "presumption" either way. Indeed, a different impression is conveyed by the judge's very next comment: "That has to be balanced, of course, with Mr. and Mrs. Wynn [a.k.a. Tommie Granville], who are trying to put together a family that includes eight children, . . . trying to get all those children together at the same time and put together some sort of functional unit wherein the children can be raised as brothers and sisters and spend lots of quality time together." *Ibid.* The judge then went on to reject the Troxels' efforts to attain the same level of visitation that

While I thus agree with JUSTICE SOUTER in this respect, I do not agree with his conclusion that the State Supreme Court made a definitive construction of the visitation statute that necessitates the constitutional conclusion he would draw.[4] As I read the State Supreme Court's opinion, *In re Smith*, 137 Wash. 2d 1, 19–20, 969 P. 2d 21, 30–31 (1998), its interpretation of the Federal Constitution made it unnecessary to adopt a definitive construction of the statutory text, or, critically, to decide whether the statute had been correctly applied in this case. In particular, the state court gave no content to the phrase, "best interest of the child," Wash. Rev. Code § 26.10.160(3) (Supp. 1996)—content that might well be gleaned from that State's own statutes or decisional law employing the same phrase in different contexts,

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their son, the girls' biological father, would have had, had he been alive. "[T]he fact that Mr. Troxel is deceased and he was the natural parent and as much as the grandparents would maybe like to step into the shoes of Brad, under our law that is not what we can do. The grandparents cannot step into the shoes of a deceased parent, per say *[sic]*, as far as whole gamut of visitation rights are concerned." *Id.*, at 215. Rather, as the judge put it, "I understand your desire to do that as loving grandparents. Unfortunately that would impact too dramatically on the children and their ability to be integrated into the nuclear unit with the mother." *Id.*, at 222–223.

However one understands the trial court's decision—and my point is merely to demonstrate that it is surely open to interpretation—its validity under the state statute as written is a judgment for the state appellate courts to make in the first instance.

[4] JUSTICE SOUTER would conclude from the state court's statement that the statute "do[es] not require the petitioner to establish that he or she has a substantial relationship with the child," 137 Wash. 2d, at 21, 969 P. 2d, at 31, that the state court has "authoritatively read [the 'best interests'] provision as placing hardly any limit on a court's discretion to award visitation rights," *ante*, at 77 (opinion concurring in judgment). Apart from the question whether one can deem this description of the statute an "authoritative" construction, it seems to me exceedingly unlikely that the state court held the statute unconstitutional because it believed that the "best interests" standard imposes "hardly any limit" on courts' discretion. See n. 5, *infra*.

and from the myriad other state statutes and court decisions at least nominally applying the same standard.[5] Thus, I believe that JUSTICE SOUTER's conclusion that the statute unconstitutionally imbues state trial court judges with "'too much discretion in *every* case,'" *ante*, at 78, n. 3 (opinion concurring in judgment) (quoting *Chicago* v. *Morales*, 527 U. S. 41, 71 (1999) (BREYER, J., concurring)), is premature.

We are thus presented with the unconstrued terms of a state statute and a State Supreme Court opinion that, in my view, significantly misstates the effect of the Federal Constitution upon any construction of that statute. Given that posture, I believe the Court should identify and correct the two flaws in the reasoning of the state court's majority opin-

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[5] The phrase "best interests of the child" appears in no less than 10 current Washington state statutory provisions governing determinations from guardianship to termination to custody to adoption. See, *e. g.*, Wash. Rev. Code § 26.09.240(6) (Supp. 1996) (amended version of visitation statute enumerating eight factors courts may consider in evaluating a child's best interests); § 26.09.002 (in cases of parental separation or divorce "best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care"; "best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm"); § 26.10.100 ("The court shall determine custody in accordance with the best interests of the child"). Indeed, the Washington state courts have invoked the standard on numerous occasions in applying these statutory provisions—just as if the phrase had quite specific and apparent meaning. See, *e. g.*, *In re McDoyle*, 122 Wash. 2d 604, 859 P. 2d 1239 (1993) (upholding trial court "best interest" assessment in custody dispute); *McDaniels* v. *Carlson*, 108 Wash. 2d 299, 310, 738 P. 2d 254, 261 (1987) (elucidating "best interests" standard in paternity suit context). More broadly, a search of current state custody and visitation laws reveals fully 698 separate references to the "best interest of the child" standard, a number that, at a minimum, should give the Court some pause before it upholds a decision implying that those words, on their face, may be too boundless to pass muster under the Federal Constitution.

ion, and remand for further review of the trial court's disposition of this specific case.

II

In my view, the State Supreme Court erred in its federal constitutional analysis because neither the provision granting "any person" the right to petition the court for visitation, 137 Wash. 2d, at 20, 969 P. 2d, at 30, nor the absence of a provision requiring a "threshold . . . finding of harm to the child," *ibid.*, provides a sufficient basis for holding that the statute is invalid in all its applications. I believe that a facial challenge should fail whenever a statute has "a 'plainly legitimate sweep,' " *Washington* v. *Glucksberg*, 521 U. S. 702, 739–740, and n. 7 (1997) (STEVENS, J., concurring in judgment).[6] Under the Washington statute, there are plainly any number of cases—indeed, one suspects, the most common to arise—in which the "person" among "any" seeking visitation is a once-custodial caregiver, an intimate relation, or even a genetic parent. Even the Court would seem to agree that in many circumstances, it would be constitutionally permissible for a court to award some visitation of a child to a parent or previous caregiver in cases of parental separation or divorce, cases of disputed custody, cases involving temporary foster care or guardianship, and so forth. As the statute plainly sweeps in a great deal of the permissible, the State Supreme Court majority incorrectly concluded that a statute authorizing "any person" to file a petition seeking visitation privileges would invariably run afoul of the Fourteenth Amendment.

The second key aspect of the Washington Supreme Court's holding—that the Federal Constitution requires a showing of actual or potential "harm" to the child before a court may

[6] It necessarily follows that under the far more stringent demands suggested by the majority in *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) (plaintiff seeking facial invalidation "must establish that no set of circumstances exists under which the Act would be valid"), respondent's facial challenge must fail.

order visitation continued over a parent's objections—finds no support in this Court's case law. While, as the Court recognizes, the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment by the State, see *infra* this page and 87–88, we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm.[7] The presumption that parental decisions generally serve the best interests of their children is sound, and clearly in the normal case the parent's interest is paramount. But even a fit parent is capable of treating a child like a mere possession.

Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child.

It has become standard practice in our substantive due process jurisprudence to begin our analysis with an identification of the "fundamental" liberty interests implicated by the challenged state action. See, *e. g.*, *ante*, at 65–66 (opinion of O'CONNOR, J.); *Washington* v. *Glucksberg*, 521 U. S. 702 (1997); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). My colleagues are of course correct to recognize that the right of a parent to maintain a relationship with his or her child is among the interests in-

[7] The suggestion by JUSTICE THOMAS that this case may be resolved solely with reference to our decision in *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925), is unpersuasive. *Pierce* involved a parent's choice whether to send a child to public or private school. While that case is a source of broad language about the scope of parents' due process rights with respect to their children, the constitutional principles and interests involved in the schooling context do not necessarily have parallel implications in this family law visitation context, in which multiple overlapping and competing prerogatives of various plausibly interested parties are at stake.

cluded most often in the constellation of liberties protected through the Fourteenth Amendment. *Ante*, at 65–66 (opinion of O'CONNOR, J.). Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest—absent exceptional circumstances—in doing so without the undue interference of strangers to them and to their child. Moreover, and critical in this case, our cases applying this principle have explained that with this constitutional liberty comes a presumption (albeit a rebuttable one) that "natural bonds of affection lead parents to act in the best interests of their children." *Parham* v. *J. R.*, 442 U. S. 584, 602 (1979); see also *Casey*, 505 U. S., at 895; *Santosky* v. *Kramer*, 455 U. S. 745, 759 (1982) (State may not presume, at factfinding stage of parental rights termination proceeding, that interests of parent and child diverge); see also *ante*, at 68–69 (opinion of O'CONNOR, J.).

Despite this Court's repeated recognition of these significant parental liberty interests, these interests have never been seen to be without limits. In *Lehr* v. *Robertson*, 463 U. S. 248 (1983), for example, this Court held that a putative biological father who had never established an actual relationship with his child did not have a constitutional right to notice of his child's adoption by the man who had married the child's mother. As this Court had recognized in an earlier case, a parent's liberty interests "'do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.'" *Id.*, at 260 (quoting *Caban* v. *Mohammed*, 441 U. S. 380, 397 (1979)).

Conversely, in *Michael H.* v. *Gerald D.*, 491 U. S. 110 (1989), this Court concluded that despite both biological parenthood and an established relationship with a young child, a father's due process liberty interest in maintaining some connection with that child was not sufficiently powerful to overcome a state statutory presumption that the husband of the child's mother was the child's parent. As a result of the

presumption, the biological father could be denied even visitation with the child because, as a matter of state law, he was not a "parent." A plurality of this Court there recognized that the parental liberty interest was a function, not simply of "isolated factors" such as biology and intimate connection, but of the broader and apparently independent interest in family. See, *e. g.*, *id.*, at 123; see also *Lehr*, 463 U. S., at 261; *Smith* v. *Organization of Foster Families For Equality & Reform*, 431 U. S. 816, 842–847 (1977); *Moore* v. *East Cleveland*, 431 U. S. 494, 498–504 (1977).

A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae*, see, *e. g.*, *Reno* v. *Flores*, 507 U. S. 292, 303–304 (1993); *Santosky* v. *Kramer*, 455 U. S., at 766; *Parham*, 442 U. S., at 605; *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944), and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection, *Santosky*, 455 U. S., at 760.

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, 491 U. S., at 130 (reserving the question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.[8] At a minimum, our prior cases rec-

[8] This Court has on numerous occasions acknowledged that children are in many circumstances possessed of constitutionally protected rights and liberties. See *Parham* v. *J. R.*, 442 U. S. 584, 600 (1979) (liberty interest in avoiding involuntary confinement); *Planned Parenthood of Central*

ognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel. See *ante*, at 64–65 (opinion of O'CONNOR, J.) (describing States' recognition of "an independent third-party interest in a child"). The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.[9]

This is not, of course, to suggest that a child's liberty interest in maintaining contact with a particular individual is to be treated invariably as on a par with that child's parents' contrary interests. Because our substantive due process case law includes a strong presumption that a parent will act

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Mo. v. *Danforth*, 428 U. S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights"); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 506–507 (1969) (First Amendment right to political speech); *In re Gault*, 387 U. S. 1, 13 (1967) (due process rights in criminal proceedings).

[9] Cf., *e. g.*, *Wisconsin* v. *Yoder*, 406 U. S. 205, 244–246 (1972) (Douglas, J., dissenting) ("While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition. It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. . . . It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny"). The majority's disagreement with Justice Douglas in that case turned not on any contrary view of children's interest in their own education, but on the impact of the Free Exercise Clause of the First Amendment on its analysis of school-related decisions by the Amish community.

in the best interest of her child, it would be necessary, were the state appellate courts actually to confront a challenge to the statute as applied, to consider whether the trial court's assessment of the "best interest of the child" incorporated that presumption. Neither would I decide whether the trial court applied Washington's statute in a constitutional way in this case, although, as I have explained, n. 3, *supra*, I think the outcome of this determination is far from clear. For the purpose of a facial challenge like this, I think it safe to assume that trial judges usually give great deference to parents' wishes, and I am not persuaded otherwise here.

But presumptions notwithstanding, we should recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a "person" other than a parent. The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily. It is indisputably the business of the States, rather than a federal court employing a national standard, to assess in the first instance the relative importance of the conflicting interests that give rise to disputes such as this.[10] Far from guaranteeing that

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[10] See *Palmore* v. *Sidoti*, 466 U. S. 429, 431 (1984) ("The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court"); cf. *Collins* v. *Harker Heights*, 503 U. S. 115, 128 (1992) (matters involving competing and multifaceted social and policy decisions best left to local decisionmaking); *Regents of Univ. of Mich.* v. *Ewing*, 474 U. S. 214, 226 (1985) (emphasizing our "reluctance to trench on the prerogatives of state and local educational institutions" as federal courts are ill-suited to "evaluate the substance of the multitude of academic decisions that are made daily by" experts in the field evaluating cumulative information). That caution is never more essential than in the realm of family and intimate relations. In part, this principle is based on long-established, if somewhat arbitrary, tradition in

parents' interests will be trammeled in the sweep of cases arising under the statute, the Washington law merely gives an individual—with whom a child may have an established relationship—the procedural right to ask the State to act as arbiter, through the entirely well-known best-interests standard, between the parent's protected interests and the child's. It seems clear to me that the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child.

Accordingly, I respectfully dissent.

JUSTICE SCALIA, dissenting.

In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all men . . . are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative

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allocating responsibility for resolving disputes of various kinds in our federal system. *Ankenbrandt* v. *Richards*, 504 U. S. 689 (1992). But the instinct against overregularizing decisions about personal relations is sustained on firmer ground than mere tradition. It flows in equal part from the premise that people and their intimate associations are complex and particular, and imposing a rigid template upon them all risks severing bonds our society would do well to preserve.

democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.

Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children[1]—two of them from an era rich in substantive due process holdings that have since been repudiated. See *Meyer* v. *Nebraska*, 262 U. S. 390, 399, 401 (1923); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925); *Wisconsin* v. *Yoder*, 406 U. S. 205, 232–233 (1972). Cf. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937) (overruling *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525 (1923)). The sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.

Judicial vindication of "parental rights" under a Constitution that does not even mention them requires (as JUSTICE KENNEDY's opinion rightly points out) not only a judicially crafted definition of parents, but also—unless, as no one be-

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[1] Whether parental rights constitute a "liberty" interest for purposes of procedural due process is a somewhat different question not implicated here. *Stanley* v. *Illinois*, 405 U. S. 645 (1972), purports to rest in part upon that proposition, see *id.*, at 651–652; but see *Michael H.* v. *Gerald D.*, 491 U. S. 110, 120–121 (1989) (plurality opinion), though the holding is independently supported on equal protection grounds, see *Stanley*, *supra*, at 658.

lieves, the parental rights are to be absolute—judicially approved assessments of "harm to the child" and judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.) who may have some claim against the wishes of the parents. If we embrace this unenumerated right, I think it obvious—whether we affirm or reverse the judgment here, or remand as JUSTICE STEVENS or JUSTICE KENNEDY would do—that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.[2]

For these reasons, I would reverse the judgment below.

JUSTICE KENNEDY, dissenting.

The Supreme Court of Washington has determined that petitioners Jenifer and Gary Troxel have standing under state law to seek court-ordered visitation with their grandchildren, notwithstanding the objections of the children's parent, respondent Tommie Granville. The statute relied upon provides:

> "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." Wash. Rev. Code § 26.10.160(3) (1994).

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[2] I note that respondent is asserting only, *on her own behalf*, a substantive due process right to direct the upbringing of her own children, and is not asserting, *on behalf of her children*, their First Amendment rights of association or free exercise. I therefore do not have occasion to consider whether, and under what circumstances, the parent could assert the latter enumerated rights.

After acknowledging this statutory right to sue for visitation, the State Supreme Court invalidated the statute as violative of the United States Constitution, because it interfered with a parent's right to raise his or her child free from unwarranted interference. *In re Smith*, 137 Wash. 2d 1, 969 P. 2d 21 (1998). Although parts of the court's decision may be open to differing interpretations, it seems to be agreed that the court invalidated the statute on its face, ruling it a nullity.

The first flaw the State Supreme Court found in the statute is that it allows an award of visitation to a nonparent without a finding that harm to the child would result if visitation were withheld; and the second is that the statute allows any person to seek visitation at any time. In my view the first theory is too broad to be correct, as it appears to contemplate that the best interests of the child standard may not be applied in any visitation case. I acknowledge the distinct possibility that visitation cases may arise where, considering the absence of other protection for the parent under state laws and procedures, the best interests of the child standard would give insufficient protection to the parent's constitutional right to raise the child without undue intervention by the State; but it is quite a different matter to say, as I understand the Supreme Court of Washington to have said, that a harm to the child standard is required in every instance.

Given the error I see in the State Supreme Court's central conclusion that the best interests of the child standard is never appropriate in third-party visitation cases, that court should have the first opportunity to reconsider this case. I would remand the case to the state court for further proceedings. If it then found the statute has been applied in an unconstitutional manner because the best interests of the child standard gives insufficient protection to a parent under the circumstances of this case, or if it again declared the statute a nullity because the statute seems to allow any person

at all to seek visitation at any time, the decision would present other issues which may or may not warrant further review in this Court. These include not only the protection the Constitution gives parents against state-ordered visitation but also the extent to which federal rules for facial challenges to statutes control in state courts. These matters, however, should await some further case. The judgment now under review should be vacated and remanded on the sole ground that the harm ruling that was so central to the Supreme Court of Washington's decision was error, given its broad formulation.

Turning to the question whether harm to the child must be the controlling standard in every visitation proceeding, there is a beginning point that commands general, perhaps unanimous, agreement in our separate opinions: As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the State, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment. See, *e. g.*, *Meyer* v. *Nebraska*, 262 U. S. 390, 399, 401 (1923); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925); *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944); *Stanley* v. *Illinois*, 405 U. S. 645, 651–652 (1972); *Wisconsin* v. *Yoder*, 406 U. S. 205, 232–233 (1972); *Santosky* v. *Kramer*, 455 U. S. 745, 753–754 (1982). *Pierce* and *Meyer*, had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion. Their formulation and subsequent interpretation have been quite different, of course; and they long have been interpreted to have found in Fourteenth Amendment concepts of liberty an independent right of the parent in the "custody, care and nurture of the child," free from state intervention. *Prince*, *supra*, at 166. The principle exists, then, in broad formulation; yet courts must use considerable restraint, including careful adherence to the incremental in-

struction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right.

The State Supreme Court sought to give content to the parent's right by announcing a categorical rule that third parties who seek visitation must always prove the denial of visitation would harm the child. After reviewing some of the relevant precedents, the Supreme Court of Washington concluded "'[t]he requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process.'" 137 Wash. 2d, at 19–20, 969 P. 2d, at 30 (quoting *Hawk* v. *Hawk*, 855 S. W. 2d 573, 580 (Tenn. 1993)). For that reason, "[s]hort of preventing harm to the child," the court considered the best interests of the child to be "insufficient to serve as a compelling state interest overruling a parent's fundamental rights." 137 Wash. 2d, at 20, 969 P. 2d, at 30.

While it might be argued as an abstract matter that in some sense the child is always harmed if his or her best interests are not considered, the law of domestic relations, as it has evolved to this point, treats as distinct the two standards, one harm to the child and the other the best interests of the child. The judgment of the Supreme Court of Washington rests on that assumption, and I, too, shall assume that there are real and consequential differences between the two standards.

On the question whether one standard must always take precedence over the other in order to protect the right of the parent or parents, "[o]ur Nation's history, legal traditions, and practices" do not give us clear or definitive answers. *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997). The consensus among courts and commentators is that at least through the 19th century there was no legal right of visitation; court-ordered visitation appears to be a 20th-century phenomenon. See, *e. g.*, 1 D. Kramer, Legal Rights of Children 124, 136 (2d ed. 1994); 2 J. Atkinson, Modern

Child Custody Practice § 8.10 (1986). A case often cited as one of the earliest visitation decisions, *Succession of Reiss*, 46 La. Ann. 347, 353, 15 So. 151, 152 (1894), explained that "the obligation ordinarily to visit grandparents is moral and not legal"—a conclusion which appears consistent with that of American common-law jurisdictions of the time. Early 20th-century exceptions did occur, often in cases where a relative had acted in a parental capacity, or where one of a child's parents had died. See *Douglass* v. *Merriman*, 163 S. C. 210, 161 S. E. 452 (1931) (maternal grandparent awarded visitation with child when custody was awarded to father; mother had died); *Solomon* v. *Solomon*, 319 Ill. App. 618, 49 N. E. 2d 807 (1943) (paternal grandparents could be given visitation with child in custody of his mother when their son was stationed abroad; case remanded for fitness hearing); *Consaul* v. *Consaul*, 63 N. Y. S. 2d 688 (Sup. Ct. Jefferson Cty. 1946) (paternal grandparents awarded visitation with child in custody of his mother; father had become incompetent). As a general matter, however, contemporary state-court decisions acknowledge that "[h]istorically, grandparents had no legal right of visitation," *Campbell* v. *Campbell*, 896 P. 2d 635, 642, n. 15 (Utah App. 1995), and it is safe to assume other third parties would have fared no better in court.

To say that third parties have had no historical right to petition for visitation does not necessarily imply, as the Supreme Court of Washington concluded, that a parent has a constitutional right to prevent visitation in all cases not involving harm. True, this Court has acknowledged that States have the authority to intervene to prevent harm to children, see, *e. g.*, *Prince*, *supra*, at 168–169; *Yoder*, *supra*, at 233–234, but that is not the same as saying that a heightened harm to the child standard must be satisfied in every case in which a third party seeks a visitation order. It is also true that the law's traditional presumption has been "that natural bonds of affection lead parents to act in the

best interests of their children," *Parham* v. *J. R.*, 442 U. S. 584, 602 (1979); and "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state," *id.*, at 603. The State Supreme Court's conclusion that the Constitution forbids the application of the best interests of the child standard in any visitation proceeding, however, appears to rest upon assumptions the Constitution does not require.

My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is simply not the structure or prevailing condition in many households. See, *e. g.*, *Moore* v. *East Cleveland*, 431 U. S. 494 (1977). For many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood. This may be so whether their childhood has been marked by tragedy or filled with considerable happiness and fulfillment.

Cases are sure to arise—perhaps a substantial number of cases—in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto. See *Michael H.* v. *Gerald D.*, 491 U. S. 110 (1989) (putative natural father not entitled to rebut state-law presumption that child born in a marriage is a child of the marriage); *Quilloin* v. *Walcott*, 434 U. S. 246 (1978) (best interests standard sufficient in adoption proceeding to protect interests of natural father who had not legitimated the child); see also *Lehr* v. *Robertson*, 463 U. S. 248, 261 (1983) ("'[T]he importance of the familial relationship, to the individuals in-

volved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship'" (quoting *Smith* v. *Organization of Foster Families For Equality & Reform*, 431 U. S. 816, 844 (1977), in turn quoting *Yoder*, 406 U. S., at 231–233)). Some pre-existing relationships, then, serve to identify persons who have a strong attachment to the child with the concomitant motivation to act in a responsible way to ensure the child's welfare. As the State Supreme Court was correct to acknowledge, those relationships can be so enduring that "in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child," 137 Wash. 2d, at 20, 969 P. 2d, at 30; and harm to the adult may also ensue. In the design and elaboration of their visitation laws, States may be entitled to consider that certain relationships are such that to avoid the risk of harm, a best interests standard can be employed by their domestic relations courts in some circumstances.

Indeed, contemporary practice should give us some pause before rejecting the best interests of the child standard in all third-party visitation cases, as the Washington court has done. The standard has been recognized for many years as a basic tool of domestic relations law in visitation proceedings. Since 1965 all 50 States have enacted a third-party visitation statute of some sort. See *ante*, at 73–74, n. (plurality opinion). Each of these statutes, save one, permits a court order to issue in certain cases if visitation is found to be in the best interests of the child. While it is unnecessary for us to consider the constitutionality of any particular provision in the case now before us, it can be noted that the statutes also include a variety of methods for limiting parents' exposure to third-party visitation petitions and for ensuring parental decisions are given respect. Many States

limit the identity of permissible petitioners by restricting visitation petitions to grandparents, or by requiring petitioners to show a substantial relationship with a child, or both. See, *e. g.*, Kan. Stat. Ann. § 38–129 (1993 and Supp. 1998) (grandparent visitation authorized under certain circumstances if a substantial relationship exists); N. C. Gen. Stat. §§ 50–13.2, 50–13.2A, 50–13.5 (1999) (same); Iowa Code § 598.35 (Supp. 1999) (same; visitation also authorized for great-grandparents); Wis. Stat. § 767.245 (Supp. 1999) (visitation authorized under certain circumstances for "a grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child"). The statutes vary in other respects—for instance, some permit visitation petitions when there has been a change in circumstances such as divorce or death of a parent, see, *e. g.*, N. H. Rev. Stat. Ann. § 458:17–d (1992), and some apply a presumption that parental decisions should control, see, *e. g.*, Cal. Fam. Code Ann. §§ 3104(e)–(f) (West 1994); R. I. Gen. Laws § 15–5–24.3(a)(2)(v) (Supp. 1999). Georgia's is the sole state legislature to have adopted a general harm to the child standard, see Ga. Code Ann. § 19–7–3(c) (1999), and it did so only after the Georgia Supreme Court held the State's prior visitation statute invalid under the Federal and Georgia Constitutions, see *Brooks* v. *Parkerson*, 265 Ga. 189, 454 S. E. 2d 769, cert. denied, 516 U. S. 942 (1995).

In light of the inconclusive historical record and case law, as well as the almost universal adoption of the best interests standard for visitation disputes, I would be hard pressed to conclude the right to be free of such review in all cases is itself "'implicit in the concept of ordered liberty.'" *Glucksberg*, 521 U. S., at 721 (quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937)). In my view, it would be more appropriate to conclude that the constitutionality of the application of the best interests standard depends on more specific factors. In short, a fit parent's right vis-à-vis a complete

stranger is one thing; her right vis-à-vis another parent or a *de facto* parent may be another. The protection the Constitution requires, then, must be elaborated with care, using the discipline and instruction of the case law system. We must keep in mind that family courts in the 50 States confront these factual variations each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise. Cf. *Ankenbrandt* v. *Richards*, 504 U. S. 689, 703–704 (1992).

It must be recognized, of course, that a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated. The best interests of the child standard has at times been criticized as indeterminate, leading to unpredictable results. See, *e. g.*, American Law Institute, Principles of the Law of Family Dissolution 2, and n. 2 (Tent. Draft No. 3, Mar. 20, 1998). If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future. Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required; and I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship. We owe it to the Nation's domestic relations legal structure, however, to proceed with caution.

It should suffice in this case to reverse the holding of the State Supreme Court that the application of the best interests of the child standard is always unconstitutional in third-party visitation cases. Whether, under the circumstances of this case, the order requiring visitation over the objection of this fit parent violated the Constitution ought to be reserved for further proceedings. Because of its sweeping ruling re-

quiring the harm to the child standard, the Supreme Court of Washington did not have the occasion to address the specific visitation order the Troxels obtained. More specific guidance should await a case in which a State's highest court has considered all of the facts in the course of elaborating the protection afforded to parents by the laws of the State and by the Constitution itself. Furthermore, in my view, we need not address whether, under the correct constitutional standards, the Washington statute can be invalidated on its face. This question, too, ought to be addressed by the state court in the first instance.

In my view the judgment under review should be vacated and the case remanded for further proceedings.

Syllabus

SIMS *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY

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

No. 98–9537. Argued March 28, 2000—Decided June 5, 2000

Petitioner applied for Social Security disability and Supplemental Security Income benefits. After a state agency denied her claims, she obtained a hearing before a Social Security Administrative Law Judge (ALJ), who also denied her claims. Petitioner then requested review by the Social Security Appeals Council, which denied review. She next filed suit in the Federal District Court, contending that the ALJ erred in three ways. The District Court rejected her contentions, and the Fifth Circuit affirmed, concluding that it lacked jurisdiction over two of the contentions because they were not included in petitioner's request for review by the Appeals Council.

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

200 F. 3d 229, reversed and remanded.

JUSTICE THOMAS delivered the opinion of the Court with respect to Parts I and II–A, concluding that Social Security claimants who exhaust administrative remedies need not also exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues. Although administrative issue-exhaustion requirements are largely creatures of statute, there is no contention that any statute requires such exhaustion here. It is also common for an agency's regulations to require issue exhaustion in administrative appeals, but Social Security Administration (SSA) regulations do not. This Court has required issue exhaustion even in the absence of a statute or regulation, but the reason for doing so does not apply here. The desirability of a judicially imposed issue-exhaustion requirement depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding. See *Hormel* v. *Helvering*, 312 U. S. 552, 556. Where that proceeding is not adversarial, the reasons for a court to require issue exhaustion are much weaker than where the parties are expected to develop the issues themselves. Pp. 106–110.

JUSTICE THOMAS, joined by JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG, concluded in Part II–B that the differences between courts and agencies are nowhere more pronounced than in Social Security proceedings, which are inquisitorial rather than adversarial. The ALJ's duty is to investigate the facts and develop the arguments

both for and against granting benefits, and the Council's review is similarly broad. The regulations expressly provide that the SSA conducts the administrative review process in an informal, nonadversary manner. As the Council, not the claimant, has primary responsibility for identifying and developing the issues, the general issue-exhaustion rule makes little sense in this context. Pp. 110–112.

JUSTICE O'CONNOR concluded that the SSA's failure to notify claimants of an issue exhaustion requirement is a sufficient basis for holding that such exhaustion is not required in this context. Requiring issue exhaustion is inappropriate here, where the SSA's regulations and procedures affirmatively suggest that specific issues need not be raised before the Appeals Council. Pp. 112–114.

THOMAS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II–A, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined, and an opinion with respect to Part II–B, in which STEVENS, SOUTER, and GINSBURG, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 112. BREYER, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and KENNEDY, JJ., joined, *post,* p. 114.

Sarah H. Bohr argued the cause for petitioner. With her on the briefs were *Chantal J. Harrington*, *Gary R. Parvin*, and *Jon C. Dubin.*

Malcolm L. Stewart argued the cause for respondent. With him on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Ogden*, *Deputy Solicitor General Kneedler*, *William Kanter*, and *Robert D. Kamenshine.**

JUSTICE THOMAS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II–A, and an opinion with respect to Part II–B, in which JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join.

A person whose claim for Social Security benefits is denied by an administrative law judge (ALJ) must in most cases,

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**Rochelle Bobroff*, *Michael Schuster*, and *Robert E. Rains* filed a brief for the American Association of Retired Persons et al. as *amici curiae* urging reversal.

before seeking judicial review of that denial, request that the Social Security Appeals Council review his claim. The question is whether a claimant pursuing judicial review has waived any issues that he did not include in that request. We hold that he has not.

I

In 1994, petitioner Juatassa Sims filed applications for disability benefits under Title II of the Social Security Act, 49 Stat. 622, 42 U. S. C. § 401 *et seq.*, and for supplemental security income benefits under Title XVI of that Act, 86 Stat. 1465, 42 U. S. C. § 1381 *et seq.* She alleged disability from a variety of ailments, including degenerative joint diseases and carpal tunnel syndrome. After a state agency denied her claims, she obtained a hearing before a Social Security ALJ. See generally *Heckler* v. *Day*, 467 U. S. 104, 106–107 (1984) (describing stages of review of claims for Social Security benefits). The ALJ, in 1996, also denied her claims, concluding that, although she did have some medical impairments, she had not been and was not under a "disability," as defined in the Act. See 42 U. S. C. §§ 423(d) (1994 ed. and Supp. III) and 1382c(a)(3) (1994 ed., Supp. III); *Sullivan* v. *Zebley*, 493 U. S. 521, 524–526 (1990).

Petitioner then requested that the Social Security Appeals Council review her claims. A claimant may request such review by completing a one-page form provided by the Social Security Administration (SSA)—Form HA–520—or "by any other writing specifically requesting review." 20 CFR § 422.205(a) (1999). Petitioner, through counsel, chose the latter option, submitting to the Council a letter arguing that the ALJ had erred in several ways in analyzing the evidence. The Council denied review.

Next, petitioner filed suit in the District Court for the Northern District of Mississippi. She contended that (1) the ALJ had made selective use of the record; (2) the questions the ALJ had posed to a vocational expert to determine petitioner's ability to work were defective because they omitted

several of petitioner's ailments; and (3) in light of certain peculiarities in the medical evidence, the ALJ should have ordered a consultative examination. The District Court rejected all of these contentions. App. 74–84.

The Court of Appeals for the Fifth Circuit affirmed. 200 F. 3d 229 (1998). That court affirmed on the merits with regard to petitioner's first contention. With regard to the second and third contentions, it concluded that, under its decision in *Paul* v. *Shalala*, 29 F. 3d 208, 210 (1994), it lacked jurisdiction because petitioner had not raised those contentions in her request for review by the Appeals Council. We granted certiorari, 528 U. S. 1018 (1999), to resolve a conflict among the Courts of Appeals over whether a Social Security claimant waives judicial review of an issue if he fails to exhaust that issue by presenting it to the Appeals Council in his request for review. Compare *Paul*, *supra*, at 210; *James* v. *Chater*, 96 F. 3d 1341, 1343–1344 (CA10 1996), with *Harwood* v. *Apfel*, 186 F. 3d 1039, 1042–1043 (CA8 1999); *Johnson* v. *Apfel*, 189 F. 3d 561, 563–564 (CA7 1999).[1]

II

A

The Social Security Act provides that "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, . . . may obtain a review of such decision by a civil action" in federal district court. 42 U. S. C. § 405(g). But the Act does not define "final decision," instead leaving it to the SSA to give meaning to that term through regulations. See § 405(a); *Weinberger* v. *Salfi*, 422 U. S. 749, 766 (1975). SSA regulations provide that, if the Appeals Council grants review of a claim, then the decision that the Council issues is the Com-

[1] We agree with the parties that, even were a court-imposed issue-exhaustion requirement proper, the Fifth Circuit erred in treating it as jurisdictional. Cf. *Mathews* v. *Eldridge*, 424 U. S. 319, 328 (1976).

missioner's final decision. But if, as here, the Council denies the request for review, the ALJ's opinion becomes the final decision. See 20 CFR §§ 404.900(a)(4)–(5), 404.955, 404.981, 422.210(a) (1999).[2] If a claimant fails to request review from the Council, there is no final decision and, as a result, no judicial review in most cases. See § 404.900(b); *Bowen* v. *City of New York*, 476 U. S. 467, 482–483 (1986). In administrative-law parlance, such a claimant may not obtain judicial review because he has failed to exhaust administrative remedies. See *Salfi*, *supra*, at 765–766.

The Commissioner rightly concedes that petitioner exhausted administrative remedies by requesting review by the Council. Petitioner thus obtained a final decision, and nothing in § 405(g) or the regulations implementing it bars judicial review of her claims.

Nevertheless, the Commissioner contends that we should require issue exhaustion in addition to exhaustion of remedies. That is, he contends that a Social Security claimant, to obtain judicial review of an issue, not only must obtain a final decision on his claim for benefits, but also must specify that issue in his request for review by the Council. (Whether a claimant must exhaust issues before the ALJ is not before us.) The Commissioner argues, in particular, that an issue-exhaustion requirement is "an important corollary" of any requirement of exhaustion of remedies. Brief for Respondent 13. We think that this is not necessarily so and that the corollary is particularly unwarranted in this case.

Initially, we note that requirements of administrative issue exhaustion are largely creatures of statute. *Marine Mammal Conservancy, Inc.* v. *Department of Agriculture*, 134 F. 3d 409, 412 (CADC 1998). Our cases addressing issue

[2] Part 404 of 20 CFR (1999) applies to Title II of the Act. The regulations governing Title XVI, which can be found at 20 CFR pt. 416 (1999), are, as relevant here, not materially different. We will therefore omit references to the latter regulations.

exhaustion reflect this fact. For example, in *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U. S. 645 (1982), we held that the Court of Appeals lacked jurisdiction to review objections not raised before the National Labor Relations Board. We so held because a statute provided that "'[n]o objection that has not been urged before the Board . . . shall be considered by the court.'" *Id.*, at 665 (quoting 29 U. S. C. § 160(e) (1982 ed.)). Our decision in *FPC* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 497–498 (1955), followed similar reasoning. See also *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 36, n. 6 (1952) (collecting statutes); *Washington Assn. for Television and Children* v. *FCC*, 712 F. 2d 677, 681–682, and n. 6 (CADC 1983) (interpreting issue-exhaustion requirement in 47 U. S. C. § 405 (1982 ed.) and collecting statutes). Here, the Commissioner does not contend that any statute requires issue exhaustion in the request for review.

Similarly, it is common for an agency's regulations to require issue exhaustion in administrative appeals. See, *e. g.*, 20 CFR § 802.211(a) (1999) (petition for review to Benefits Review Board must "lis[t] the specific issues to be considered on appeal"). And when regulations do so, courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues. See, *e. g.*, *South Carolina* v. *United States Dept. of Labor*, 795 F. 2d 375, 378 (CA4 1986); *Sears, Roebuck and Co.* v. *FTC*, 676 F. 2d 385, 398, n. 26 (CA9 1982). Yet, SSA regulations do not require issue exhaustion. (Although the question is not before us, we think it likely that the Commissioner could adopt a regulation that did require issue exhaustion.)

It is true that we have imposed an issue-exhaustion requirement even in the absence of a statute or regulation. But the reason we have done so does not apply here. The basis for a judicially imposed issue-exhaustion requirement is an analogy to the rule that appellate courts will not consider

arguments not raised before trial courts. As the Court explained in *Hormel* v. *Helvering,* 312 U. S. 552 (1941):

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. And the basic reasons which support this general principle applicable to trial courts make it equally desirable that parties should have an opportunity to offer evidence on the general issues involved in the less formal proceedings before administrative agencies entrusted with the responsibility of fact finding." *Id.,* at 556.

As we further explained in *L. A. Tucker Truck Lines,* courts require administrative issue exhaustion "as a general rule" because it is usually "appropriate under [an agency's] practice" for "contestants in an adversary proceeding" before it to develop fully all issues there. 344 U. S., at 36–37. (We also spoke favorably of issue exhaustion in *Unemployment Compensation Comm'n of Alaska* v. *Aragon,* 329 U. S. 143, 154–155 (1946), without relying on any statute or regulation, but in that case the waived issue had not been raised before the District Court, see *id.,* at 149, 155.)

But, as *Hormel* and *L. A. Tucker Truck Lines* suggest, the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding. Cf. *McKart* v. *United States,* 395 U. S. 185, 193 (1969) (application of doctrine of exhaustion of ad-

ministrative remedies "requires an understanding of its purposes and of the particular administrative scheme involved"); *Salfi*, 422 U. S., at 765 (same). Where the parties are expected to develop the issues in an adversarial administrative proceeding, it seems to us that the rationale for requiring issue exhaustion is at its greatest. *Hormel*, *L. A. Tucker Truck Lines*, and *Aragon* each involved an adversarial proceeding. See *Hormel*, *supra*, at 554, 556; *L. A. Tucker Truck Lines*, *supra*, at 36; *Aragon* v. *Unemployment Compensation Comm'n of Alaska*, 149 F. 2d 447, 449–452 (CA9 1945), aff'd in part and rev'd in part, 329 U. S. 143 (1946). (In *Hormel*, we allowed an exception to the issue-exhaustion requirement. 312 U. S., at 560.) Where, by contrast, an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker. More generally, we have observed that "it is well settled that there are wide differences between administrative agencies and courts," *Shepard* v. *NLRB*, 459 U. S. 344, 351 (1983), and we have thus warned against reflexively "assimilat[ing] the relation of . . . administrative bodies and the courts to the relationship between lower and upper courts," *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144 (1940).

B

The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings. Although "[m]any agency systems of adjudication are based to a significant extent on the judicial model of decisionmaking," 2 K. Davis & R. Pierce, Administrative Law Treatise § 9.10, p. 103 (3d ed. 1994), the SSA is "[p]erhaps the best example of an agency" that is not, B. Schwartz, Administrative Law 469–470 (4th ed. 1994). See *id.*, at 470 ("The most important of [the SSA's modifications of the judicial model] is the replacement of normal adversary procedure by . . . the 'investigatory model' " (quoting Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1290 (1975))). Social Security proceed-

ings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits, see *Richardson* v. *Perales*, 402 U. S. 389, 400–401 (1971), and the Council's review is similarly broad. The Commissioner has no representative before the ALJ to oppose the claim for benefits, and we have found no indication that he opposes claimants before the Council. See generally Dubin, Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings, 97 Colum. L. Rev. 1289, 1301–1305, 1325–1329 (1997).

The regulations make this nature of SSA proceedings quite clear. They expressly provide that the SSA "conduct[s] the administrative review process in an informal, nonadversary manner." 20 CFR § 404.900(b) (1999). They permit—but do not require—the filing of a brief with the Council (even when the Council grants review), § 404.975, and the Council's review is plenary unless it states otherwise, § 404.976(a). See also § 404.900(b) ("[W]e will consider at each step of the review process any information you present as well as all the information in our records"). The Commissioner's involvement in the Appeals Council's decision whether to grant review appears to be not as a litigant opposing the claimant, but rather just as an adviser to the Council regarding which cases are good candidates for the Council to review pursuant to its authority to review a case *sua sponte.* See §§ 404.969(b)–(c); *Perales*, *supra*, at 403. The regulations further make clear that the Council will "evaluate the entire record," including "new and material evidence," in determining whether to grant review. § 404.970(b). Similarly, the notice of decision that ALJ's provide unsuccessful claimants informs them that if they request review, the Council will "consider all of [the ALJ's] decision, even the parts with which you may agree," and that the Council might review the decision "even if you do not ask it to do so." App. 25–27. Finally, Form HA–520, which

the Commissioner considers adequate for the Council's purposes in determining whether to review a case, see § 422.205(a), provides only three lines for the request for review, and a notice accompanying the form estimates that it will take only 10 minutes to "read the instructions, gather the necessary facts and fill out the form." The form therefore strongly suggests that the Council does not depend much, if at all, on claimants to identify issues for review. Given that a large portion of Social Security claimants either have no representation at all or are represented by nonattorneys, see Dubin, *supra*, at 1294, n. 29, the lack of such dependence is entirely understandable.

Thus, the *Hormel* analogy to judicial proceedings is at its weakest in this area. The adversarial development of issues by the parties—the "com[ing] to issue," 312 U. S., at 556—on which that analogy depends simply does not exist. The Council, not the claimant, has primary responsibility for identifying and developing the issues. We therefore agree with the Eighth Circuit that "the general rule [of issue exhaustion] makes little sense in this particular context." *Harwood*, 186 F. 3d, at 1042.

Accordingly, we hold that a judicially created issue-exhaustion requirement is inappropriate. Claimants who exhaust administrative remedies need not also exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues. The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings.

It is so ordered.

Justice O'Connor, concurring in part and concurring in the judgment.

In most cases, an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court. On this underlying principle of administrative law, the Court is unanimous. See *ante*, at 108; *post*, at 114–115

(Breyer, J., dissenting). In the absence of a specific statute or regulation requiring issue exhaustion, however, such a rule is not always appropriate. The inquiry requires careful examination of "the characteristics of the particular administrative procedure provided." *McCarthy* v. *Madigan*, 503 U. S. 140, 146 (1992). The Court's opinion provides such an examination, and reaches the correct result. Accordingly, I join Parts I and II–A of the Court's opinion, as well as its judgment. I write separately because, in my view, the agency's failure to notify claimants of an issue exhaustion requirement in this context is a sufficient basis for our decision. Requiring issue exhaustion is particularly inappropriate here, where the regulations and procedures of the Social Security Administration (SSA) affirmatively suggest that specific issues need not be raised before the Appeals Council.

Although the SSA's regulations warn claimants that completely failing to request Appeals Council review will forfeit the right to seek judicial review, see 20 CFR § 404.900(b) (1999), the regulations provide no notice that claimants must also raise specific issues before the Appeals Council to preserve them for review in federal court, see *ante*, at 108 (SSA regulations do not require issue exhaustion). To the contrary, the relevant regulations and procedures indicate that issue exhaustion before the Appeals Council is *not* required. To request Appeals Council review, a claimant need not file a brief. See § 404.975. Rather, he can file either Form HA–520, "Request for Review of Hearing Decision/Order," or "any other writing specifically requesting review." § 422.205(a). Form HA–520, the suggested means of requesting review, provides only three lines (roughly two inches) for the statement of issues and grounds for appeal, and the SSA estimates that it should take a total of 10 minutes to read the instructions, collect the relevant information, and complete the form, see 58 Fed. Reg. 28596 (1993); *ante*, at 111–112. Moreover, Appeals Council review is plenary unless the Council informs the claimant otherwise in

writing, see § 404.976(a); as the notice of decision of the Administrative Law Judge (ALJ) to petitioner stated, if she requested review before the Appeals Council, "the Council will consider all of [the ALJ's] decision . . . . Requesting review places the entire record of your case before the Council." See App. 26–27.

JUSTICE BREYER concedes that these factors "might mislead the Social Security claimant" to believe that issue exhaustion is not required. *Post*, at 118 (dissenting opinion). He nonetheless contends that this is not a problem because the SSA has assured the Court that it "has not invoked [issue exhaustion] in suits brought by claimants who were unrepresented during the Appeals Council proceedings." Brief for Respondent 41–42. As a matter of past practice, the agency's statement appears to be inaccurate. See *Owens* v. *Apfel*, No. 1:98CV1442 (ND Ohio, Aug. 3, 1999), vacated on other grounds, 205 F. 3d 1341 (CA6 2000). But even if this stated policy were uniformly followed, I think it would be unwise to adopt a rule that imposes different issue exhaustion obligations depending on whether claimants are represented by counsel.

In this case, the SSA told petitioner (1) that she could request review by sending a letter or filling out a 1-page form that should take 10 minutes to complete, (2) only that failing to request Appeals Council review would preclude judicial review, and (3) that the Appeals Council would review her entire case for issues. She did everything that the agency asked of her. I would not impose any additional requirements, and would reverse the judgment and remand for further proceedings consistent with this opinion.

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

Under ordinary principles of administrative law a reviewing court will not consider arguments that a party failed to raise in timely fashion before an administrative agency. See

United States v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 36–37 (1952); *Unemployment Compensation Comm'n of Alaska* v. *Aragon*, 329 U. S. 143, 155 (1946); *Hormel* v. *Helvering*, 312 U. S. 552, 556–557 (1941); see also 2 K. Davis & R. Pierce, Administrative Law Treatise § 15.8, pp. 341–344 (3d ed. 1994). As this Court explained long ago:

> "[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. . . . [C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *L. A. Tucker Truck Lines*, *supra*, at 37.

Although the rule has exceptions, it applies with particular force where resolution of the claim significantly depends upon specialized agency knowledge or practice. In this case, petitioner asked the reviewing court to consider arguments of the kind that clearly fall within the general rule, namely, whether an administrative law judge should have ordered a further medical examination or asked different questions of a vocational expert. No one claims that any established exception to this ordinary "exhaustion" or "waiver" rule applies. See, *e. g.*, *Bethesda Hospital Assn.* v. *Bowen*, 485 U. S. 399, 406–407 (1988) (futility); *Mathews* v. *Eldridge*, 424 U. S. 319, 329, n. 10 (1976) (constitutional claims).

The Court nonetheless concludes that the law requires a new exception. It points out that the ordinary waiver rule as applied to administrative agencies "is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts." *Ante*, at 108–109. And the plurality argues that the agency proceedings here at issue, unlike those before trial courts, are not adversarial proceedings. *Ante*, at 110–112. Although I agree with both

propositions, I do not see how they lead to the plurality's conclusion.

There are, of course, important differences between a court and an administrative agency, but those differences argue *in favor of*, not against, applying the waiver principle here. Cf. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 88–95 (1943). As this Court has explained, the law ordinarily insists that a party invoke administrative processes before coming to court in order to avoid premature interruption of the administrative process and to enable the expert agency to develop the necessary facts. *McKart* v. *United States*, 395 U. S. 185, 193–194 (1969). In addition, exhaustion is required because a

> "complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." *Id.*, at 195.

Certain of these reasons apply with equal force to courts and to administrative agencies. Others, such as the notion of "administrative autonomy," apply with special force to agencies. None of them applies *only* to courts. Practical considerations arising out of the agency's familiarity with the subject matter as well as institutional considerations caution strongly against courts' deciding ordinary, circumstance-specific matters that the parties have not raised before the agency—at least where there is no good reason excusing that failure. These considerations apply where a party fails to give an agency an opportunity to correct its own mistake, *i. e.*, to a failure to raise a matter on an internal agency ap-

peal, just as they apply to a failure ever to raise the matter at all. See *id.*, at 194 (exhaustion principles apply equally where "administrative process is at an end and a party seeks judicial review of a decision that was not appealed through the administrative process").

I would add that these ordinary "exhaustion of remedies" rules are particularly important in Social Security cases, where the Appeals Council is asked to process over 100,000 claims each year, Social Security Administration Office of Hearings and Appeals, Key Workload Indicators—Fiscal Year 1999, p. 21 (115,151 requests for Appeals Council review), where many of those cases ultimately find their way to federal court, Administrative Office of the United States Courts, L. Mecham, Judicial Business of the United States Courts: 1998 Report of the Director 144 (Table C–2) (over 14,000 cases in fiscal year 1998), and where the Social Security Act itself stresses their applicability, 42 U. S. C. §§ 405(g), (h). See generally *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U. S. 1, 12–13 (2000); *Weinberger* v. *Salfi*, 422 U. S. 749, 765–766 (1975).

Nor, with one exception, do I see why the nonadversarial nature of the Social Security Administration internal appellate process makes a difference. An initial ALJ proceeding is, after all, itself nonadversarial. *Ante*, at 111 (although claimant may be represented by counsel, the agency itself has no representative present and relies upon the ALJ to "investigate the facts and develop the arguments both for and against granting benefits"). Yet I assume the plurality would not forgive the requirement that a party ordinarily must raise all relevant issues before the ALJ. Cf. *Shalala*, *supra*, at 15 (noting statute's "nonwaivable and nonexcusable requirement that an individual present a claim to the agency before raising it in court").

Neither does the law in this area disfavor informal proceedings. See *Hormel*, 312 U. S., at 556 ("And the basic reasons which support th[e] general principle [of waiver] appli-

cable to trial courts *make it equally desirable* that parties should have an opportunity to offer evidence on the general issues involved *in the less formal proceedings* before administrative agencies entrusted with the responsibility of fact finding" (emphasis added)). Considerations of time and expense can favor such proceedings. And, since a Social Security claimant is permitted his own counsel or other representative if he wishes, the informality does not necessarily work to his disadvantage. Indeed, the plurality's rule, by interfering with the ordinary ALJ/Appeals Council/District Court order for presenting agency-specific arguments, threatens to complicate judicial review, thereby producing increased delay without any benefit to the agency or to the claimants themselves.

There is, however, one exception, *i. e.*, one way in which the informality of the proceedings may matter. Administrative lawyers are normally aware of the basic "exhaustion of remedies" rules, including the specific waiver principle here at issue. But the internal appellate review proceeding's informality; the absence of a clear statement in the rules or on the Appeals Council instructional form insisting upon the raising of all, not just some, issues; the presence on the instructional form of just a few lines for the listing of issues; and an attached estimate that on average an appellant can "read the instructions, gather the necessary facts and fill out the form" in 10 minutes, see Form HA–520—taken together—might mislead the Social Security claimant. That is, it might make the claimant believe he need not raise every issue before the Appeals Council. *Ante*, at 113–114 (O'CONNOR, J., concurring in part and concurring in judgment).

But the Social Security Administration says that it does not apply its waiver rule where the claimant is not represented. Brief for Respondent 41–42. And I cannot say it is "arbitrary, capricious, [or] an abuse of discretion," 5 U. S. C. § 706(2)(A), to apply the waiver rule when a claimant was represented before the Appeals Council, as was petitioner,

by an *attorney*. Petitioner's lawyer should have known the basic legal principle: namely, that, with important exceptions, a claimant must raise his objections in an internal agency appellate proceeding or forgo the opportunity later to raise them in court. The Fifth Circuit, moreover, had precedent applying the general rule in this specific context. *Paul* v. *Shalala*, 29 F. 3d 208, 210–211 (1994). And far from being misled by the agency's form, petitioner's lawyer followed an alternative procedure, see 20 CFR §§ 422.205(a), 404.968(a) (1999), and filed 19 pages of detailed legal and factual arguments challenging the ALJ's decision. App. 51–69. In these circumstances, petitioner is accountable for her lawyer's decision—whether neglectful or by design—to reserve some of her objections for federal court.

For these reasons, I would affirm the judgment of the Court of Appeals.

Syllabus

CASTILLO ET AL. *v.* UNITED STATES

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

No. 99–658. Argued April 24, 2000—Decided June 5, 2000

Petitioners were indicted for, among other things, conspiring to murder federal officers. At the time of their trial, 18 U. S. C. § 924(c)(1) read in relevant part: "Whoever, during and in relation to any crime of violence . . . , uses or carries a firearm, shall, in addition to the punishment provided for such crime . . . , be sentenced to imprisonment for five years, . . . and if the firearm is[, *e. g.*,] a machinegun, . . . to imprisonment for thirty years." The jury determined that petitioners had violated this section, and at sentencing, the judge found that the firearms included machineguns and imposed the mandatory 30-year prison sentence. The Fifth Circuit affirmed, concluding that statutory words such as "machinegun" create sentencing factors, not elements of a separate crime.

Held: Section 924(c)(1) uses the word "machinegun" (and similar words) to state an element of a separate, aggravated crime. The statute's language, structure, context, history, and other factors helpful in determining its objectives lead to this conclusion. First, while the statute's literal language, taken alone, appears neutral, its overall structure strongly favors the "new crime" interpretation. The first part of § 924(c)(1)'s opening sentence clearly establishes the elements of the basic federal offense of using or carrying a gun during a crime of violence, and Congress placed that element and the word machinegun in a single sentence, not broken up with dashes or separated into subsections. That, along with the fact that the next three sentences refer directly to sentencing, strongly suggests that the entire first sentence defines crimes. Second, courts have not typically or traditionally used firearm types (such as "machinegun") as sentencing factors where the use or carrying of the firearm is itself the substantive crime. See *Jones* v. *United States*, 526 U. S. 227, 234. Third, to ask a jury, rather than a judge, to decide whether a defendant used or carried a machinegun would rarely complicate a trial or risk unfairness. Cf. *Almendarez-Torres* v. *United States*, 523 U. S. 224, 234–235. Fourth, the legislative history favors interpreting § 924(c) as setting forth elements rather than sentencing factors. Finally, the length and severity of an added mandatory sentence that turns on the presence or absence of a "machinegun" (or any of the other listed firearm types) weighs in favor of treating

such offense-related words as referring to an element in this context. Such considerations make this a stronger "separate crime" case than either *Jones* or *Almendarez-Torres*—cases in which this Court was closely divided as to Congress' likely intent. Pp. 123–131.

179 F. 3d 321, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined, and in which SCALIA, J., joined except as to point Fourth of Part II.

Stephen P. Halbrook argued the cause for petitioners. With him on the briefs were *John F. Carroll*, *Richard G. Ferguson*, *Stanley Rentz*, and *Steven R. Rosen*.

Assistant Attorney General Robinson argued the cause for the United States. With him on the brief were *Solicitor General Waxman*, *Deputy Solicitor General Dreeben*, *Edward C. DuMont*, and *Joseph C. Wyderko*.*

JUSTICE BREYER delivered the opinion of the Court.†

In this case we once again decide whether words in a federal criminal statute create offense elements (determined by a jury) or sentencing factors (determined by a judge). See *Jones* v. *United States*, 526 U. S. 227 (1999); *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998). The statute in question, 18 U. S. C. § 924(c) (1988 ed., Supp. V), prohibits the use or carrying of a "firearm" in relation to a crime of violence, and increases the penalty dramatically when the weapon used or carried is, for example, a "machinegun." We conclude that the statute uses the word "machinegun" (and similar words) to state an element of a separate offense.

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*Briefs of *amici curiae* urging reversal were filed for Law Enforcement Alliance of America, Inc., by *Richard E. Gardiner;* and for the National Association of Criminal Defense Lawyers et al. by *Ann C. McClintock*, *Kyle O'Dowd*, and *Barbara Bergman*.

†JUSTICE SCALIA joins this opinion except as to point Fourth of Part II.

I

Petitioners are members of the Branch-Davidian religious sect and are among those who were involved in a violent confrontation with federal agents from the Bureau of Alcohol, Tobacco, and Firearms near Waco, Texas, in 1993. The case before us arises out of an indictment alleging that, among other things, petitioners conspired to murder federal officers. At the time of petitioners' trial, the criminal statute at issue (reprinted in its entirety in the Appendix, *infra*) read in relevant part:

> "(c)(1) Whoever, during and in relation to any crime of violence . . . , uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . . , be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle [or a] short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years." 18 U. S. C. § 924(c)(1) (1988 ed., Supp. V).

A jury determined that petitioners had violated this section by, in the words of the trial judge's instruction, "knowingly us[ing] or carr[ying] a firearm during and in relation to" the commission of a crime of violence. App. 29. At sentencing, the judge found that the "firearms" at issue included certain machineguns (many equipped with silencers) and handgrenades that the defendants actually or constructively had possessed. *United States* v. *Branch*, Crim. No. W–93–CR–046 (WD Tex., June 21, 1994), reprinted in App. to Pet. for Cert. 119a, 124a–125a. The judge then imposed the statute's mandatory 30-year prison sentence. *Id.*, at 134a.

Petitioners appealed. Meanwhile, this Court decided that the word "use" in § 924(c)(1) requires evidence of more than "mere possession." *Bailey* v. *United States*, 516 U. S. 137, 143 (1995). The Court of Appeals subsequently held that

our decision in *Bailey* necessitated a remand of the case to determine whether, in *Bailey*'s stronger sense of "use," petitioners had used "machineguns and other enhancing weapons." *United States* v. *Branch*, 91 F. 3d 699, 740–741 (CA5 1996). The court also concluded that statutory words such as "machinegun" create sentencing factors, *i. e.*, factors that enhance a sentence, not elements of a separate crime. *Id.*, at 738–740. Hence, it specified that the jury "was not required" to determine whether petitioners used or carried "machineguns" or other enhanced weapons. *Id.*, at 740. Rather, it wrote that "[s]hould *the district court* find on remand that members of the conspiracy actively employed machineguns, it is free to reimpose the 30-year sentence." *Id.*, at 740–741 (emphasis added). On remand, the District Court resentenced petitioners to 30-year terms of imprisonment based on its weapons-related findings. See App. to Pet. for Cert. 119a. The Court of Appeals affirmed. 179 F. 3d 321 (CA5 1999).

The Federal Courts of Appeals have different views as to whether the statutory word "machinegun" (and similar words appearing in the version of 18 U. S. C. § 924(c)(1) here at issue) refers to a sentencing factor to be assessed by the trial court or creates a new substantive crime to be determined by the jury. Compare, *e. g.*, *United States* v. *Alborola-Rodriguez*, 153 F. 3d 1269, 1272 (CA11 1998) (sentencing factor), with *United States* v. *Alerta*, 96 F. 3d 1230, 1235 (CA9 1996) (element). We granted certiorari to resolve the conflict.

II

The question before us is whether Congress intended the statutory references to particular firearm types in § 924(c)(1) to define a separate crime or simply to authorize an enhanced penalty. If the former, the indictment must identify the firearm type and a jury must find that element proved beyond a reasonable doubt. If the latter, the matter need not be tried before a jury but may be left for the sentencing

judge to decide. As petitioners note, our decision in *Jones* concluded, in a similar situation, that treating facts that lead to an increase in the maximum sentence as a sentencing factor would give rise to significant constitutional questions. See 526 U. S., at 239–252. Here, even apart from the doctrine of constitutional doubt, our consideration of § 924(c)(1)'s language, structure, context, history, and such other factors as typically help courts determine a statute's objectives, leads us to conclude that the relevant words create a separate substantive crime.

First, while the statute's literal language, taken alone, appears neutral, its overall structure strongly favors the "new crime" interpretation. The relevant statutory sentence says: "Whoever, during and in relation to any crime of violence . . . , uses or carries a firearm, shall . . . be sentenced to imprisonment for five years, and if the firearm is a . . . machinegun, . . . to imprisonment for thirty years." § 924(c)(1). On the one hand, one could read the words "during and in relation to a crime of violence" and "uses or carries a firearm" as setting forth two basic elements of the offense, and the subsequent "machinegun" phrase as merely increasing a defendant's sentence in relevant cases. But, with equal ease, by emphasizing the phrase "if *the* firearm is a . . . ," one can read the language as simply substituting the word "machinegun" for the initial word "firearm"; thereby both incorporating by reference the initial phrases that relate the basic elements of the crime and creating a different crime containing one new element, *i. e.*, the use or carrying of a "machinegun" during and in relation to a crime of violence.

The statute's structure clarifies any ambiguity inherent in its literal language. The first part of the opening sentence clearly and indisputably establishes the elements of the basic federal offense of using or carrying a gun during and in relation to a crime of violence. See *United States* v. *Rodriguez-Moreno*, 526 U. S. 275, 280 (1999). Congress

placed the element "uses or carries a firearm" and the word "machinegun" in a single sentence, not broken up with dashes or separated into subsections. Cf. *Jones*, *supra*, at 232–233 (noting that the structure of the carjacking statute—a "principal paragraph" followed by "numbered subsections"—makes it "look" as though the statute sets forth sentencing factors). The next three sentences of § 924(c)(1) (which appear *after* the sentence quoted above (see Appendix, *infra*)) refer directly to sentencing: the first to recidivism, the second to concurrent sentences, the third to parole. These structural features strongly suggest that the basic job of the entire first sentence is the definition of crimes and the role of the remaining three is the description of factors (such as recidivism) that ordinarily pertain only to sentencing.

We concede that there are two other structural circumstances that suggest a contrary interpretation. The title of the entirety of § 924 is "Penalties"; and in 1998 Congress reenacted § 924(c)(1), separating different parts of the first sentence (and others) into different subsections, see Pub. L. 105–386, § 1(a)(1), 112 Stat. 3469. In this case, however, the section's title cannot help, for Congress already has determined that at least some portion of § 924, including § 924(c) itself, creates, not penalty enhancements, but entirely new crimes. See S. Rep. No. 98–225, pp. 312–314 (1984) ("Section 924(c) sets out an offense distinct from the underlying felony and is not simply a penalty provision"); see also *Busic* v. *United States*, 446 U. S. 398, 404 (1980); *Simpson* v. *United States*, 435 U. S. 6, 10 (1978). The title alone does not tell us which are which. Nor can a new postenactment statutory restructuring help us here to determine what Congress intended at the time it enacted the earlier statutory provision that governs this case. See *Almendarez-Torres*, 523 U. S., at 237 (amendments that, among other things, neither "declare the meaning of earlier law" nor "seek to clarify an earlier enacted general term" fail to provide interpretive guidance).

Second, we cannot say that courts have typically or traditionally used firearm types (such as "shotgun" or "machinegun") as sentencing factors, at least not in respect to an underlying "use or carry" crime. See *Jones*, *supra*, at 234 ("[S]tatutory drafting occurs against a backdrop . . . of traditional treatment of certain categories of important facts"); see also *Almendarez-Torres*, *supra*, at 230 (recidivism "is as typical a sentencing factor as one might imagine"). Traditional sentencing factors often involve either characteristics of the offender, such as recidivism, or special features of the manner in which a basic crime was carried out (*e. g.*, that the defendant abused a position of trust or brandished a gun). See 18 U. S. C. § 3553(a)(1) (providing that a sentencing court "shall" consider "the history and characteristics of the defendant" and "the nature and circumstances of the offense"); see also, *e. g.*, United States Sentencing Commission, Guidelines Manual § 4A1.1 (Nov. 1998) (sentence based in part on defendant's criminal history); § 3B1.3 (upward adjustment for abuse of position of trust); § 5K2.6 (same for use of a dangerous instrumentality). Offender characteristics are not here at issue. And, although one might consider the use of a machinegun, or for that matter a firearm, as a means (or a *manner*) in which the offender carried out the more basic underlying crime of violence, the underlying crime of violence is *not* the basic crime here at issue. Rather, as we have already mentioned, the use or carrying of a firearm is itself a separate substantive crime. See *Busic*, *supra*, at 404; *Simpson*, *supra*, at 10.

The Government argues that, conceptually speaking, one can refer to the use of a machinegun as simply a "metho[d]" of committing the underlying "firearms offense." Brief for United States 23. But the difference between carrying, say, a pistol and carrying a machinegun (or, to mention another factor in the same statutory sentence, a "destructive device," *i. e.*, a bomb) is great, both in degree and kind. And, more importantly, that difference concerns the nature of the ele-

ment lying closest to the heart of the crime at issue. It is not surprising that numerous gun crimes make substantive distinctions between weapons such as pistols and machineguns. See, *e. g.*, 18 U. S. C. § 922(a)(4) (making it unlawful to "transport in interstate or foreign commerce" any "destructive device," "machine gun," or similar type of weapon unless carrier is licensed or authorized, but making no such prohibition for pistols); § 922(b)(4) (prohibiting the unauthorized sale or delivery of "machine gun[s]" and similar weapons); § 922(*o*)(1) (making it "unlawful for any person to transfer or possess a machine gun"); § 922(v)(1) (making it illegal "to manufacture, transfer, or possess a semiautomatic assault weapon"). And we do not have any indication that legislatures or judges typically have viewed the difference between using a pistol and using a machinegun as insubstantial. Indeed, the fact that (a) the statute at issue prescribes a mandatory penalty for using or carrying a machinegun that is six times more severe than the punishment for using or carrying a mere "firearm," and (b) at least two Courts of Appeals have interpreted § 924(c)(1) as setting forth a separate "machinegun" element in relevant cases, see *Alerta,* 96 F. 3d, at 1235; Judicial Committee on Model Jury Instructions for the Eighth Circuit, Manual of Model Criminal Jury Instructions ¶ 6.18.924C (1997 ed.), in L. Sand, J. Siffert, W. Loughlin, & S. Reiss, Modern Federal Jury Instructions: Criminal Pattern Instructions, p. 8–153 (1999), points to the conclusion that the difference between the act of using or carrying a "firearm" and the act of using or carrying a "machinegun" is both substantive and substantial—a conclusion that supports a "separate crime" interpretation.

Third, to ask a jury, rather than a judge, to decide whether a defendant used or carried a machinegun would rarely complicate a trial or risk unfairness. Cf. *Almendarez-Torres, supra,* at 234–235 (pointing to potential unfairness of placing fact of recidivism before jury). As a practical matter, in determining whether a defendant used or carried a "firearm,"

the jury ordinarily will be asked to assess the particular weapon at issue as well as the circumstances under which it was allegedly used. Furthermore, inasmuch as the prosecution's case under § 924(c) usually will involve presenting a certain weapon (or weapons) to the jury and arguing that the defendant used or carried that weapon during a crime of violence within the meaning of the statute, the evidence is unlikely to enable a defendant to respond *both* (1) "I did not use or carry *any* firearm," and (2) "even if I did, it was a pistol, not a machinegun." Hence, a rule of law that makes it difficult to make both claims at the same time to the same decisionmaker (the jury) will not often prejudice a defendant's case.

At the same time, a contrary rule—one that leaves the machinegun matter to the sentencing judge—might unnecessarily produce a conflict between the judge and the jury. That is because, under our case law interpreting the statute here at issue, a jury may well have to decide which of several weapons the defendant actively used, rather than passively possessed. See *Bailey*, 516 U. S., at 143. And, in such a case, the sentencing judge will not necessarily know which "firearm" supports the jury's determination. Under these circumstances, a judge's later, sentencing-related decision that the defendant used the machinegun, rather than, say, the pistol, might conflict with the jury's belief that he actively used the pistol, which factual belief underlay its firearm "use" conviction. Cf. *Alerta*, *supra*, at 1234–1235 (in the absence of a specific jury finding regarding the type of weapon that defendant used, it was possible that the jury did not find "use" of a machinegun even though the judge imposed the 30-year mandatory statutory sentence). There is no reason to think that Congress would have wanted a judge's views to prevail in a case of so direct a factual conflict, particularly when the sentencing judge applies a lower standard of proof and when 25 additional years in prison are at stake.

Fourth, the Government argues that the legislative history of the statute favors interpreting § 924(c) as setting forth sentencing factors, not elements. It points out that § 924(c), as originally enacted, provided a mandatory minimum prison term of at least one year (up to a maximum of 10 years) where a person (1) "use[d] a firearm to commit any felony," or (2) "carr[ied] a firearm unlawfully during the commission of any felony." Gun Control Act of 1968, § 102, 82 Stat. 1223; see also Omnibus Crime Control Act of 1970, § 13, 84 Stat. 1889. In 1984, Congress amended the law, eliminating the range of permissible penalties, setting a mandatory prison term of five years, and specifying that that term was to be added on top of the prison term related to the underlying "crime of violence," including statutory sentences that imposed certain other weapons-related enhancements. See Comprehensive Crime Control Act of 1984, § 1005(a), 98 Stat. 2138. In 1986, Congress again amended the law by providing for a 10-year mandatory prison term (20 years for subsequent offenses) "if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler." Firearms Owners' Protection Act, § 104(a)(2), 100 Stat. 456. In 1988, Congress changed the provision to its here-relevant form. Anti-Drug Abuse Act of 1988, § 6460, 102 Stat. 4373.

The Government finds three features of the history surrounding the enactment of the key 1986 version of the statute significant. First, the House Report spoke in terms of a sentence, not an offense. The Report stated, for example, that the relevant bill would create "a new mandatory prison term of ten years for using or carrying a machine gun during and in relation to a crime of violence or a drug trafficking offense for a first offense, and twenty years for a subsequent offense." H. R. Rep. No. 99–495, p. 28 (1986); see also *id.*, at 2 (bill "[p]rovides a mandatory prison term of ten years for using or carrying a machine gun during and in relation to a crime of violence or a drug trafficking offense, and a

mandatory twenty years for any subsequent offense"). Second, statements of the bill's sponsors and supporters on the floor of the House also spoke in terms of sentencing, noting, for example, that the proposed law "imposes mandatory prison terms on those [who] would use a machinegun in the commission of a violent offense." 132 Cong. Rec. 3809 (1986) (statement of Rep. Hughes); see also, *e. g.*, *id.*, at 6843 (statement of Rep. Volkmer) (bill "includes stiff mandatory sentences for the use of firearms, including machineguns and silencers, in relation to violent or drug trafficking crimes"); *id.*, at 6850 (statement of Rep. Moore) (machinegun clause "strengthen[s] criminal penalties"); *id.*, at 6856 (statement of Rep. Wirth) (proposed law "would have many benefits, including the expansion of mandatory sentencing to those persons who use a machinegun in the commission of a violent crime"). Third, and similarly, "any discussion suggesting the creation of a new offense" was "[n]oticeably absent" from the legislative record. 91 F. 3d, at 739; Brief for United States 36.

Insofar as this history may be relevant, however, it does not significantly help the Government. That is because the statute's basic "uses or carries a firearm" provision *also* dealt primarily with sentencing, its pre-eminent feature consisting of the creation of a new mandatory term of imprisonment additional to that for the underlying crime of violence. Cf. *Bailey*, *supra*, at 142 ("Section 924(c)(1) requires the imposition of specified penalties"); *Smith* v. *United States*, 508 U. S. 223, 227 (1993) (same). In this context, the absence of "separate offense" statements means little, and the "mandatory sentencing" statements to which the Government points show only that Congress believed that the "machinegun" and "firearm" provisions would work similarly. Indeed, the legislative statements that discuss a new prison term for the act of "us[ing] a machine gun," see, *e. g.*, *supra* this page, seemingly describe offense conduct, and, thus, argue *against* (not *for*) the Government's position.

Fifth and finally, the length and severity of an added mandatory sentence that turns on the presence or absence of a "machinegun" (or any of the other listed firearm types) weighs in favor of treating such offense-related words as referring to an element. Thus, if after considering traditional interpretive factors, we were left genuinely uncertain as to Congress' intent in this regard, we would assume a preference for traditional jury determination of so important a factual matter. Cf. *Staples* v. *United States*, 511 U. S. 600, 619, n. 17 (1994) (rule of lenity requires that "ambiguous criminal statute[s] . . . be construed in favor of the accused"); *United States* v. *Granderson*, 511 U. S. 39, 54 (1994) (similar); *United States* v. *Bass*, 404 U. S. 336, 347 (1971) (same).

These considerations, in our view, make this a stronger "separate crime" case than either *Jones* or *Almendarez-Torres*—cases in which we were closely divided as to Congress' likely intent. For the reasons stated, we believe that Congress intended the firearm type-related words it used in § 924(c)(1) to refer to an element of a separate, aggravated crime. Accordingly, we reverse the contrary determination of the Court of Appeals and remand the case for proceedings consistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

"§ 924. Penalties.

. . . . . .

"(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for

five years, and if the firearm is a short-barreled rifle [or a] short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein." 18 U. S. C. § 924(c)(1) (1988 ed., Supp. V) (footnote omitted).

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REEVES *v.* SANDERSON PLUMBING PRODUCTS, INC.

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

No. 99–536. Argued March 21, 2000—Decided June 12, 2000

Petitioner Reeves, 57, and Joe Oswalt, in his mid-thirties, were the supervisors in one of respondent's departments known as the "Hinge Room," which was managed by Russell Caldwell, 45. Reeves' responsibilities included recording the attendance and hours worked by employees under his supervision. In 1995, Caldwell informed Powe Chesnut, the company's director of manufacturing, that Hinge Room production was down because employees were often absent, coming in late, and leaving early. Because the monthly attendance reports did not indicate a problem, Chesnut ordered an audit, which, according to his testimony, revealed numerous timekeeping errors and misrepresentations by Caldwell, Reeves, and Oswalt. Chesnut and other company officials recommended to the company president, Sandra Sanderson, that Reeves and Caldwell be fired, and she complied. Reeves filed this suit, contending that he had been terminated because of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA). At trial, respondent contended Reeves had been fired due to his failure to maintain accurate attendance records. Reeves attempted to demonstrate that this explanation was pretext for age discrimination, introducing evidence that he had accurately recorded the attendance and hours of the employees he supervised, and that Chesnut, whom Oswalt described as wielding "absolute power" within the company, had demonstrated age-based animus in his dealings with him. The District Court denied respondent's motions for judgment as a matter of law under Federal Rule of Civil Procedure 50, and the case went to the jury, which returned a verdict for Reeves. The Fifth Circuit reversed. Although recognizing that Reeves may well have offered sufficient evidence for the jury to have found that respondent's explanation was pretextual, the court explained that this did not mean that Reeves had presented sufficient evidence to show that he had been fired because of his age. In finding the evidence insufficient, the court weighed the additional evidence of discrimination introduced by Reeves against other circumstances surrounding his discharge, including that Chesnut's age-based comments were not made in the direct context of Reeves' termination; there was no allegation that the other individuals who recommended his firing

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were motivated by age; two of those officials were over 50; all three Hinge Room supervisors were accused of inaccurate recordkeeping; and several of respondent's managers were over 50 when Reeves was fired.

Held:

1. A plaintiff's prima facie case of discrimination (as defined in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802, and subsequent decisions), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, may be adequate to sustain a finding of liability for intentional discrimination under the ADEA. In this case, Reeves established a prima facie case and made a substantial showing that respondent's legitimate, nondiscriminatory explanation, *i. e.*, his shoddy recordkeeping, was false. He offered evidence showing that he had properly maintained the attendance records in question and that cast doubt on whether he was responsible for any failure to discipline late and absent employees. In holding that the evidence was insufficient to sustain the jury's verdict, the Fifth Circuit ignored this evidence, as well as the evidence supporting Reeves' prima facie case, and instead confined its review of the evidence favoring Reeves to that showing that Chesnut had directed derogatory, age-based comments at Reeves, and that Chesnut had singled him out for harsher treatment than younger employees. It is therefore apparent that the court believed that only this additional evidence of discrimination was relevant to whether the jury's verdict should stand. In so reasoning, the court misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence. In *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502, 511, the Court stated that, because the factfinder's disbelief of the reasons put forward by the defendant, together with the elements of the prima facie case, may suffice to show intentional discrimination, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination. Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive. See *id.*, at 517. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. See, *e. g.*, *Wright* v. *West*, 505 U. S. 277, 296. Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Cf. *Furnco Constr. Corp.* v. *Waters*, 438 U. S. 567, 577. Such a showing by the plaintiff will not *always* be adequate to sustain a jury's liability finding. Certainly there will be instances where, although the plaintiff has established a prima facie case and

introduced sufficient evidence to reject the employer's explanation, no rational factfinder could conclude that discrimination had occurred. This Court need not—and could not—resolve all such circumstances here. In this case, it suffices to say that a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. Pp. 141–149.

2. Respondent was not entitled to judgment as a matter of law under the particular circumstances presented here. Pp. 149–154.

(a) Rule 50 requires a court to render judgment as a matter of law when a party has been fully heard on an issue, and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. The standard for judgment as a matter of law under Rule 50 mirrors the standard for summary judgment under Rule 56. Thus, the court must review all of the evidence in the record, cf., *e. g.*, *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 587, drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence, *e. g.*, *Lytle* v. *Household Mfg., Inc.*, 494 U. S. 545, 554–555. The latter functions, along with the drawing of legitimate inferences from the facts, are for the jury, not the court. *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 255. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. Pp. 149–151.

(b) In holding that the record contained insufficient evidence to sustain the jury's verdict, the Fifth Circuit misapplied the standard of review dictated by Rule 50. The court disregarded evidence favorable to Reeves—the evidence supporting his prima facie case and undermining respondent's nondiscriminatory explanation—and failed to draw all reasonable inferences in his favor. For instance, while acknowledging the potentially damning nature of Chesnut's age-related comments, the court discounted them on the ground that they were not made in the direct context of Reeves' termination. And the court discredited Reeves' evidence that Chesnut was the actual decisionmaker by giving weight to the fact that there was no evidence suggesting the other decisionmakers were motivated by age. Moreover, the other evidence on which the court relied—that Caldwell and Oswalt were also cited for poor recordkeeping, and that respondent employed many managers over age 50—although relevant, is certainly not dispositive. See *Furnco*, *supra*, at 580. The ultimate question in every disparate treatment case is whether the plaintiff was the victim of intentional discrimination. Here, the District Court informed the jury that Reeves was required to show by a preponderance of the evidence that his age was a determining and motivating factor in the decision to terminate

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him. It instructed the jury that, to show respondent's explanation was pretextual, Reeves had to demonstrate that age discrimination, not respondent's explanation, was the real reason for his discharge. Given that Reeves established a prima facie case, introduced enough evidence for the jury to reject respondent's explanation, and produced additional evidence that Chesnut was motivated by age-based animus and was principally responsible for Reeves' firing, there was sufficient evidence for the jury to conclude that respondent had intentionally discriminated. Pp. 151–154.

197 F. 3d 688, reversed.

O'CONNOR, J., delivered the opinion for a unanimous Court. GINSBURG, J., filed a concurring opinion, *post,* p. 154.

Jim Waide argued the cause for petitioner. With him on the briefs were *David A. Chandler*, *Victor I. Fleitas*, *Eric Schnapper*, and *Alan B. Morrison.*

Patricia A. Millett argued the cause for the United States et al. as *amici curiae* urging reversal. On the brief were *Solicitor General Waxman*, *Deputy Solicitor General Underwood*, *Matthew D. Roberts*, *C. Gregory Stewart*, and *Philip B. Sklover.*

Taylor B. Smith argued the cause for respondent. With him on the brief was *Berkley N. Huskison.**

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*Briefs of *amici curiae* urging reversal were filed for the AARP by *Thomas W. Osborne*, *Laurie A. McCann*, *Sally Dunaway*, and *Melvin Radowitz;* for the Association of Trial Lawyers of America by *Jeffrey Robert White;* for the Hispanic National Bar Association by *Seth J. Benezra*, *Luis Perez*, and *Gilbert M. Roman;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Daniel F. Kolb*, *Norman Redlich*, *Barbara R. Arnwine*, *Thomas J. Henderson*, *Richard T. Seymour*, *Teresa A. Ferrante*, *Elainy R. Jones*, *Theodore M. Shaw*, *Norman J. Chachkin*, *Charles Stephen Ralston*, *Dennis C. Hayes*, *Antonia Hernandez*, *Judith L. Lichtman*, *Donna R. Lenhoff*, *Marcia D. Greenberger*, *Judith C. Appelbaum*, *Martha F. Davis*, *Sara L. Mandelbaum*, and *Steven R. Shapiro;* and for the National Employment Lawyers Association by *Paul W. Mollica* and *Paula A. Brantner.*

Briefs of *amici curiae* urging affirmance were filed for the Alabama Retail Association by *John J. Coleman III* and *Marcel L. Debruge;* for the Chamber of Commerce of the United States by *Marshall B. Babson*, *Stan-*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case concerns the kind and amount of evidence necessary to sustain a jury's verdict that an employer unlawfully discriminated on the basis of age. Specifically, we must resolve whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action. We must also decide whether the employer was entitled to judgment as a matter of law under the particular circumstances presented here.

I

In October 1995, petitioner Roger Reeves was 57 years old and had spent 40 years in the employ of respondent, Sanderson Plumbing Products, Inc., a manufacturer of toilet seats and covers. 197 F. 3d 688, 690 (CA5 1999). Petitioner worked in a department known as the "Hinge Room," where he supervised the "regular line." *Ibid.* Joe Oswalt, in his mid-thirties, supervised the Hinge Room's "special line," and Russell Caldwell, the manager of the Hinge Room and age 45, supervised both petitioner and Oswalt. *Ibid.* Petitioner's responsibilities included recording the attendance and hours of those under his supervision, and reviewing a weekly report that listed the hours worked by each employee. 3 Record 38–40.

In the summer of 1995, Caldwell informed Powe Chesnut, the director of manufacturing and the husband of company president Sandra Sanderson, that "production was down" in

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ley Strauss, *Stephen A. Bokat*, and *Robin S. Conrad;* for the Equal Employment Advisory Council by *Ann Elizabeth Reesman;* for the Product Liability Advisory Council, Inc., by *Andrew L. Frey*, *Charles Rothfeld*, and *Stephen M. Shapiro;* for the Society for Human Resource Management by *Peter J. Petesch*, *Thomas J. Walsh, Jr.*, *Timothy S. Bland*, and *John E. Duvall;* and for the Texas Association of Business and Chamber of Commerce by *Dean J. Schaner* and *Scott M. Nelson.*

the Hinge Room because employees were often absent and were "coming in late and leaving early." 4 *id.*, at 203–204. Because the monthly attendance reports did not indicate a problem, Chesnut ordered an audit of the Hinge Room's timesheets for July, August, and September of that year. 197 F. 3d, at 690. According to Chesnut's testimony, that investigation revealed "numerous timekeeping errors and misrepresentations on the part of Caldwell, Reeves, and Oswalt." *Ibid.* Following the audit, Chesnut, along with Dana Jester, vice president of human resources, and Tom Whitaker, vice president of operations, recommended to company president Sanderson that petitioner and Caldwell be fired. *Id.*, at 690–691. In October 1995, Sanderson followed the recommendation and discharged both petitioner and Caldwell. *Id.*, at 691.

In June 1996, petitioner filed suit in the United States District Court for the Northern District of Mississippi, contending that he had been fired because of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.* At trial, respondent contended that it had fired petitioner due to his failure to maintain accurate attendance records, while petitioner attempted to demonstrate that respondent's explanation was pretext for age discrimination. 197 F. 3d, at 692–693. Petitioner introduced evidence that he had accurately recorded the attendance and hours of the employees under his supervision, and that Chesnut, whom Oswalt described as wielding "absolute power" within the company, 3 Record 80, had demonstrated age-based animus in his dealings with petitioner. 197 F. 3d, at 693.

During the trial, the District Court twice denied oral motions by respondent for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure, and the case went to the jury. 3 Record 183; 4 *id.*, at 354. The court instructed the jury that "[i]f the plaintiff fails to prove age was a determinative or motivating factor in the decision to

terminate him, then your verdict shall be for the defendant." Tr. 7 (Jury Charge) (Sept. 12, 1997). So charged, the jury returned a verdict in favor of petitioner, awarding him $35,000 in compensatory damages, and found that respondent's age discrimination had been "willfu[l]." 197 F. 3d, at 691. The District Court accordingly entered judgment for petitioner in the amount of $70,000, which included $35,000 in liquidated damages based on the jury's finding of willfulness. *Ibid.* Respondent then renewed its motion for judgment as a matter of law and alternatively moved for a new trial, while petitioner moved for front pay. 2 Record, Doc. Nos. 36, 38. The District Court denied respondent's motions and granted petitioner's, awarding him $28,490.80 in front pay for two years' lost income. 2 *id.*, Doc. Nos. 40, 41.

The Court of Appeals for the Fifth Circuit reversed, holding that petitioner had not introduced sufficient evidence to sustain the jury's finding of unlawful discrimination. 197 F. 3d, at 694. After noting respondent's proffered justification for petitioner's discharge, the court acknowledged that petitioner "very well may" have offered sufficient evidence for "a reasonable jury [to] have found that [respondent's] explanation for its employment decision was pretextual." *Id.*, at 693. The court explained, however, that this was "not dispositive" of the ultimate issue—namely, "whether Reeves presented sufficient evidence that his age motivated [respondent's] employment decision." *Ibid.* Addressing this question, the court weighed petitioner's additional evidence of discrimination against other circumstances surrounding his discharge. See *id.*, at 693–694. Specifically, the court noted that Chesnut's age-based comments "were not made in the direct context of Reeves's termination"; there was no allegation that the two other individuals who had recommended that petitioner be fired (Jester and Whitaker) were motivated by age; two of the decisionmakers involved in petitioner's discharge (Jester and Sanderson) were over the age of 50; all three of the Hinge Room supervisors were

accused of inaccurate recordkeeping; and several of respondent's management positions were filled by persons over age 50 when petitioner was fired. *Ibid.* On this basis, the court concluded that petitioner had not introduced sufficient evidence for a rational jury to conclude that he had been discharged because of his age. *Id.*, at 694.

We granted certiorari, 528 U. S. 985 (1999), to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination (as defined in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973)), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination. Compare *Kline* v. *TVA*, 128 F. 3d 337 (CA6 1997) (prima facie case combined with sufficient evidence to disbelieve employer's explanation always creates jury issue of whether employer intentionally discriminated); *Combs* v. *Plantation Patterns*, 106 F. 3d 1519 (CA11 1997) (same), cert. denied, 522 U. S. 1045 (1998); *Sheridan* v. *E. I. DuPont de Nemours & Co.*, 100 F. 3d 1061 (CA3 1996) (same) (en banc), cert. denied, 521 U. S. 1129 (1997); *Gaworski* v. *ITT Commercial Finance Corp.*, 17 F. 3d 1104 (CA8) (same), cert. denied, 513 U. S. 946 (1994); *Anderson* v. *Baxter Healthcare Corp.*, 13 F. 3d 1120 (CA7 1994) (same); *Washington* v. *Garrett*, 10 F. 3d 1421 (CA9 1993) (same), with *Aka* v. *Washington Hospital Center*, 156 F. 3d 1284 (CADC 1998) (en banc) (plaintiff's discrediting of employer's explanation is entitled to considerable weight, such that plaintiff should not be routinely required to submit evidence over and above proof of pretext), and with *Fisher* v. *Vassar College*, 114 F. 3d 1332 (CA2 1997) (en banc) (plaintiff must introduce sufficient evidence for jury to find both that employer's reason was false and that real reason was discrimination), cert. denied, 522 U. S. 1075 (1998); *Rhodes* v. *Guiberson Oil Tools*, 75 F. 3d 989 (CA5 1996) (same); *Theard* v. *Glaxo, Inc.*, 47 F. 3d

676 (CA4 1995) (same); *Woods* v. *Friction Materials, Inc.*, 30 F. 3d 255 (CA1 1994) (same).

II

Under the ADEA, it is "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). When a plaintiff alleges disparate treatment, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604, 610 (1993). That is, the plaintiff's age must have "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome." *Ibid.* Recognizing that "the question facing triers of fact in discrimination cases is both sensitive and difficult," and that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 716 (1983), the Courts of Appeals, including the Fifth Circuit in this case, have employed some variant of the framework articulated in *McDonnell Douglas* to analyze ADEA claims that are based principally on circumstantial evidence. See, *e. g.*, *Stokes* v. *Westinghouse Savannah River Co.*, 206 F. 3d 420, 429 (CA4 2000); *Galabya* v. *New York City Bd. of Ed.*, 202 F. 3d 636, 639 (CA2 2000); *Hall* v. *Giant Food, Inc.*, 175 F. 3d 1074, 1077–1078 (CADC 1999); *Beaird* v. *Seagate Technology Inc.*, 145 F. 3d 1159, 1165 (CA10), cert. denied, 525 U. S. 1054 (1998); *Hindman* v. *Transkrit Corp.*, 145 F. 3d 986, 990–991 (CA8 1998); *Turlington* v. *Atlanta Gas Light Co.*, 135 F. 3d 1428, 1432 (CA11), cert. denied, 525 U. S. 962 (1998); *Keller* v. *Orix Credit Alliance, Inc.*, 130 F. 3d 1101, 1108 (CA3 1997) (en banc); *Kaniff* v. *Allstate Ins. Co.*, 121 F. 3d 258, 263 (CA7 1997); *Ritter* v. *Hughes Aircraft Co.*, 58 F. 3d 454, 456–457 (CA9 1995); *Bodenheimer* v. *PPG Industries, Inc.*, 5 F. 3d

955, 957 (CA5 1993); *Mesnick* v. *General Elec. Co.*, 950 F. 2d 816, 823 (CA1 1991), cert. denied, 504 U. S. 985 (1992); *Ackerman* v. *Diamond Shamrock Corp.*, 670 F. 2d 66, 69 (CA6 1982). This Court has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U. S. C. § 2000e–2(a)(1), also applies to ADEA actions. Because the parties do not dispute the issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here. Cf. *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U. S. 308, 311 (1996).

McDonnell Douglas and subsequent decisions have "established an allocation of the burden of production and an order for the presentation of proof in . . . discriminatory-treatment cases." *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502, 506 (1993). First, the plaintiff must establish a prima facie case of discrimination. *Ibid.; Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 252–253 (1981). It is undisputed that petitioner satisfied this burden here: (i) at the time he was fired, he was a member of the class protected by the ADEA ("individuals who are at least 40 years of age," 29 U. S. C. § 631(a)), (ii) he was otherwise qualified for the position of Hinge Room supervisor, (iii) he was discharged by respondent, and (iv) respondent successively hired three persons in their thirties to fill petitioner's position. See 197 F. 3d, at 691–692. The burden therefore shifted to respondent to "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Burdine*, *supra*, at 254. This burden is one of production, not persuasion; it "can involve no credibility assessment." *St. Mary's Honor Center*, *supra*, at 509. Respondent met this burden by offering admissible evidence sufficient for the trier of fact to conclude that petitioner was fired because of his failure to maintain accurate attendance records. See 197 F. 3d, at 692. Accordingly, "the *McDonnell Douglas* framework—with

its presumptions and burdens"—disappeared, *St. Mary's Honor Center*, *supra*, at 510, and the sole remaining issue was "discrimination *vel non*," *Aikens*, *supra*, at 714.

Although intermediate evidentiary burdens shift back and forth under this framework, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U. S., at 253. And in attempting to satisfy this burden, the plaintiff—once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision—must be afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Ibid.;* see also *St. Mary's Honor Center*, *supra*, at 507–508. That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, *supra*, at 256. Moreover, although the presumption of discrimination "drops out of the picture" once the defendant meets its burden of production, *St. Mary's Honor Center*, *supra*, at 511, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual," *Burdine*, *supra*, at 255, n. 10.

In this case, the evidence supporting respondent's explanation for petitioner's discharge consisted primarily of testimony by Chesnut and Sanderson and documentation of petitioner's alleged "shoddy record keeping." 197 F. 3d, at 692. Chesnut testified that a 1993 audit of Hinge Room operations revealed "a very lax assembly line" where employees were not adhering to general work rules. 4 Record 197–199. As a result of that audit, petitioner was placed on 90 days' probation for unsatisfactory performance. 197 F. 3d, at 690. In 1995, Chesnut ordered another investi-

gation of the Hinge Room, which, according to his testimony, revealed that petitioner was not correctly recording the absences and hours of employees. 4 Record 204–205. Respondent introduced summaries of that investigation documenting several attendance violations by 12 employees under petitioner's supervision, and noting that each should have been disciplined in some manner. See App. 21–24, 30–37; 4 Record 206–208. Chesnut testified that this failure to discipline absent and late employees is "extremely important when you are dealing with a union" because uneven enforcement across departments would keep the company "in grievance and arbitration cases, which are costly, all the time." 4 *id.*, at 206. He and Sanderson also stated that petitioner's errors, by failing to adjust for hours not worked, cost the company overpaid wages. 3 *id.*, at 100, 142, 154; 4 *id.*, at 191–192, 213. Sanderson testified that she accepted the recommendation to discharge petitioner because he had "intentionally falsif[ied] company pay records." 3 *id.*, at 100.

Petitioner, however, made a substantial showing that respondent's explanation was false. First, petitioner offered evidence that he had properly maintained the attendance records. Most of the timekeeping errors cited by respondent involved employees who were not marked late but who were recorded as having arrived at the plant at 7 a.m. for the 7 a.m. shift. 3 *id.*, at 118–123; 4 *id.*, at 240–247, 283–285, 291, 293–294. Respondent contended that employees arriving at 7 a.m. could not have been at their workstations by 7 a.m., and therefore must have been late. 3 *id.*, at 119–120; 4 *id.*, at 241, 245. But both petitioner and Oswalt testified that the company's automated timeclock often failed to scan employees' timecards, so that the timesheets would not record any time of arrival. 3 *id.*, at 6, 85; 4 *id.*, at 334–335. On these occasions, petitioner and Oswalt would visually check the workstations and record whether the employees were present at the start of the shift. 3 *id.*, at 6, 85–87;

4 *id.*, at 335. They stated that if an employee arrived promptly but the timesheet contained no time of arrival, they would reconcile the two by marking "7 a.m." as the employee's arrival time, even if the employee actually arrived at the plant earlier. *Ibid.* On cross-examination, Chesnut acknowledged that the timeclock sometimes malfunctioned, and that if "people were there at their work station[s]" at the start of the shift, the supervisor "would write in seven o'clock." 4 *id.*, at 244. Petitioner also testified that when employees arrived before or stayed after their shifts, he would assign them additional work so they would not be overpaid. See 197 F. 3d, at 693.

Petitioner similarly cast doubt on whether he was responsible for any failure to discipline late and absent employees. Petitioner testified that his job only included reviewing the daily and weekly attendance reports, and that disciplinary writeups were based on the monthly reports, which were reviewed by Caldwell. 3 Record 20–22; 4 *id.*, at 335. Sanderson admitted that Caldwell, and not petitioner, was responsible for citing employees for violations of the company's attendance policy. 3 *id.*, at 20–21, 137–138. Further, Chesnut conceded that there had never been a union grievance or employee complaint arising from petitioner's recordkeeping, and that the company had never calculated the amount of overpayments allegedly attributable to petitioner's errors. 4 *id.*, at 267, 301. Petitioner also testified that, on the day he was fired, Chesnut said that his discharge was due to his failure to report as absent one employee, Gina Mae Coley, on two days in September 1995. 3 *id.*, at 23, 70; 4 *id.*, at 335–336. But petitioner explained that he had spent those days in the hospital, and that Caldwell was therefore responsible for any overpayment of Coley. 3 *id.*, at 17, 22. Finally, petitioner stated that on previous occasions that employees were paid for hours they had not worked, the company had simply adjusted those employees' next paychecks to correct the errors. 3 *id.*, at 72–73.

Based on this evidence, the Court of Appeals concluded that petitioner "very well may be correct" that "a reasonable jury could have found that [respondent's] explanation for its employment decision was pretextual." 197 F. 3d, at 693. Nonetheless, the court held that this showing, standing alone, was insufficient to sustain the jury's finding of liability: "We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated [respondent's] employment decision." *Ibid.* And in making this determination, the Court of Appeals ignored the evidence supporting petitioner's prima facie case and challenging respondent's explanation for its decision. See *id.*, at 693–694. The court confined its review of evidence favoring petitioner to that evidence showing that Chesnut had directed derogatory, age-based comments at petitioner, and that Chesnut had singled out petitioner for harsher treatment than younger employees. See *ibid.* It is therefore apparent that the court believed that only this additional evidence of discrimination was relevant to whether the jury's verdict should stand. That is, the Court of Appeals proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination.

In so reasoning, the Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence. This much is evident from our decision in *St. Mary's Honor Center.* There we held that the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff. 509 U. S., at 511. The ultimate question is whether the employer intentionally discriminated, and proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's prof-

fered reason . . . is correct." *Id.*, at 524. In other words, "[i]t is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.*, at 519.

In reaching this conclusion, however, we reasoned that it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, we stated:

> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." *Id.*, at 511.

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. See *id.*, at 517 ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination"). In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Wright* v. *West*, 505 U. S. 277, 296 (1992); see also *Wilson* v. *United States*, 162 U. S. 613, 620–621 (1896); 2 J. Wigmore, Evidence § 278(2), p. 133 (J. Chadbourn rev. 1979). Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Cf. *Furnco Constr. Corp.* v.

Waters, 438 U. S. 567, 577 (1978) ("[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration"). Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. See *Aka* v. *Washington Hospital Center*, 156 F. 3d, at 1291–1292; see also *Fisher* v. *Vassar College*, 114 F. 3d, at 1338 ("[I]f the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent"). To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not "'treat discrimination differently from other ultimate questions of fact.'" *St. Mary's Honor Center*, *supra*, at 524 (quoting *Aikens*, 460 U. S., at 716).

Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie

case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. See *infra*, at 151–152. For purposes of this case, we need not—and could not—resolve all of the circumstances in which such factors would entitle an employer to judgment as a matter of law. It suffices to say that, because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.

III

A

The remaining question is whether, despite the Court of Appeals' misconception of petitioner's evidentiary burden, respondent was nonetheless entitled to judgment as a matter of law. Under Rule 50, a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. Rule Civ. Proc. 50(a); see also *Weisgram* v. *Marley Co.*, 528 U. S. 440, 447–448 (2000). The Courts of Appeals have articulated differing formulations as to what evidence a court is to consider in ruling on a Rule 50 motion. See *Venture Technology, Inc.* v. *National Fuel Gas Distribution Corp.*, decided with *Schwimmer* v. *Sony Corp. of America*, 459 U. S. 1007, 1009 (1982) (White, J., dissenting from denial of certiorari). Some decisions have stated that review is limited to that evidence favorable to the nonmoving party, see, *e. g.*, *Aparicio* v. *Norfolk & Western R. Co.*, 84 F. 3d 803, 807 (CA6 1996); *Simpson* v. *Skelly Oil Co.*, 371 F. 2d 563, 566 (CA8 1967), while most have held that review extends to the entire record, drawing all reasonable inferences in favor of the nonmovant, see, *e. g.*, *Tate* v. *Government Employees Ins. Co.*,

997 F. 2d 1433, 1436 (CA11 1993); *Boeing Co.* v. *Shipman*, 411 F. 2d 365, 374 (CA5 1969) (en banc).

On closer examination, this conflict seems more semantic than real. Those decisions holding that review under Rule 50 should be limited to evidence favorable to the nonmovant appear to have their genesis in *Wilkerson* v. *McCarthy*, 336 U. S. 53 (1949). See 9A C. Wright & A. Miller, Federal Practice and Procedure § 2529, pp. 297–301 (2d ed. 1995) (hereinafter Wright & Miller). In *Wilkerson*, we stated that "in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of" the nonmoving party. 336 U. S., at 57. But subsequent decisions have clarified that this passage was referring to the evidence to which the trial court should *give credence*, not the evidence that the court should *review*. In the analogous context of summary judgment under Rule 56, we have stated that the court must review the record "taken as a whole." *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 587 (1986). And the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, such that "the inquiry under each is the same." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 250–251 (1986); see also *Celotex Corp.* v. *Catrett*, 477 U. S. 317, 323 (1986). It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.

In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *Lytle* v. *Household Mfg., Inc.*, 494 U. S. 545, 554–555 (1990); *Liberty Lobby, Inc.*, *supra*, at 254; *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 696, n. 6 (1962). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty*

Lobby, supra, at 255. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.,* at 300.

B

Applying this standard here, it is apparent that respondent was not entitled to judgment as a matter of law. In this case, in addition to establishing a prima facie case of discrimination and creating a jury issue as to the falsity of the employer's explanation, petitioner introduced additional evidence that Chesnut was motivated by age-based animus and was principally responsible for petitioner's firing. Petitioner testified that Chesnut had told him that he "was so old [he] must have come over on the Mayflower" and, on one occasion when petitioner was having difficulty starting a machine, that he "was too damn old to do [his] job." 3 Record 26. According to petitioner, Chesnut would regularly "cuss at me and shake his finger in my face." 3 *id.,* at 26–27. Oswalt, roughly 24 years younger than petitioner, corroborated that there was an "obvious difference" in how Chesnut treated them. 3 *id.,* at 82. He stated that, although he and Chesnut "had [their] differences," "it was nothing compared to the way [Chesnut] treated Roger." *Ibid.* Oswalt explained that Chesnut "tolerated quite a bit" from him even though he "defied" Chesnut "quite often," but that Chesnut treated petitioner "[i]n a manner, as you would . . . treat . . . a child when . . . you're angry with [him]." 3 *id.,* at 82–83. Petitioner also demonstrated that, according to company records, he and Oswalt had nearly identical rates of productivity in 1993. 3 *id.,* at 163–167; 4 *id.,* at 225–226. Yet respondent conducted an efficiency study of only the

regular line, supervised by petitioner, and placed only petitioner on probation. 3 *id.*, at 166–167; 4 *id.*, at 229. Chesnut conducted that efficiency study and, after having testified to the contrary on direct examination, acknowledged on cross-examination that he had recommended that petitioner be placed on probation following the study. 4 *id.*, at 197–199, 237.

Further, petitioner introduced evidence that Chesnut was the actual decisionmaker behind his firing. Chesnut was married to Sanderson, who made the formal decision to discharge petitioner. 3 *id.*, at 90, 152. Although Sanderson testified that she fired petitioner because he had "intentionally falsif[ied] company pay records," 3 *id.*, at 100, respondent only introduced evidence concerning the inaccuracy of the records, not their falsification. A 1994 letter authored by Chesnut indicated that he berated other company directors, who were supposedly his coequals, about how to do their jobs. Pl. Exh. 7, 3 Record 108–112. Moreover, Oswalt testified that all of respondent's employees feared Chesnut, and that Chesnut had exercised "absolute power" within the company for "[a]s long as [he] can remember." 3 *id.*, at 80.

In holding that the record contained insufficient evidence to sustain the jury's verdict, the Court of Appeals misapplied the standard of review dictated by Rule 50. Again, the court disregarded critical evidence favorable to petitioner—namely, the evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory explanation. See 197 F. 3d, at 693–694. The court also failed to draw all reasonable inferences in favor of petitioner. For instance, while acknowledging "the potentially damning nature" of Chesnut's age-related comments, the court discounted them on the ground that they "were not made in the direct context of Reeves's termination." *Id.*, at 693. And the court discredited petitioner's evidence that Chesnut was the actual decisionmaker by giving weight to the fact that

there was "no evidence to suggest that any of the other decision makers were motivated by age." *Id.*, at 694. Moreover, the other evidence on which the court relied—that Caldwell and Oswalt were also cited for poor recordkeeping, and that respondent employed many managers over age 50—although relevant, is certainly not dispositive. See *Furnco*, 438 U. S., at 580 (evidence that employer's work force was racially balanced, while "not wholly irrelevant," was not "sufficient to *conclusively* demonstrate that [the employer's] actions were not discriminatorily motivated"). In concluding that these circumstances so overwhelmed the evidence favoring petitioner that no rational trier of fact could have found that petitioner was fired because of his age, the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's.

The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination. Given the evidence in the record supporting petitioner, we see no reason to subject the parties to an additional round of litigation before the Court of Appeals rather than to resolve the matter here. The District Court plainly informed the jury that petitioner was required to show "by a preponderance of the evidence that his age was a determining and motivating factor in the decision of [respondent] to terminate him." Tr. 7 (Jury Charge) (Sept. 12, 1997). The court instructed the jury that, to show that respondent's explanation was a pretext for discrimination, petitioner had to demonstrate "1, that the stated reasons were not the real reasons for [petitioner's] discharge; *and* 2, that age discrimination was the real reason for [petitioner's] discharge." *Ibid.* (emphasis added). Given that petitioner established a prima facie case of discrimination, introduced enough evidence for the jury to reject respondent's explanation, and produced additional evidence of age-based animus, there was sufficient evidence for the jury to find that respondent had

intentionally discriminated. The District Court was therefore correct to submit the case to the jury, and the Court of Appeals erred in overturning its verdict.

For these reasons, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE GINSBURG, concurring.

The Court today holds that an employment discrimination plaintiff *may* survive judgment as a matter of law by submitting two categories of evidence: first, evidence establishing a "prima facie case," as that term is used in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973); and second, evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. Because the Court of Appeals in this case plainly, and erroneously, required the plaintiff to offer some evidence beyond those two categories, no broader holding is necessary to support reversal.

I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law. I anticipate that such circumstances will be uncommon. As the Court notes, it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. *Ante*, at 147. Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation. *Ibid.* Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide; that is the lesson of *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502 (1993). But the inference remains—unless it is conclusively

demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law, see *ante*, at 151, that discrimination could not have been the defendant's true motivation. If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above. Because the Court's opinion leaves room for such further elaboration in an appropriate case, I join it in full.

Syllabus

RAMDASS *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

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

No. 99–7000. Argued April 18, 2000—Decided June 12, 2000

Petitioner Ramdass was sentenced to death in Virginia for the murder of Mohammed Kayani. Under Virginia law, a conviction does not become final until the jury returns a verdict and, some time thereafter, the judge enters a final judgment of conviction. At the time of the Kayani sentencing trial, a final judgment had been entered against Ramdass for an armed robbery at a Pizza Hut restaurant and a jury had found him guilty of an armed robbery at a Domino's Pizza restaurant, but no final judgment had been entered. The prosecutor argued future dangerousness at the Kayani sentencing trial, claiming that Ramdass would commit further violent crimes if released. The jury recommended death. After final judgment was entered on the Domino's conviction, the Kayani judge held a hearing to consider whether to impose the recommended sentence. Arguing for a life sentence, Ramdass claimed that his prior convictions made him ineligible for parole under Virginia's three-strikes law, which denies parole to a person convicted of three separate felony offenses of murder, rape, or armed robbery, which were not part of a common act, transaction, or scheme. The court sentenced Ramdass to death, and the Virginia Supreme Court affirmed. On remand from this Court, the Virginia Supreme Court again affirmed the sentence, declining to apply the holding of *Simmons* v. *South Carolina*, 512 U. S. 154, that a jury considering imposing death should be told if the defendant is parole ineligible under state law. The court concluded that Ramdass was not parole ineligible when the jury was considering his sentence because the Domino's crime, in which no final judgment had been entered, did not count as a conviction for purposes of the three-strikes law. Ultimately, Ramdass sought federal habeas relief. The District Court granted his petition, but the Court of Appeals reversed.

Held: The judgment is affirmed.

187 F. 3d 396, affirmed.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS, concluded that Ramdass was not entitled to a jury instruction on parole ineligibility under Virginia's three-strikes law. Pp. 165–178.

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(a) Whether Ramdass may obtain relief under *Simmons* is governed by the habeas corpus statute, 28 U. S. C. § 2254(d)(1), which forbids relief unless a state-court adjudication of a federal claim is contrary to, or an unreasonable application of, clearly established federal law as determined by this Court. The Virginia Supreme Court's ruling here was neither contrary to *Simmons* nor an unreasonable application of its rationale. Pp. 165–166.

(b) *Simmons* created a workable rule. The parole-ineligibility instruction is required only when, assuming the jury fixes a life sentence, the defendant is ineligible for parole under state law. The instruction was required in *Simmons* because it was legally accurate. However, that is not the case here, for the Virginia Supreme Court's authoritative determination is that Ramdass was not parole ineligible when the jury considered his sentence. Material differences exist between this case and *Simmons:* The *Simmons* defendant had conclusively established his parole ineligibility at the time of sentencing and Ramdass had not; a sentence had been imposed for the *Simmons* defendant's prior conviction and he pleaded guilty, while the Domino's case was tried to a jury and no sentence had been imposed; and the grounds for challenging a guilty plea in the *Simmons* defendant's State are limited. Ramdass' additional attempts to equate his case with *Simmons* do not refute the critical point that he was not parole ineligible as a matter of state law at the time of his sentencing trial. Pp. 166–169.

(c) Extending *Simmons* to cover situations where it looks like a defendant will turn out to be parole ineligible is neither necessary nor workable, and the Virginia Supreme Court was not unreasonable in refusing to do so. Doing so would require courts to evaluate the probability of future events in cases where a three-strikes law is the issue. The States are entitled to some latitude in this field, for the admissibility of evidence at capital sentencing is an issue left to them, subject to federal requirements. Extending *Simmons* would also give rise to litigation on a peripheral point, since parole eligibility may be only indirectly related to the circumstances of the crime being considered and is of uncertain materiality. The State is entitled to some deference in determining the best reference point for making the ineligibility determination. Virginia's rule using judgment in the Domino's case to determine parole ineligibility is not arbitrary by virtue of Virginia's also allowing the prosecutor to introduce evidence of Ramdass' unadjudicated prior bad acts to show future dangerousness. Public opinion polls showing the likely effect of parole ineligibility on jury verdicts cast no doubt upon the State's rule. Ramdass' claim is based on the contention that it is inevitable that a judgment of conviction would be entered for his Domino's crime, but it is a well-established practice for Virginia

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courts to consider and grant post-trial motions to set aside jury verdicts. Ramdass' time to file such a motion in the Domino's case had not expired when the jury was deliberating the Kayani sentence. Ramdass complains that using the entry of judgment rather than the jury verdict to determine finality is arbitrary because the availability of postjudgment relief renders uncertain the judgment's finality and reliability. However, States may take different approaches, and a judgment is the usual measure of finality in the trial court. Ramdass' conduct in this litigation confirms the conclusion reached here. He did not indicate at trial that he thought he would never be paroled or mention the three-strikes law at trial, and it appears he did not argue that his parole ineligibility should have been determined based on the date of the Domino's verdict until the Virginia Supreme Court declared that another one of his convictions did not count as a strike. Pp. 169–177.

(d) State courts remain free to adopt rules that go beyond the Constitution's minimum requirements. In fact, Virginia allows a *Simmons* instruction even where future dangerousness is not at issue; and since it has also eliminated parole for capital defendants sentenced to life in prison, all capital defendants now receive the instruction. Pp. 177–178.

JUSTICE O'CONNOR agreed that Ramdass is not entitled to habeas relief. The standard of review applicable in federal habeas cases is narrower than that applicable on direct review. Whether a defendant is entitled to inform the jury that he is parole ineligible is ultimately a federal law question, but this Court looks to state law to determine the defendant's parole status. Under Virginia law, Ramdass was not parole ineligible. Were the entry of judgment a purely ministerial act under Virginia law, the facts in this case would have been materially indistinguishable from those in *Simmons* v. *South Carolina*, 512 U. S. 154. Such was not the case here, however, for, under Virginia law, a guilty verdict does not inevitably lead to the entry of a judgment order. Consequently, the Virginia Supreme Court's decision was neither contrary to, nor an unreasonable application of, *Simmons*. Pp. 178–181.

KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 178. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 182.

David I. Bruck argued the cause for petitioner. With him on the briefs were *F. Nash Bilisoly*, by appointment of the Court, 528 U. S. 1152, *John M. Ryan*, and *Michele J. Brace*.

Katherine P. Baldwin, Assistant Attorney General of Virginia, argued the cause for respondent. With her on the brief was *Mark L. Earley*, Attorney General.

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join.

Petitioner received a death sentence in the Commonwealth of Virginia for murder in the course of robbery. On review of a decision denying relief in federal habeas corpus, he seeks to set aside the death sentence in reliance on *Simmons* v. *South Carolina*, 512 U. S. 154 (1994). He argues the jury should have been instructed of his parole ineligibility based on prior criminal convictions. We reject his claims and conclude *Simmons* is inapplicable to petitioner since he was not parole ineligible when the jury considered his case, nor would he have been parole ineligible by reason of a conviction in the case then under consideration by the jury. He is not entitled to the relief he seeks.

I

Sometime after midnight on September 2, 1992, Mohammed Kayani was working as a convenience store clerk. Petitioner Bobby Lee Ramdass and his accomplices entered the store and forced the customers to the floor at gunpoint. While petitioner ordered Kayani to open the store's safe, accomplices took the customers' wallets, money from the cash registers, cigarettes, Kool Aid, and lottery tickets. When Kayani fumbled in an initial attempt to open the safe, petitioner squatted next to him and yelled at him to open the safe. At close range he held the gun to Kayani's head and pulled the trigger. The gun did not fire at first; but petitioner tried again and shot Kayani just above his left ear, killing him. Petitioner stood over the body and laughed. He later inquired of an accomplice why the customers were not killed as well.

The murder of Kayani was no isolated incident. Just four months earlier, after serving time for a 1988 robbery conviction, petitioner had been released on parole and almost at once engaged in a series of violent crimes. In July, petitioner committed a murder in Alexandria, Virginia. On August 25, petitioner and three accomplices committed an armed robbery of a Pizza Hut restaurant, abducting one of the victims. Four days later, petitioner and an accomplice pistol-whipped and robbed a hotel clerk. On the afternoon of August 30, petitioner and two accomplices robbed a taxicab driver, Emanuel Selassie, shot him in the head, and left him for dead. Through major surgery and after weeks of unconsciousness, Selassie survived. The same day as the Selassie shooting, petitioner committed an armed robbery of a Domino's Pizza restaurant.

The crime spree ended with petitioner's arrest on September 11, 1992, nine days after the Kayani shooting. Petitioner faced a series of criminal prosecutions. For reasons we discuss later, the sequence of events in the criminal proceedings is important to the claim petitioner makes in this Court. Under Virginia law, a conviction does not become final in the trial court until two steps have occurred. First, the jury must return a guilty verdict; and, second, some time thereafter, the judge must enter a final judgment of conviction and pronounce sentence, unless he or she determines to set the verdict aside. On December 15, 1992, a jury returned a guilty verdict based on the Pizza Hut robbery. On January 7, 1993, a jury rendered a guilty verdict for the Domino's robbery; on January 22, the trial court entered a judgment of conviction on the Pizza Hut verdict; on January 30, the sentencing phase of the Kayani murder trial was completed, with the jury recommending that petitioner be sentenced to death for that crime; and on February 18, the trial court entered judgment on the Domino's verdict. After his capital trial for the Kayani killing, petitioner pleaded guilty to the July murder in Alexandria and to the shooting of

Selassie. Thus, at the time of the capital sentencing trial, a final judgment of conviction had been entered for the Pizza Hut crime; a jury had found petitioner guilty of the Domino's crime, but the trial court had not entered a final judgment of conviction; and charges in the Alexandria murder had not yet been filed, and indeed petitioner had denied any role in the crime until sometime after the sentencing phase in the instant case.

At the sentencing phase of the capital murder trial for Kayani's murder, the Commonwealth submitted the case to the jury using the future dangerousness aggravating circumstance, arguing that the death penalty should be imposed because Ramdass "would commit criminal acts of violence that would constitute a continuing serious threat to society." Va. Code Ann. § 19.2–264.4(C) (1993). Petitioner countered by arguing that he would never be released from jail, even if the jury refused to sentence him to death. For this proposition, Ramdass relied on the sentences he would receive for the crimes detailed above, including those which had yet to go to trial and those (such as the Domino's crime) for which no judgment had been entered and no sentence had been pronounced. Counsel argued petitioner "is going to jail for the rest of his life. . . . I ask you to give him life. Life, he will never see the light of day . . . ." App. 85. At another point, counsel argued: "'Ramdass will never be out of jail. Your sentence today will insure that if he lives to be a hundred and twenty two, he will spend the rest of his life in prison.'" 187 F. 3d 396, 400 (CA4 1999). These arguments drew no objection from the Commonwealth.

The prosecution's case at sentencing consisted of an account of some of Ramdass' prior crimes, including crimes for which Ramdass had not yet been charged or tried, such as the shooting of Selassie and the assault of the hotel clerk. Investigators of Ramdass' crimes, an accomplice, and two victims provided narrative descriptions of the crime spree preceding the murder, and their evidence of those crimes

was the basis for the prosecution's case in the sentencing hearing. Evidence of the crime spree did not depend on formal convictions for its admission. The prosecutor, moreover, did not mention the Domino's crime in his opening statement and did not introduce evidence of the crime during the Commonwealth's case in chief. App. 8–47. Ramdass himself first injected the Domino's crime into the sentencing proceeding, testifying in response to his own lawyer's questions about his involvement in the crime. In closing, the prosecutor argued that Ramdass could not live by the rules of society "either here or in prison." *Id.*, at 86.

During the juror deliberations, the jury sent a note to the judge asking: "'[I]f the Defendant is given life, is there a possibility of parole at some time before his natural death?'" *Id.*, at 88. Petitioner's counsel suggested the following response: "'"You must not concern yourself with matters that will occur after you impose your sentence, but you may impose *[sic]* that your sentence will be the legal sentence imposed in the case."'" *Id.*, at 89. The trial judge refused the instruction, relying on the then-settled Virginia law that parole is not an appropriate factor for the jury to consider, and informed the jury that they "'are not to concern [them]selves with what may happen afterwards.'" *Id.*, at 91. The next day the jury returned its verdict recommending the death sentence.

Virginia law permitted the judge to give a life sentence despite the jury's recommendation; and two months later the trial court conducted a hearing to decide whether the jury's recommended sentence would be imposed. During the interval between the jury trial and the court's sentencing hearing, final judgment had been entered on the Domino's conviction. At the court's sentencing hearing, Ramdass' counsel argued for the first time that his prior convictions rendered him ineligible for parole under Virginia's three-strikes law, which denies parole to a person convicted of three separate felony offenses of murder, rape, or armed

robbery, which were not part of a common act, transaction, or scheme. Va. Code Ann. § 53.1–151(B1) (1993). Petitioner's counsel also stated that three jurors contacted by petitioner's counsel after the verdict expressed the opinion that a life sentence would have been imposed had they known Ramdass would not be eligible for parole. These jurors were not identified by name, were not produced for testimony, and provided no formal or sworn statements supporting defense counsel's representations. App. 95. Rejecting petitioner's arguments for a life sentence, the trial court sentenced petitioner to death.

Ramdass appealed, arguing that his parole ineligibility, as he characterized it, should have been disclosed to the jury. The Virginia Supreme Court rejected the claim, applying its settled law "that a jury should not hear evidence of parole eligibility or ineligibility because it is not a relevant consideration in fixing the appropriate sentence." *Ramdass* v. *Commonwealth*, 246 Va. 413, 426, 437 S. E. 2d 566, 573 (1993). The court did not address whether Ramdass had waived the claim by failing to mention the three-strikes law at trial or by not objecting to the instructions that were given. Other Virginia capital defendants in Ramdass' position had been raising the issue at trial, despite existing Virginia law to the contrary. *E. g.*, *Mickens* v. *Commonwealth*, 249 Va. 423, 424, 457 S. E. 2d 9, 10 (1995); *O'Dell* v. *Thompson*, 502 U. S. 995, 996–997, n. 3 (1991) (Blackmun, J., respecting denial of certiorari); *Mueller* v. *Commonwealth*, 244 Va. 386, 408–409, 422 S. E. 2d 380, 394 (1992); *Eaton* v. *Commonwealth*, 240 Va. 236, 244, 397 S. E. 2d 385, 390 (1990).

From the State Supreme Court's denial of his claims on direct review, Ramdass filed a petition for a writ of certiorari in this Court. One of his arguments was that the judge should have instructed the jury that he was ineligible for parole. While the petition was pending, we decided *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), which held that where a defendant was parole ineligible under state law at

the time of the jury's death penalty deliberations, the jury should have been informed of that fact. We granted Ramdass' petition for certiorari and remanded the case for reconsideration in light of *Simmons*. *Ramdass* v. *Virginia*, 512 U. S. 1217 (1994).

On remand, the Virginia Supreme Court affirmed Ramdass' death sentence, concluding that *Simmons* applied only if Ramdass was ineligible for parole when the jury was considering his sentence. *Ramdass* v. *Commonwealth*, 248 Va. 518, 450 S. E. 2d 360 (1994). The court held that Ramdass was not parole ineligible when the jury considered his sentence because the Kayani murder conviction was not his third conviction for purposes of the three-strikes law. In a conclusion not challenged here, the court did not count the 1988 robbery conviction as one which qualified under the three-strikes provision. (It appears the crime did not involve use of a weapon.) The court also held the Domino's robbery did not count as a conviction because no final judgment had been entered on the verdict. Thus, the only conviction prior to the Kayani murder verdict counting as a strike at the time of the sentencing trial was for the Pizza Hut robbery. Unless the three-strikes law was operative, Ramdass was eligible for parole because, at the time of his trial, murder convicts became eligible for parole in 25 years. Va. Code Ann. § 53.1–151(C) (1993). Under state law, then, Ramdass was not parole ineligible at the time of sentencing; and the Virginia Supreme Court declined to apply *Simmons* to reverse Ramdass' sentence.

Ramdass filed a petition for a writ of certiorari contending that the Virginia Supreme Court misapplied *Simmons*, and we denied certiorari. *Ramdass* v. *Virginia*, 514 U. S. 1085 (1995). After an unsuccessful round of postconviction proceedings in Virginia courts, Ramdass sought habeas corpus relief in federal court. He argued once more that the Virginia Supreme Court erred in not applying *Simmons*. The District Court granted relief. 28 F. Supp. 2d 343 (ED Va.

1998). The Court of Appeals reversed. 187 F. 3d, at 407. When Ramdass filed a third petition for a writ of certiorari, we stayed his execution, 528 U. S. 1015 (1999), and granted certiorari, 528 U. S. 1068 (2000). Ramdass contends he was entitled to a jury instruction of parole ineligibility under the Virginia three-strikes law. Rejecting the contention, we now affirm.

II

Petitioner bases his request for habeas corpus relief on *Simmons*, *supra*. The premise of the *Simmons* case was that, under South Carolina law, the capital defendant would be ineligible for parole if the jury were to vote for a life sentence. Future dangerousness being at issue, the plurality opinion concluded that due process entitled the defendant to inform the jury of parole ineligibility, either by a jury instruction or in arguments by counsel. In our later decision in *O'Dell* v. *Netherland*, 521 U. S. 151, 166 (1997), we held that *Simmons* created a new rule for purposes of *Teague* v. *Lane*, 489 U. S. 288 (1989). *O'Dell* reaffirmed that the States have some discretion in determining the extent to which a sentencing jury should be advised of probable future custody and parole status in a future dangerousness case, subject to the rule of *Simmons*. We have not extended *Simmons* to cases where parole ineligibility has not been established as a matter of state law at the time of the jury's future dangerousness deliberations in a capital case.

Whether Ramdass may obtain relief under *Simmons* is governed by the habeas corpus statute, 28 U. S. C. § 2254(d)(1) (1994 ed., Supp. III), which forbids relief unless the state-court adjudication of a federal 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." As explained in JUSTICE O'CONNOR's opinion for the Court in *Williams* v. *Taylor*, 529 U. S. 362, 412–413 (2000), a state court acts contrary to clearly established federal law if it applies a legal rule

that contradicts our prior holdings or if it reaches a different result from one of our cases despite confronting indistinguishable facts. The statute also authorizes federal habeas corpus relief if, under clearly established federal law, a state court has been unreasonable in applying the governing legal principle to the facts of the case. A state determination may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled. The Virginia Supreme Court's ruling in the case before us was neither contrary to *Simmons* nor an unreasonable application of its rationale.

Petitioner contends his case is indistinguishable from *Simmons,* making the Virginia Supreme Court's refusal to grant relief contrary to that case. In his view the Pizza Hut conviction and the Domino's guilty verdict classified him, like the *Simmons* petitioner, as ineligible for parole when the jury deliberated his sentence. He makes this argument even though the Virginia Supreme Court declared that he was not parole ineligible at the time of the sentencing trial because no judgment of conviction had been entered for the Domino's crime.

Simmons created a workable rule. The parole-ineligibility instruction is required only when, assuming the jury fixes the sentence at life, the defendant is ineligible for parole under state law. 512 U. S., at 156 (plurality opinion) (limiting holding to situations where "state law prohibits the defendant's release on parole"); *id.*, at 165, n. 5 (relying on fact that Simmons was "ineligible for parole under state law"); *id.*, at 176 (O'CONNOR, J., concurring) (citing state statutes to demonstrate that for Simmons "the only available alternative sentence to death . . . was life imprisonment without [the] possibility of parole"). The instruction was required in *Simmons* because it was agreed that "an instruction informing the jury

that petitioner is ineligible for parole is legally accurate." *Id.*, at 166.

In this case, a *Simmons* instruction would not have been accurate under the law; for the authoritative determination of the Virginia Supreme Court is that petitioner was not ineligible for parole when the jury considered his sentence. In *Simmons* the defendant had "conclusively established" his parole ineligibility at the time of sentencing. *Id.*, at 158. Ramdass had not. In *Simmons*, a sentence had been imposed for the defendant's prior conviction and he pleaded guilty. Ramdass' Domino's case was tried to a jury and no sentence had been imposed. While a South Carolina defendant might challenge a guilty plea, the grounds for doing so are limited, see *Rivers* v. *Strickland*, 264 S. C. 121, 124, 213 S. E. 2d 97, 98 (1975) ("The general rule is that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea"); see also *Whetsell* v. *South Carolina*, 276 S. C. 295, 296, 277 S. E. 2d 891, 892 (1981), and, in all events, such a motion cannot seek to set aside a jury verdict or be considered a post-trial motion, for there was no trial or jury verdict in the case. 512 U. S., at 156. *Simmons* further does not indicate that South Carolina law considered a guilty plea and sentence insufficient to render the defendant parole ineligible upon conviction of another crime. Material differences exist between this case and *Simmons*, and the Virginia Supreme Court's decision is not contrary to the rule *Simmons* announced.

Ramdass makes two arguments to equate his own case with *Simmons*. Neither contention refutes the critical point that he was not ineligible for parole as a matter of state law at the time of his sentencing trial. First he contends that the *Simmons* petitioner was not parole ineligible at the time of his sentencing trial. According to Ramdass, a South Carolina prisoner is not parole ineligible until the State

Board of Probation makes a formal determination of parole ineligibility and the state board had not done so when the capital sentencing jury fixed Simmons' penalty. This argument is without merit. Virginia does not argue that Ramdass was parole eligible because a parole board had not acted. It argues Ramdass was still parole eligible at the time of the sentencing trial by reason of his then criminal record as it stood under state law. We further note that Ramdass bases his argument on briefs and the record filed in *Simmons.* A failure by a state court to glean information from the record of a controlling decision here and to refine further holdings accordingly does not necessarily render the state-court ruling "contrary to, or . . . an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States." § 2254(d)(1). On review of state decisions in habeas corpus, state courts are responsible for a faithful application of the principles set out in the controlling opinion of the Court.

Second, Ramdass argues *Simmons* allowed a prisoner to obtain a parole-ineligibility instruction even though "hypothetical future events" (such as escape, pardon, or a change in the law) might mean the prisoner would, at some point, be released from prison. This argument is likewise of no assistance to Ramdass. The *Simmons* petitioner was, as a matter of state law, ineligible for parole at the time of the sentencing trial. The State was left to argue that future events might change this status or otherwise permit Simmons to reenter society. *Id.*, at 166. Ramdass' situation is just the opposite. He was eligible for parole at the time of his sentencing trial and is forced to argue that a hypothetical future event (the entry of judgment on the Domino's convictions) would render him parole ineligible under state law, despite his current parole-eligible status. This case is not parallel to *Simmons* on the critical point. The differences between the cases foreclose the conclusion that the Virginia

Supreme Court's decision denying Ramdass relief was contrary to *Simmons*.

Ramdass contends the Virginia Supreme Court nevertheless was bound to extend *Simmons* to cover his circumstances. He urges us to ignore the legal rules dictating his parole eligibility under state law in favor of what he calls a functional approach, under which, it seems, a court evaluates whether it looks like the defendant will turn out to be parole ineligible. We do not agree that the extension of *Simmons* is either necessary or workable; and we are confident in saying that the Virginia Supreme Court was not unreasonable in refusing the requested extension.

Simmons applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison. Petitioner's proposed rule would require courts to evaluate the probability of future events in cases where a three-strikes law is the issue. Among other matters, a court will have to consider whether a trial court in an unrelated proceeding will grant post-verdict relief, whether a conviction will be reversed on appeal, or whether the defendant will be prosecuted for fully investigated yet uncharged crimes. If the inquiry is to include whether a defendant will, at some point, be released from prison, even the age or health of a prisoner facing a long period of incarceration would seem relevant. The possibilities are many, the certainties few. If the *Simmons* rule is extended beyond when a defendant is, as a matter of state law, parole ineligible at the time of his trial, the State might well conclude that the jury would be distracted from the other vital issues in the case. The States are entitled to some latitude in this field, for the admissibility of evidence at capital sentencing was, and remains, an issue left to the States, subject of course to federal requirements, especially, as relevant here, those related to the admission of mitigating evidence. *Id.,* at 168; *California* v. *Ramos,* 463 U. S. 992 (1983).

By eliminating *Simmons*' well-understood rule, petitioner's approach would give rise to litigation on a peripheral point. Parole eligibility may be unrelated to the circumstances of the crime the jury is considering or the character of the defendant, except in an indirect way. Evidence of potential parole ineligibility is of uncertain materiality, as it can be overcome if a jury concludes that even if the defendant might not be paroled, he may escape to murder again, see *Garner* v. *Jones*, 529 U. S. 244 (2000); he may be pardoned; he may benefit from a change in parole laws; some other change in the law might operate to invalidate a conviction once thought beyond review, see *Bousley* v. *United States*, 523 U. S. 614 (1998); or he may be no less a risk to society in prison, see *United States* v. *Battle*, 173 F. 3d 1343 (CA11 1999), cert. denied, 529 U. S. 1022 (2000). The Virginia Supreme Court had good reason not to extend *Simmons* beyond the circumstances of that case, which included conclusive proof of parole ineligibility under state law at the time of sentencing.

A jury evaluating future dangerousness under Virginia law considers all of the defendant's recent criminal history, without being confined to convictions. As we have pointed out, the Domino's Pizza conviction was not even a part of the prosecution's main case in the sentencing proceedings. Parole ineligibility, on the other hand, does relate to formal criminal proceedings. The Commonwealth is entitled to some deference, in the context of its own parole laws, in determining the best reference point for making the ineligibility determination. Given the damaging testimony of the criminal acts in the spree Ramdass embarked upon in the weeks before the Kayani murder, it is difficult to say just what weight a jury would or should have given to the possibility of parole; and it was not error for the Commonwealth to insist upon an accurate assessment of the parole rules by using a trial court judgment as the measuring point.

As we have explained, the dispositive fact in *Simmons* was that the defendant conclusively established his parole ineligibility under state law at the time of his trial. Ramdass did not because of the judicial determination Virginia uses to establish a conviction's finality under its parole law. We note that Virginia's rule using judgment in the Domino's case to determine parole ineligibility is not arbitrary by virtue of Virginia's also allowing evidence of the defendant's prior criminal history. To demonstrate Ramdass' evil character and his propensity to commit violent acts in the future, the prosecutor used Ramdass' prior criminal conduct, supported in some cases (although not in the Domino's case) by evidence in the form of the resulting jury verdicts. Virginia law did not require a guilty verdict, a criminal judgment, or the exhaustion of an appeal before prior criminal conduct could be introduced at trial. Virginia law instead permitted unadjudicated prior bad acts to be introduced as evidence at trial. See *Watkins* v. *Commonwealth*, 229 Va. 469, 487, 331 S. E. 2d 422, 435 (1985). For example, the prosecutor was permitted to use the shooting of Selassie in aggravation, even though no verdict had been rendered in that case. The prosecutor likewise asked Ramdass about the July murder in Alexandria. App. 64. (Despite Ramdass' sworn denial, he pleaded guilty to the crime after being sentenced to death in this case.) The guilty verdict of the jury in the Domino's case, therefore, was not a necessary prerequisite to the admissibility of the conduct underlying the Domino's crime. Ramdass, furthermore, could not object to the Commonwealth's use of the Domino's crime at sentencing, for it was he who introduced the evidence. The Commonwealth did not mention the crime in its opening statement and did not present evidence of the crime in its case in chief. Ramdass used the Domino's crime to argue he would never be out of jail; and he overused the crime even for that purpose. Counsel advised the jury the Domino's crime would result in

"[a]t least another life sentence," when in fact the sentence imposed was for 18 years. *Id.*, at 50.

The various public opinion polls to which we are pointed cast no doubt upon the rule adopted by the Commonwealth. We are referred, for example, to a poll whose result is reported in Paduano & Smith, Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty, 18 Colum. Human Rights L. Rev. 211 (1987). The poll is said to permit the conclusion that 67% of potential jurors would be more likely to give a life sentence instead of death if they knew the defendant had to serve at least 25 years in prison before being parole eligible.

The poll is not a proper consideration in this Court. Mere citation of a law review to a court does not suffice to introduce into evidence the truth of the hearsay or the so-called scientific conclusions contained within it. Had the creators of the poll taken the stand in support of the poll's application to Ramdass' case, the poll likely would have been demonstrated to be inadmissible. The poll's reporters concede the poll was limited in scope, surveying 40 individuals eligible for jury service. *Id.*, at 221. The poll was limited to jurors in one Georgia county, jurors who would never serve on a Fairfax County, Virginia, jury. The poll was supervised by the Southern Prisoners' Defense Committee, a group having an interest in obtaining life sentences for the inmates it represents. The poll was conducted in the context of ongoing litigation of a particular defendant's death sentence. The article makes no reference to any independent source confirming the propriety of the sampling methodology. The poll asked but four questions. It failed to ask those who were surveyed why they held the views that they did or to ascertain their reaction to evidence supplied by the prosecution designed to counter the parole information. No data indicate the questions were framed using methodology employed by reliable pollsters. No indication exists regarding the amount of time participants were given to answer.

The reporters of the poll contend other similar, limited studies support the results, yet those studies were conducted over the telephone "by defense attorneys in connection with motions for new trials." *Id.*, at 223, n. 35. These, and other, deficiencies have been relied upon by courts with fact-finding powers to exclude or minimize survey evidence. *E. g.*, *Amstar Corp.* v. *Domino's Pizza, Inc.*, 615 F. 2d 252, 264 (CA5 1980) (inadequate survey universe); *Dreyfus Fund, Inc.* v. *Royal Bank of Canada*, 525 F. Supp. 1108, 1116 (SDNY 1981) (unreliable sampling technique); *General Motors Corp.* v. *Cadillac Marine & Boat Co.*, 226 F. Supp. 716, 737 (WD Mich. 1964) (only 150 people surveyed); *Kingsford Products Co.* v. *Kingsfords, Inc.*, 715 F. Supp. 1013, 1016 (Kan. 1989) (sample drawn from wrong area); *Conagra, Inc.* v. *Geo. A. Hormel & Co.*, 784 F. Supp. 700, 726 (Neb. 1992) (survey failed to ask the reasons why the participant provided the answer he selected); *Sterling Drug, Inc.* v. *Bayer AG*, 792 F. Supp. 1357, 1373 (SDNY 1992) (questions not properly drafted); *American Home Products Corp.* v. *Proctor & Gamble Co.*, 871 F. Supp. 739, 761 (NJ 1994) (respondents given extended time to answer); *Gucci* v. *Gucci Shops, Inc.*, 688 F. Supp. 916, 926 (SDNY 1988) (surveys should be conducted by recognized independent experts); *Schering Corp.* v. *Schering Aktiengesellschaft*, 667 F. Supp. 175, 189 (NJ 1987) (attorney contact and interference invalidates poll); see generally *Toys "R" Us, Inc.* v. *Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189 (EDNY 1983) (listing factors to consider in determining whether a survey is reliable). The poll reported in the Columbia Human Rights Law Review should not be considered by this Court. See *Stanford* v. *Kentucky*, 492 U. S. 361, 377 (1989) (plurality opinion). It is the Virginia Supreme Court's decision rejecting Ramdass' claims that is under review in this habeas proceeding. It was not required to consult public opinion polls.

Ramdass' claim is based on the contention that it is inevitable that a judgment of conviction would be entered for

his Domino's crime. He calls the entry of judgment following a jury verdict a "ministerial act whose performance was foreseeable, imminent, and inexorable." Brief for Petitioner 21, 36. Petitioner cites no authority for the proposition that a judicial officer's determination that final judgment should be entered (as opposed to the clerk's noting of the final judgment in the record) is a ministerial act. We are not surprised. We doubt most lawyers would consider a criminal case concluded in the trial court before judgment is entered, for it is judgment which signals that the case has become final and is about to end or reach another stage of proceedings. See Va. Sup. Ct. Rule 1:1, 5A:6 (1999) (requiring notice of appeal to be filed "within 30 days after entry of final judgment").

Post-trial motions are an essential part of Virginia criminal law practice, as discussed in leading treatises such as J. Costello, Virginia Criminal Law and Procedure 829 (2d ed. 1995), and R. Bacigal, Virginia Criminal Procedure 337 (2d ed. 1989). Under Virginia Supreme Court Rule 3A:15(b) (1999), a verdict of guilty may be set aside "for error committed during the trial or if the evidence is insufficient as a matter of law to sustain a conviction." A few examples from the reports of Virginia decisions demonstrate it to be well-established procedure in Virginia for trial courts to consider and grant motions to set aside jury verdicts. *E. g.*, *Floyd* v. *Commonwealth*, 219 Va. 575, 576–577, 249 S. E. 2d 171, 172 (1978); *Payne* v. *Commonwealth*, 220 Va. 601, 602–603, 260 S. E. 2d 247, 248 (1979); *Johnson* v. *Commonwealth*, 20 Va. App. 547, 553, 458 S. E. 2d 599, 601 (1995); *Walker* v. *Commonwealth*, 4 Va. App. 286, 291, 356 S. E. 2d 853, 856 (1987); *Gorham* v. *Commonwealth*, 15 Va. App. 673, 674, 426 S. E. 2d 493, 494 (1993); *Carter* v. *Commonwealth*, 10 Va. App. 507, 509, 393 S. E. 2d 639, 640 (1990); *Cullen* v. *Commonwealth*, 13 Va. App. 182, 184, 409 S. E. 2d 487, 488 (1991).

The motion to set aside may be filed and resolved before judgment is entered, *e. g.*, *Walker*, *supra*, at 291, 356 S. E. 2d, at 856, and trial courts may conduct hearings or allow evidence to be introduced on these motions. Postverdict motions may be granted despite the denial of a motion to strike the evidence made during trial, *e. g.*, *Gorham*, *supra*, at 674, 426 S. E. 2d, at 494, or after denial of a pretrial motion to dismiss, *Cullen*, *supra*, at 184, 409 S. E. 2d, at 488. Federal judges familiar with Virginia practice have held that postverdict motions give a defendant a full and fair opportunity to raise claims of trial error, *DiPaola* v. *Riddle*, 581 F. 2d 1111, 1113 (CA4 1978). In contexts beyond the three-strikes statute, Virginia courts have held that the possibility of postverdict relief renders a jury verdict uncertain and unreliable until judgment is entered. *E. g.*, *Dowell* v. *Commonwealth*, 12 Va. App. 1145, 408 S. E. 2d 263, 265 (1991); see also *Smith* v. *Commonwealth*, 134 Va. 589, 113 S. E. 707 (1922); *Blair* v. *Commonwealth*, 66 Va. 850, 858, 861 (1874) (availability of postverdict motions means it is at the defendant's option whether to "let judgment be entered in regular order"). In one recent case, the Virginia Court of Appeals relied on Rule 3A:15 to hold, contrary to petitioner's contention here, that it is an "incorrect statement of the law" to say that the trial court has no concern with the proceedings after the jury's verdict. *Davis* v. *Commonwealth*, No. 2960–98–2, 2000 WL 135148, *4, n. 1 (Va. App., Feb. 8, 2000) (unpublished).

The time for Ramdass to file a motion to set aside the Domino's verdict had not expired when the jury was deliberating on the sentence for Kayani's murder; and he concedes he could have filed postverdict motions. The Domino's case was pending in a different county from the Kayani murder trial and the record contains no indication that Ramdass' counsel advised the judge in the Kayani case that he would not pursue postverdict relief in the Domino's case. The Virginia Supreme Court was reasonable to reject a parole-

ineligibility instruction for a defendant who would become ineligible only in the event a trial judge in a different county entered final judgment in an unrelated criminal case.

Ramdass complains that the Virginia Supreme Court's selection of the entry of judgment rather than the jury verdict is arbitrary. He points out that a trial court may set the judgment aside within 21 days after its entry. Va. Sup. Ct. Rule 1:1 (1999). Appeal is also permitted. We agree with Ramdass that the availability of postjudgment relief in the trial court or on appeal renders uncertain the finality and reliability of even a judgment in the trial court. Our own jurisprudence under *Teague* v. *Lane*, for example, does not consider a Virginia-state-court conviction final until the direct review process is completed. *O'Dell* v. *Netherland*, 521 U. S., at 157. States may take different approaches and we see no support for a rule that would require a State to declare a conviction final for purposes of a three-strikes statute once a verdict has been rendered. Verdicts may be overturned by the state trial court, by a state appellate court, by the state supreme court, by a state court on collateral attack, by a federal court in habeas corpus, or by this Court on review of any of these proceedings. Virginia's approach, which would permit a *Simmons* instruction despite the availability of postjudgment relief that might, the day after the jury is instructed that the defendant is parole ineligible, undo one of the strikes supporting the instruction, provided Ramdass sufficient protection. A judgment, not a verdict, is the usual measure for finality in the trial court.

Our conclusion is confirmed by a review of petitioner's conduct in this litigation. The current claim that it was certain at the time of trial that Ramdass would never be released on parole in the event the jury sentenced him to life is belied by the testimony his counsel elicited from him at sentencing. Ramdass' counsel asked him, "Are you going to spend the rest of your life in prison?" Despite the claim advanced

now that parole would be impossible, the answer counsel elicited from Ramdass at trial was, "I don't know." We think Ramdass' answer at trial is an accurate assessment of the uncertainties that surrounded his parole and custody status at the time of trial. In like manner, before the Virginia Supreme Court's decision now challenged as unreasonable, petitioner had not argued that his parole eligibility should have been determined based on the date of the Domino's verdict (January 7, 1993) rather than the date the judgment was entered (February 18, 1993). He did not mention the three-strikes law at trial, although the Domino's verdict had already been returned. Petitioner's brief to the Virginia Supreme Court on remand from this Court conceded that the appropriate date to consider for the Domino's crime was the date of judgment. His brief states Ramdass "was convicted . . . on 18 February 1993 of armed robbery" and that "[o]f course, the . . . 18 February convictio[n] occurred after the jury findings in this case." App. 123–124. Thus the Virginia Supreme Court treated the Domino's conviction in the manner urged by petitioner. Petitioner's change of heart on the controlling date appears based on a belated realization that the 1988 robbery conviction did not qualify as a strike, meaning that he needed the Domino's conviction to count. To accomplish the task, petitioner began arguing that the date of the jury verdict controlled. His original position, however, is the one in accord with Virginia law.

State trial judges and appellate courts remain free, of course, to experiment by adopting rules that go beyond the minimum requirements of the Constitution. In this regard, we note that the jury was not informed that Ramdass, at the time of trial, was eligible for parole in 25 years, that the trial judge had the power to override a recommended death sentence, or that Ramdass' prior convictions were subject to being set aside by the trial court or on appeal. Each statement would have been accurate as a matter of law, but each statement might also have made it more probable that the

jury would have recommended a death sentence. We further note Virginia has expanded *Simmons* by allowing a defendant to obtain a *Simmons* instruction even where the defendant's future dangerousness is not at issue. *Yarbrough* v. *Commonwealth*, 258 Va. 347, 519 S. E. 2d 602 (1999). Likewise, Virginia has, after Ramdass' conviction, eliminated parole for capital defendants sentenced to life in prison. The combination of *Yarbrough* and the elimination of parole means that all capital defendants in Virginia now receive a *Simmons* instruction if they so desire. In circumstances like those presented here, even if some instruction had been given on the subject addressed by *Simmons*, the extent to which the trial court should have addressed the contingencies that could affect finality of the other convictions is not altogether clear. A full elaboration of the various ways to set a conviction aside or grant a new trial might not have been favorable to the petitioner. In all events the Constitution does not require the instruction that Ramdass now requests. The sentencing proceeding was not invalid by reason of its omission.

III

The Virginia Supreme Court's decision to deny petitioner relief was neither contrary to, nor an unreasonable application of, *Simmons*. The United States Court of Appeals for the Fourth Circuit was required to deny him relief under 28 U. S. C. § 2254 (1994 ed. and Supp. III), and we affirm the judgment.

It is so ordered.

JUSTICE O'CONNOR, concurring in the judgment.

In *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), a majority of the Court held that "[w]here the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant

to inform the capital sentencing jury . . . that he is parole ineligible." *Id.*, at 178 (O'CONNOR, J., concurring in judgment); see also *id.*, at 163–164 (plurality opinion). Due process requires that "a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" *Id.*, at 175 (O'CONNOR, J., concurring in judgment) (quoting *Skipper* v. *South Carolina*, 476 U. S. 1, 5, n. 1 (1986)). Accordingly, where the State seeks to demonstrate that the defendant poses a future danger to society, he "should be allowed to bring his parole ineligibility to the jury's attention" as a means of rebutting the State's case. 512 U. S., at 177. I have no doubt that *Simmons* was rightly decided.

In this case, because petitioner seeks a writ of habeas corpus rather than the vacatur of his sentence on direct appeal, the scope of our review is governed by 28 U. S. C. § 2254(d)(1) (1994 ed., Supp. III). Accordingly, we may grant relief only if the Virginia Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *ibid.;* see also *Williams* v. *Taylor*, 529 U. S. 362, 402–409 (2000), which in this case is our holding in *Simmons.*

The Virginia Supreme Court concluded that *Simmons* was inapplicable because petitioner "was not ineligible for parole when the jury was considering his sentence." *Ramdass* v. *Commonwealth*, 248 Va. 518, 521, 450 S. E. 2d 360, 361 (1994). The court noted that, under Virginia law, any person who has been convicted of three separate felony offenses of murder, rape, or robbery "by the presenting of firearms or other deadly weapon" "shall not be eligible for parole." Va. Code Ann. § 53.1–151(B1) (1993). It explained that Ramdass was not parole ineligible at the time of his capital sentencing proceeding because the Kayani murder conviction would not constitute his third conviction for purposes of § 53.1–151(B1). Critically, the court held that, although Ramdass had been

found guilty of the armed robbery of a Domino's Pizza restaurant, that verdict did not count as a prior conviction under §53.1–151(B1) because judgment had not yet been entered on that verdict at the time of Ramdass' capital sentencing proceeding. 248 Va., at 520, 450 S. E. 2d, at 361.

For the reasons explained in the plurality opinion, the Virginia Supreme Court's decision was neither contrary to, nor an unreasonable application of, our holding in *Simmons*. Whether a defendant is entitled to inform the jury that he is parole ineligible is ultimately a question of federal law, but we look to state law to determine a defendant's parole status. In *Simmons*, the defendant had "conclusively establish[ed]" that he was parole ineligible at the time of sentencing, and the "prosecution did not challenge or question [his] parole ineligibility." 512 U. S., at 158. Ramdass, however, was not ineligible for parole when the jury considered his sentence as the relevant court had not yet entered the judgment of conviction for the Domino's Pizza robbery. Were the entry of judgment a purely ministerial act under Virginia law, in the sense that it was foreordained, I would agree with petitioner that "the only available alternative sentence to death [was] life imprisonment without possibility of parole." *Id.*, at 178 (O'CONNOR, J., concurring in judgment). Such circumstances would be "materially indistinguishable" from the facts of *Simmons*. See *Williams* v. *Taylor*, 529 U. S., at 405. It therefore would have been "contrary to" *Simmons* for the Virginia Supreme Court to hold that petitioner was not entitled to inform the jury that he would be parole ineligible. See *ibid.* Where all that stands between a defendant and parole ineligibility under state law is a purely ministerial act, *Simmons* entitles the defendant to inform the jury of that ineligibility, either by argument or instruction, even if he is not technically "parole ineligible" at the moment of sentencing.

Such was not the case here, however. As the plurality opinion explains, the entry of judgment following a criminal

conviction in Virginia state court is not a purely ministerial act, *i. e.*, one that is inevitable and foreordained under state law. The Commonwealth allows criminal defendants to file post-trial motions following a guilty verdict, and trial courts may set aside jury verdicts in response to such motions. See *ante*, at 173–175. Thus, as a matter of Virginia law, a guilty verdict does not inevitably lead to the entry of a judgment order. Consequently, the jury verdict finding petitioner guilty of the Domino's Pizza robbery did not mean that petitioner would necessarily be parole ineligible under state law. Indeed, petitioner himself concedes that there was a "possibility that the Domino's Pizza trial judge could set aside the verdict under Virginia Supreme Court Rule 3A:15(b)." Brief for Petitioner 37.

Petitioner nevertheless contends that the possibility that the trial court would set aside the guilty verdict for the Domino's Pizza robbery was quite remote, and therefore that the entry of judgment was extremely likely. But, as the plurality opinion explains, *Simmons* does not require courts to estimate the likelihood of future contingencies concerning the defendant's parole ineligibility. Rather, *Simmons* entitles the defendant to inform the capital sentencing jury that he is parole ineligible where the only alternative sentence to death is life without the possibility of parole. And unlike the defendant in *Simmons*, Ramdass *was* eligible for parole under state law at the time of his sentencing.

For these reasons, I agree that petitioner is not entitled to the issuance of a writ of habeas corpus. As our decision in *Williams* v. *Taylor* makes clear, the standard of review dictated by 28 U. S. C. § 2254(d)(1) (1994 ed., Supp. III) is narrower than that applicable on direct review. Applying that standard here, I believe the Virginia Supreme Court's decision was neither contrary to, nor an unreasonable application of, our holding in *Simmons*. Accordingly, I concur in the judgment.

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

There is an acute unfairness in permitting a State to rely on a recent conviction to establish a defendant's future dangerousness while simultaneously permitting the State to deny that there was such a conviction when the defendant attempts to argue that he is parole ineligible and therefore not a future danger. Even the most miserly reading of the opinions in *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), supports the conclusion that this petitioner was denied "one of the hallmarks of due process in our adversary system," namely, the defendant's right "to meet the State's case against him." *Id.*, at 175 (O'CONNOR, J., concurring in judgment).

I

In *Simmons*, we held that "[w]hen the State seeks to show the defendant's future dangerousness . . . the defendant should be allowed to bring his parole ineligibility to the jury's attention—by way of argument by defense counsel or an instruction from the court—as a means of responding to the State's showing of future dangerousness." *Id.*, at 177 (O'CONNOR, J., concurring in judgment). The present case falls squarely within our holding.

There is no question that the Commonwealth argued Ramdass' future dangerousness. *Ante*, at 161. In doing so, it focused almost entirely on Ramdass' extensive criminal history, emphasizing that his most recent crime spree was committed after his mandatory release on parole.[1] Indeed,

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[1] The prosecution's opening argument began by recounting Ramdass' entire criminal history. App. 8–11. Eight of the nine witnesses the Commonwealth called did little more than relate the details of Ramdass' criminal past. *Id.*, at 12–64. The prosecution's closing argument highlighted the connection between Ramdass' crimes and his prior releases from prison. *Id.*, at 80–82. In fact, it did so on several occasions. *Id.*, at 9 (Ramdass "served time [for the 1988 strong arm robbery conviction] and was finally paroled in May of 1992"); *id.*, at 46–47 (Ramdass "was

the prosecution relied upon the Domino's Pizza robbery—the very crime Virginia has precluded Ramdass from relying upon to establish his parole ineligibility.[2]

There is also no question that Ramdass was denied the opportunity to inform the jury of his parole ineligibility. During the sentencing deliberations, the jury asked the following question: "[I]f the Defendant is given life, is there a possibility of parole at some time before his natural death?" App. 88. Rather than giving any kind of straightforward answer, and rather than permitting counsel to explain petitioner's parole ineligibility, the court instructed: "[Y]ou should impose such punishment as you feel is just under the evidence . . . . You are not to concern yourselves with what may happen afterwards." *Id.*, at 91.

Finally, it is undisputed that the absence of a clear instruction made a difference. The question itself demonstrates that parole ineligibility was important to the jury, and that the jury was confused about whether a "life" sentence truly means life—or whether it means life subject to

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released on mandatory parole" in 1992, shortly before his most recent crime spree began); *id.*, at 51b–52 (describing Ramdass' 1992 release on mandatory parole).

[2] *Id.*, at 57–59 ("On that next night, August 30th, you did a robbery of the Domino's Pizza over in Alexandria? . . . Well, if the cab driver was shot in the head on August 30th and Domino's Pizza was August 30th, you did them both the same day; didn't you?"); *id.*, at 81 ("August 30th, 1992, he robbed Domino's Pizza at the point of a gun in Alexandria and he robbed Domino's Pizza not long after he shot that Arlington cab driver through the head . . .").

Of course, *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), applies when the prosecution argues future dangerousness; it does not require the State to argue any particular past crime. My purpose in pointing out Virginia's reliance on the Domino's Pizza verdict is to underscore the unfairness of permitting Virginia to use it, while denying Ramdass the same use. The plurality's repeated statement that Virginia brought up the crime in its cross-examination rather than its case in chief, *ante*, at 162, 170, 171, neither means *Simmons* is inapplicable nor mitigates the unfairness here. It only signals the formalism the plurality is prepared to endorse.

the possibility of parole. See *Simmons*, 512 U. S., at 178 (O'CONNOR, J., concurring in judgment) ("[T]hat the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison"). More critically, three jurors said that "if the [jury] knew that [Ramdass] would have never gotten out of prison, they would have given him life rather than death." App. 95. Two of them stated "that would have been the result among all of [the jurors] beyond question, if they had had that information." *Ibid.* But "because they weren't told or given the answer . . . they all had a perception that he would be paroled." *Ibid.*[3]

After we remanded for reconsideration in light of *Simmons*, the Virginia Supreme Court held that case did not apply because Ramdass was not "ineligible for parole when the jury was considering his sentence." *Ramdass* v. *Commonwealth*, 248 Va. 518, 520, 450 S. E. 2d 360, 361 (1994). The applicable Virginia statute requires three strikes for a defendant to be parole ineligible. "At the time that the jury was considering Ramdass's penalty on January 30, 1993," the court held, Ramdass "was not ineligible for parole" because he had only two strikes against him—the Pizza Hut robbery and the instant capital murder. *Ibid.* Ramdass' robbery of the Domino's Pizza did not count as his third strike, even though the jury in that case had already found him guilty. Technically, under state law, that did not count as a "conviction," because Virginia's definition of "conviction" is not just a guilty verdict. Rather, a "conviction" also requires a piece of paper signed by the judge entering the verdict into

[3] Once again, *Simmons*' applicability does not at all turn on whether this kind of evidence exists. I point it out only to emphasize how real the *Simmons* concerns are here. The plurality complains, in essence, that the evidence came in the form of an uncontested proffer rather than as a sworn affidavit. *Ante*, at 163. Again, neither *Simmons*' applicability nor the reality of the case is undercut by this quibble. The only thing that it proves is the plurality's penchant for formalism.

the record. *Id.*, at 520–521, 450 S. E. 2d, at 361. The trial judge signed the entry of the judgment in the Domino's Pizza case 19 days after the end of the sentencing phase in Ramdass' capital murder proceeding. *Ante*, at 160. Therefore, the Virginia Supreme Court held that at the time "when the jury was considering [petitioner's] sentence" in the capital murder case, Ramdass was "not ineligible for parole" under state law, and thus *Simmons* was inapplicable.

II

The plurality begins by stating what it thinks is the rule established in *Simmons:* "The parole-ineligibility instruction is required only when, assuming the jury fixes the sentence at life, the defendant is ineligible for parole under state law." *Ante*, at 166. The plurality also adds a proviso: The defendant must be parole ineligible *at the time of sentencing.*[4] Given that understanding, the plurality says "[m]aterial differences exist between this case and *Simmons.*" *Ante*, at 167. But the differences to which the plurality points do not distinguish this case from *Simmons.*

The first asserted distinction is that, as the Virginia Supreme Court stated, Ramdass was not parole ineligible under state law *at the time of sentencing.* Ramdass might

[4] Though the plurality does not include the proviso in its initial statement of the rule in *Simmons*, it repeats this requirement no less than 20 times in its 20-page opinion. See *ante*, at 159 ("when the jury considered his case"), 161 ("at the time of the capital sentencing trial"), 163–164 ("at the time of the jury's death penalty deliberations"), 164 ("when the jury was considering his sentence"), *ibid.* ("at the time of the sentencing trial"), *ibid.* ("at the time of his trial"), *ibid.* ("at the time of sentencing"), 165 ("at the time of the jury's future dangerousness deliberations"), 166 ("when the jury deliberated his sentence"), *ibid.* ("at the time of the sentencing trial"), 167 ("when the jury considered his sentence"), *ibid.* ("at the time of sentencing"), *ibid.* ("at the time of his sentencing trial"), *ibid.* (same), 168 ("at the time of the sentencing trial"), *ibid.* (same), *ibid.* ("at the time of his sentencing trial"), 169 ("at the time of his trial"), 171 ("at the time of his trial"), 176 ("at the time of trial").

have become parole ineligible at some later date, but at the exact moment the jury was deliberating that was not yet so. The trouble is, that is not a fact that distinguishes Ramdass' case from Simmons'.

In *Simmons*, the relevant parole statute was S. C. Code Ann. §24–21–640 (Supp. 1993). See *Simmons*, 512 U. S., at 176 (O'CONNOR, J., concurring in judgment) (citing South Carolina parole law); see also *id.*, at 156 (plurality opinion) (same).[5] Under that statute, it was the South Carolina Board of Probation, Parole, and Pardon Services that determined a defendant's parole eligibility—and that determination would come *after* the sentencing phase. Then-current South Carolina case law unambiguously stated that the eligibility determination would not be made at trial, but by the parole board.[6] Moreover, the statute required the parole board to find that the defendant's prior convictions were not committed "pursuant to one continuous course of conduct," and it was by no means certain that the board would ultimately reach that conclusion. In fact, in *Simmons* the State of South Carolina steadfastly maintained that Simmons was not truly parole ineligible at the time of his sentencing

[5] That statute read in part: "The board must not grant parole nor is parole authorized, to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16–1–60. Provided that where more than one included offense shall be committed within a one-day period or pursuant to one continuous course of conduct, such multiple offenses must be treated for purposes of this section as one offense."

[6] See, *e. g.*, *State* v. *McKay*, 300 S. C. 113, 115, 386 S. E. 2d 623, 623–624 (1989).

It is true, as the plurality points out, *ante*, at 167, that in *Simmons* the defendant did have an entry of judgment. But, under the plurality's reasoning, the issue is *whether* the defendant is parole ineligible *at the time of sentencing*, not *why* he is or is not ineligible. Thus, whether the defendant is parole *eligible* at that time because he has no entry of judgment or because the parole board has not yet met is hardly relevant. It is a distinction, but not a material one.

phase because the parole board's determination had not yet been made.[7] Therefore, the fact that parole ineligibility under state law had not been determined *at the time of sentencing* is simply not a fact that distinguishes *Simmons* from Ramdass' case.[8]

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[7] "First and foremost, *at the time of the trial*, no state agency had ever determined that Simmons was going to be serving a sentence of life without the possibility of parole, despite the fact that he had earlier pled guilty and been sentenced to a violent crime prior to this trial. The importance of that distinction is that the power to make that determination did not rest with the judiciary, but was solely vested in an executive branch agency, the South Carolina Board of Probation, Parole and Pardon Services." Brief for Respondent in *Simmons* v. *South Carolina*, O. T. 1993, No. 92–9059, p. 95 (emphasis added).

The plurality also complains that "a state court [need not] glean information from the record" in *Simmons*. *Ante*, at 168. That is true, but it is equally true that a state court cannot pretend that a fact creates a material distinction simply because it was not expressly raised and rejected by this Court. Moreover, it is evident in the opinion itself that Simmons' parole-ineligibility status had *not* been definitively and legally determined yet at the time of sentencing. See n. 8, *infra*.

[8] The plurality contends that in *Simmons* "the defendant had 'conclusively established' his parole ineligibility at the time of sentencing." *Ante*, at 167 (quoting *Simmons*, 512 U. S., at 158 (plurality opinion)); see also *ante*, at 171. What *Simmons* in fact said was that no one questioned that the defendant had all the facts necessary to be found ineligible at some future date. It does not indicate that a legal determination of the defendant's parole ineligibility had already been definitively made by the parole board. This is clear in the plurality's citation of the South Carolina parole statute, under which a defendant's parole status is determined by the parole board at a later date. See *supra*, at 186. This is also clear from the fact that the plurality relied upon the testimony of the parole board's attorneys, 512 U. S., at 158–159, demonstrating the plurality's recognition that it was the parole board that would ultimately determine Simmons' parole eligibility. Furthermore, the plurality's statement that Simmons was "*in fact* ineligible," *id.*, at 158 (emphasis added), as opposed to "legally" ineligible or ineligible "as a matter of law," clearly distinguished between the facts as known at that time (which indicated how Simmons' status would, in all likelihood, ultimately be determined), and the *legal* determination of status (which would be formally determined at

Perhaps recognizing that problem, the plurality shifts ground. It is not, the plurality says, "only" whether parole ineligibility under state law has been determined "at the time of sentencing," but whether there is "no possibility" of parole eligibility at that time. *Ante*, at 169. In other words, the plurality says that *Simmons* applies when there is "conclusive proof" *at the time of sentencing* that the defendant will (in the future) "inevitabl[y]" be found parole ineligible. *Ante*, at 170, 173–174. In Ramdass' case, the plurality continues, he would not *inevitably* be parole ineligible, because, under Virginia law, his Domino's Pizza robbery verdict could have been set aside under Virginia Supreme Court Rule 3A:15(b) (1999). That Rule permits a trial court to set aside a guilty verdict up to 21 days after final judgment has been entered. *Ante*, at 174–175.[9]

But again, this is not a fact that distinguishes Ramdass' case from Simmons'. Like Virginia, South Carolina permitted (and still permits) the court to entertain post-trial motions to set aside a verdict and such a motion could have

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a later date). Finally, if Simmons' parole ineligibility had been *legally and conclusively* resolved by the time of his trial, there would have been no need for the plurality to discuss (and reject) possibilities that might have undermined Simmons' eventual finding of parole ineligibility. See *infra*, at 201–203.

The *Simmons* plurality did say that "an instruction informing the jury that petitioner is ineligible for parole is legally accurate." 512 U. S., at 166; *ante*, at 166–167. But in the very next sentence the plurality wrote: "Certainly, such an instruction is *more accurate* than no instruction at all." 512 U. S., at 166 (emphasis added). This made it clear that "accuracy," in the sense used there, is a relative term, not an absolute conclusive determination of legal status.

[9] At the time of Ramdass' trial, Rule 3A:15(b) read:

"(b) Motion to Set Aside Verdict.—If the jury returns a verdict of guilty, the court may, on motion of the accused made not later than 21 days after entry of a final order, set aside the verdict for error committed during the trial or if the evidence is insufficient as a matter of law to sustain a conviction."

been filed in Simmons' case.[10] If the availability of such a post-trial procedure makes Ramdass' parole ineligibility less than inevitable, the same must also have been true for Simmons.[11] Accordingly, the mere availability of such a procedure is not a fact that distinguishes the two cases.

In the end, though, the plurality does not really rest upon inevitability at all, nor upon the alleged lack of inevitability represented by the post-trial motion procedure. Instead, the plurality relies upon the fact that at the time of Ramdass' sentencing phase, although the jury had rendered a guilty verdict in the Domino's Pizza robbery case, the trial judge had not yet entered judgment on the verdict. *Ante*, at 160, 167, 173–174, 176. That entry of judgment would come 19 days later. *Ante*, at 160. The distinction is important, the plurality says, because "[a] judgment, not a verdict, is the usual measure for finality in the trial court," *ante*, at 176, whereas a verdict without a judgment is "uncertain," *ibid.* The plurality is, of course, correct that the missing entry of judgment is a circumstance that was not present in *Simmons*.

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[10] South Carolina Rule of Criminal Procedure 29(b) (1999) reads, in relevant part: "A motion for a new trial based on after-discovered evidence must be made within a reasonable period of time after the discovery of the evidence."

[11] It is true, of course, that a motion for a new trial under South Carolina's rule must be predicated on the discovery of new evidence, but that does not meaningfully distinguish its rule from Virginia's rule, under which a verdict can be set aside only for trial error or insufficient evidence.

The plurality says that because Simmons pleaded guilty to his prior crime, he was foreclosed from filing a motion under South Carolina's rule. *Ante*, at 167. For this proposition, the plurality cites *Whetsell* v. *State*, 276 S. C. 295, 277 S. E. 2d 891 (1981). This is just flat wrong. See *Johnson* v. *Catoe*, 336 S. C. 354, 358–359, 520 S. E. 2d 617, 619 (1999) ("*Whetsell* does not stand for the proposition that a defendant who admits his guilt is barred from collaterally attacking his conviction. *Whetsell* stands only for the narrow proposition that a [postconviction relief] applicant who has pled guilty on advice of counsel cannot satisfy the prejudice prong on collateral attack if he states he would have pled guilty in any event").

But the plurality's entirely unsupported assertion that an entry of judgment is more "certain" than a verdict is just flat wrong.

The sole basis for the plurality's conclusion that the Domino's Pizza verdict is uncertain is the possibility that it could be set aside under Rule 3A:15(b). But under that Rule, a guilty verdict may be set aside *even after* judgment has been entered. See n. 9, *supra.* The plurality has cited not a single case suggesting that the standard for setting aside a verdict under Rule 3A:15(b) varies depending on whether or not judgment has been entered. Accordingly, a verdict that is susceptible to being set aside under Rule 3A:15(b) is no more or less certain simply because judgment has been entered on that verdict; whatever the degree of uncertainty is, it is identical in both cases. In short, whether judgment has been entered on the verdict has absolutely no bearing on the verdict's "uncertainty."

The plurality cites 11 Virginia cases to support its argument that Rule 3A:15(b) puts a verdict on shaky ground. *Ante*, at 174–175. The authorities are less than overwhelming. Only 2 of those 11 cases actually mention Rule 3A:15(b),[12] and one of those does so in dicta in a footnote in the unpublished decision of an intermediate state court.[13] Four others make passing reference to *some* sort of post-trial motion that was *denied*, but do so only in the context of reciting the procedural history of the case under review.[14]

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[12] *Dowell* v. *Commonwealth,* 12 Va. App. 1145, 408 S. E. 2d 263 (1991); *Davis* v. *Commonwealth,* No. 2960–98–2, 2000 WL 135148 (Va. App., Feb. 8, 2000) (unpublished).

[13] See *id.,* at *4, n. 1.

[14] *Floyd* v. *Commonwealth,* 219 Va. 575, 577, 249 S. E. 2d 171, 172 (1978) ("Overruling Floyd's motions to set aside the verdicts . . . , the trial court entered judgments on the verdicts"); *Johnson* v. *Commonwealth,* 20 Va. App. 547, 552, 458 S. E. 2d 599, 601 (1995) ("At Johnson's sentencing hearing, defense counsel made a motion to set aside the verdict . . . . The trial judge denied the motion"); *Walker* v. *Commonwealth,* 4 Va. App. 286, 291, 356 S. E. 2d 853, 856 (1987) ("After the jury was discharged, defendant

Another case also makes passing reference to the denial of a post-trial motion, but it is clear from the fact that the motion was predicated on "new evidence" (which is not a basis for a Rule 3A:15(b) motion, see n. 9, *supra*) and was made four months after the verdict that the motion was almost certainly not based on Rule 3A:15(b).[15] Ultimately, the plurality points to only three cases to demonstrate that "a jury verdict [is] uncertain and unreliable until judgment is entered." *Ante*, at 175 (citing *Dowell* v. *Commonwealth*, 12 Va. App. 1145, 1149, 408 S. E. 2d 263, 265 (1991) (mentioning Rule 3A:15(b)); *Smith* v. *Commonwealth*, 134 Va. 589, 113 S. E. 707 (1922); *Blair* v. *Commonwealth*, 66 Va. 850 (1874)). What these cases hold, however, is (1) that a verdict without an entry of judgment may not be used for purposes of impeaching a witness' credibility; (2) the same may not be used for purposes of a statute permitting the removal from public office of any person "convicted of an act . . . involving moral turpitude"; but (3) the Governor can pardon a prisoner after a verdict and before entry of judgment. Not one of them actually involves a Rule 3A:15(b) motion, nor remotely says that a verdict itself is "unreliable."[16] The

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moved the court to set aside the verdict; the court denied the motion"); *Carter* v. *Commonwealth*, 10 Va. App. 507, 509, 393 S. E. 2d 639, 640 (1990) ("Carter . . . appeals from judgments of the Circuit Court of Loudoun County . . . which . . . denied his post-trial motions for a new trial").

[15] *Payne* v. *Commonwealth*, 220 Va. 601, 602–603, 260 S. E. 2d 247, 248 (1979).

[16] *Dowell* does say that a verdict without a judgment is not reliable "for impeachment purposes," 12 Va. App., at 1149, 408 S. E. 2d, at 265, but this is a far cry from saying the verdict is itself unreliable. What the three cases actually address is the question whether a verdict is a "conviction" under state law; they say that it depends on the context, answering in the negative in two cases, and in the affirmative in a third.

The plurality also cites two intermediate state-court cases making passing reference to a trial court's granting of a post-trial motion, though neither case mentions Rule 3A:15(b). See *Gorham* v. *Commonwealth*, 15 Va. App. 673, 426 S. E. 2d 493 (1993); *Cullen* v. *Commonwealth*, 13 Va. App. 182, 409 S. E. 2d 487 (1991). But a mere two cases among all the criminal

plurality scrounges to find case law support, but the result barely registers on the radar screen.

Furthermore, the plurality thinks that there is "no authority" for the proposition that entry of judgment is generally considered to be a "ministerial" matter. *Ante*, at 174. In a related context, however, the Virginia Supreme Court has observed:

> "The rendition of a judgment is to be distinguished from its entry in the records. The rendition of a judgment is the judicial act of the court, whereas the entry of a judgment by the clerk on the records of the court is a ministerial, and not a judicial, act. . . . The entry or recordation of such an instrument in an order book is the ministerial act of the clerk and does not constitute an integral part of the judgment." *Rollins* v. *Bazile*, 205 Va. 613, 617, 139 S. E. 2d 114, 117 (1964) (citations and internal quotation marks omitted).

In any event, there is a more critical point to be made about the plurality's entry-of-judgment distinction. In relying on that distinction, the plurality is necessarily abandoning the very understanding of *Simmons* that it purports to be following. As explained above, to the extent that the availability of Rule 3A:15(b) motions undermines the inevitability of a defendant's prior verdicts (and therefore his parole ineligibility) under state law, it does so whether or not judgment has been entered on the verdict. So why is it that *Simmons* does not apply when there is no entry of judgment?

The answer simply cannot be that, under state law, and at the time of sentencing, the defendant will not inevitably be

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cases in Virginia surely demonstrates that setting aside a verdict by post-trial motion is a rarity; if those two instances make the verdict uncertain, then one might as well cite the solitary case in which the Governor granted a pardon after the verdict but before the entry of judgment. See *Blair* v. *Commonwealth*, 66 Va. 850 (1874).

found parole ineligible: the inevitability of the verdict is undermined equally with or without the judgment; and the defendant is eligible for parole under state law if the verdict is set aside, regardless of whether it is set aside before or after judgment is entered. In fact, though, the plurality really makes no attempt to explain the entry-of-judgment distinction in terms of either the at-the-time-of-sentencing-under-state-law rule, or in terms of the inevitable-under-state-law rule. Rather, the significance of the entry of judgment rests upon the assertion that a judgment is *more certain* than a jury verdict. The entry-of-judgment line, then, is really about relative degrees of certainty regarding parole ineligibility.[17]

If the question is not one in which state law controls (by looking to the defendant's conclusively determined status either at the time of sentencing or inevitably thereafter), the question of *Simmons*' applicability must be an issue of federal due process law. That is a proposition with which I agree entirely; indeed, *Simmons* itself makes that perfectly clear, as I discuss below. Before examining what *Simmons*'

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[17] Though the plurality insists that judgment "is the usual measure for finality," *ante,* at 176, its own opinion reveals that it does not mean "finality" in any absolute sense. Rather, it concedes that while a "jury verdict [is] uncertain," *ante,* at 175, "even a judgment" is "uncertain" too, because of "the availability of postjudgment relief," *ante,* at 176. What it means, then—though it is not particularly candid about it—is that a judgment is *more certain* than a verdict. Put differently, the plurality thinks a judgment is more enduring, in that there is a greater *probability* that a verdict will survive a motion to set it aside if there has already been an entry of judgment.

It is clear that the significance of the entry of judgment for the plurality must be based on that belief. The significance cannot be that without the entry of judgment the defendant is not ineligible for parole at the exact moment of sentencing; as explained above, that fact is not dispositive. See *supra,* at 185–187. Nor can its significance be that without the entry of judgment, his parole status is not inevitable. As also explained above, the entry of judgment has no significance insofar as inevitability is concerned. See *supra,* at 188–192 and this page.

due process requirements entail, however, it is important to understand the rationale behind *Simmons:* the need for capital sentencing juries to have accurate information about the defendant in the particular area of parole eligibility.

III

We stated in *Gregg* v. *Georgia*, 428 U. S. 153 (1976):

> "If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." *Id.*, at 190 (joint opinion of Stewart, Powell, and STEVENS, JJ.).

This imperative is all the more critical when the jury must make a determination as to future dangerousness. "[A]ny sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what sentence to impose. . . . What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek* v. *Texas*, 428 U. S. 262, 274–276 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). When it comes to issues such as future dangerousness and the possibility of parole, it is therefore vitally important that "the jury [have] accurate information of which both the defendant and his counsel are aware," including "an accurate statement of a potential sentencing alternative." *California* v. *Ramos*, 463 U. S. 992, 1004, 1009 (1983).

This is not to say, of course, that the Constitution compels the States to tell the jury every single piece of information that may be relevant to its deliberations. See, *e. g.*, *id.*, at

1010–1012. Indeed, in *California* v. *Ramos*, we held it ordinarily proper to "defe[r] to the State's choice of substantive factors relevant to the penalty determination." *Id.*, at 1001. Notwithstanding the broad discretion recognized in *Ramos*, the latitude to which the States are entitled is not unbounded; at times, it must give way to the demands of due process.

One such due process requirement is that a defendant must have an opportunity to rebut the State's case against him. *Simmons*, 512 U. S., at 175 (O'CONNOR, J., concurring in judgment). And "[w]hen the State seeks to show the defendant's future dangerousness, . . . the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case." *Id.*, at 177 (O'CONNOR, J., concurring in judgment). Accordingly, "despite our general deference to state decisions regarding what the jury should be told about sentencing, . . . due process requires that the defendant be allowed [to bring his parole ineligibility to the jury's attention] in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future." *Ibid.*

The rationale for the *Simmons* exception to the general rule of *Ramos* is quite apparent. In *Ramos*, the defendant claimed that if the State were permitted to argue that the Governor could commute a sentence of life without parole, then due process entitled him to tell the jury that the Governor could commute a death sentence as well. We rejected that argument, however, holding that the information the defendant sought to introduce "would not 'balance' the impact" of telling the jury that the Governor could commute a sentence of life without parole. 463 U. S., at 1011. Nor would it make the jury "any less inclined to vote for the death penalty upon learning" that information. *Ibid.* Nor, finally, were we persuaded that it would "impermissibly impe[l] the

jury toward voting for the death sentence" if the jury were told that a life without parole sentence could be commuted, but were not told that a death penalty could be commuted as well. *Id.*, at 1012.

Each of these factors, however, points in precisely the opposite direction when it comes to information about a defendant's parole ineligibility. If the State argues that the defendant will be a future danger to society, it quite plainly rebuts that argument to point out that the defendant—because of his parole ineligibility—will never be a part of society again. *Simmons*, 512 U. S., at 177 (O'CONNOR, J., concurring in judgment) ("[T]he fact that he will never be released from prison will often . . . rebut the State's case"). And unlike *Ramos*, if the jury is informed of a defendant's parole ineligibility, it is "less inclined to vote for the death penalty upon learning" that fact. Conversely, permitting the State to argue the defendant's future dangerousness, while simultaneously precluding the defendant from arguing his parole ineligibility, does tend to "impe[l] the jury toward voting for the death sentence." Despite the plurality's unsupported remark that "[e]vidence of potential parole ineligibility is of uncertain materiality," *ante*, at 170, all of the available data demonstrate to the contrary.

How long a defendant will remain in jail is a critical factor for juries. One study, for example, indicates that 79% of Virginia residents consider the number of years that a defendant might actually serve before being paroled to be an "'important consideration when choosing between life imprisonment and the death penalty.'"[18] A similar study reveals that 76.5% of potential jurors think it is "extremely important" or "very important" to know that information when deciding between life imprisonment and the death pen-

[18] See Note, The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing, 75 Va. L. Rev. 1605, 1624, and n. 102 (1989) (citing study by National Legal Research Group).

alty.[19] Likewise, two-thirds of the respondents in another survey stated that they would be more likely to give a life sentence instead of death if they knew the defendant had to serve at least 25 years in prison before being parole eligible.[20] General public support for the death penalty also plummets when the survey subjects are given the alternative of life without parole.[21] Indeed, parole ineligibility information is so important that 62.3% of potential Virginia jurors would actually disregard a judge's instructions not to consider parole eligibility when determining the defendant's sentence.[22]

At the same time, the recent development of parole ineligibility statutes results in confusion and misperception, such that "common sense tells us that many jurors might not know whether a life sentence carries with it the possibility

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[19] Hughes, Informing South Carolina Capital Juries About Parole, 44 S. C. L. Rev. 383, 409–410 (1993) (citing 1991 study by Univ. of South Carolina's Institute for Public Affairs); see also *Simmons*, 512 U. S., at 159 (plurality opinion) (discussing this study).

[20] Paduano & Smith, Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty, 18 Colum. Human Rights L. Rev. 211, 223 (1987).

[21] See, *e. g.*, Rising Doubts on Death Penalty, USA Today, Dec. 22, 1999, p. 17A (nationwide 1999 Gallup Poll finds 71% support death penalty; 56% support death penalty when life without parole is offered as an option); Finn, Given Choice, Va. Juries Vote for Life, Washington Post, Feb. 3, 1997, pp. A1, A6 ("According to a poll conducted for the Death Penalty Information Center, which opposes capital punishment, support for the death penalty nationwide falls from 77 percent to 41 percent if the alternative is life without parole accompanied by restitution"); Heyser, Death Penalty on the Rise in Virginia, Roanoke Times, Aug. 31, 1998, p. C3 (reporting study by Virginia Tech's Center for Survey Research, finding that 79% of Virginians "strongly" or "somewhat" support the death penalty, a figure that drops to 57% when respondents are given the alternative of life without parole for 25 years plus restitution); Armstrong & Mills, Death Penalty Support Erodes, Many Back Life Term as an Alternative, Chicago Tribune, Mar. 7, 2000, p. 1 (58% of Illinois registered voters support death penalty; only 43% favor death when given option of life without parole).

[22] See Note, 75 Va. L. Rev., at 1624–1625, and n. 103.

of parole." *Simmons*, 512 U. S., at 177–178 (O'CONNOR, J., concurring in judgment). The statistical data bear this out. One study of potential Virginia jurors asked: "'If a person is sentenced to life imprisonment for intentional murder during an armed robbery, how many years on the average do you think that the person would actually serve before being released on parole?'" The most frequent response was 10 years.[23] Another potential-juror survey put the average response at just over eight years.[24] And more than 70% of potential jurors think that a person sentenced to life in prison for murder can be released at some point in the future.[25]

Given this data, it is not surprising that one study concluded: "[J]urors assessing dangerousness attach great weight to the defendant's expected sentence if a death sentence is not imposed. Most importantly, jurors who believe the alternative to death is a relatively short time in prison tend to sentence to death. Jurors who believe the alternative treatment is longer tend to sentence to life."[26] Consequently, every reason why the Governor's commutation power at issue in *Ramos* was *not* required to be put before the jury leads to precisely the opposite conclusion when it comes to the issue of parole ineligibility. That is exactly why *Simmons* is an exception to the normally operative rule of deference established in *Ramos*.[27]

The plurality—focusing exclusively on one of the many sources cited—criticizes at length (*ante*, at 172–173) these "so-called scientific conclusions" that merely confirm what

[23] See *id.*, at 1624, and n. 101.

[24] See Paduano & Smith, 18 Colum. Human Rights L. Rev., at 223, n. 34.

[25] See Hughes, 44 S. C. L. Rev., at 408; see also Finn, Washington Post, at A6 ("[O]nly 4 percent of Americans believe that convicted murderers will spend the rest of their days in prison").

[26] See Eisenberg & Wells, Deadly Confusion: Juror Instructions in Capital Cases, 79 Cornell L. Rev. 1, 7 (1993).

[27] See *Simmons*, 512 U. S., at 159, 170, n. 9 (plurality opinion) (discussing above data).

every sentencing judge surely knows—that how soon the defendant may actually be released from prison is highly relevant to the sentencing decision. The plurality's criticism yet again underscores the formalistic character of its analysis of the life-or-death issue presented by this case. In exercising the judicial function, there are times when judgment is far more important than technical symmetry.[28]

IV

The Virginia Supreme Court held that whether *Simmons* applies is a question whose answer is entirely controlled by the operation of state law. See *supra*, at 184–185. This understanding was adopted by the plurality as well, at least as it originally stated the holding of *Simmons*. See *supra*, at 185. But as explained above, the Virginia court's view, as well as the plurality's original stance, simply cannot be reconciled with *Simmons* itself. That might explain why the plurality ultimately abandons that view, instead relying

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[28] As for the specific criticisms, the plurality first complains that such surveys are inadmissible as evidence. The question, though, is not whether the statistical studies are admissible evidence, but whether they are relevant facts assisting in our determination of the proper scope of the *Simmons* due process right. Surely they are. In any event, Ramdass *did* raise such studies at his sentencing hearing. See App. 95–96. Virginia had its chance to object, but opted not to do so. It is far too late in the day to complain about it now. (Simmons, incidentally, also introduced similar evidence in his trial without objection. See 512 U. S., at 159 (plurality opinion).)

Next, the plurality says that one of the studies I cited focused only on Georgia jurors, as if Georgians have some unique preference for life without parole. In any event, the studies focusing on Virginia jurors yield the same results. See nn. 18, 21, *supra*. Finally, the plurality questions the objectivity of one particular study. Even if the plurality were justified in that criticism, it surely has no basis for questioning the many other sources cited. See n. 19, *supra* (Univ. of South Carolina's Institute for Public Affairs), n. 21 (Gallup Poll and Virginia Tech's Center for Survey Research), n. 26 (study by Associate Professor of Statistics, Dept. of Economic and Social Statistics, Cornell Univ.).

on an assessment of how probable it is that the defendant will be found parole ineligible—or, as the plurality might put it, what is "more certain" under state law.

The plurality is correct to reject the Virginia Supreme Court's holding that state law entirely controls the applicability of *Simmons*. *Simmons* announced a rule of due process, not state law. 512 U. S., at 156 (plurality opinion); *id.*, at 177 (O'CONNOR, J., concurring in judgment). This is not to say that the federal due process right in *Simmons* does not make *reference* to state law, for surely it does; the very reason why *Simmons* is an exception to *Ramos* is because of the consequences of parole ineligibility under state law. But that is not the same thing as saying that the precise, technical operation of state law entirely controls its applicability.

Simmons itself makes this perfectly clear. In that case South Carolina argued that "because future exigencies such as legislative reform, commutation, clemency, and escape might allow [Simmons] to be released into society, [Simmons] was not entitled to inform the jury that he is parole ineligible." 512 U. S., at 166, and n. 6 (plurality opinion). Indeed, as noted earlier, it argued that Simmons was not, technically, parole ineligible at the time of sentencing because the state parole board had not yet made its determination. See *supra*, at 186–187.

Yet the plurality opinion rejected outright the argument that "hypothetical future developments" control the issue, finding that South Carolina's argument about state law, while "technically . . . true," and "legally accurate," had "little force." *Simmons*, 512 U. S., at 166, and n. 6.[29] In other words, the due process standard of *Simmons* was not con-

[29] While JUSTICE O'CONNOR's concurring opinion did not make direct reference to those hypothetical possibilities, South Carolina's brief and the plurality's opinion put the issue squarely before the Court. If those hypotheticals had made a difference, the outcome of the case for the concurring opinion would have been precisely the opposite of what it was.

trolled entirely by the technical minutiae of state law, even though it looked at state law for determining when the right to rebut the State's argument was triggered.

It makes perfect sense for *Simmons*' due process right to make reference to, yet not be wholly controlled by, state law. On the one hand, *Simmons* is a limited exception to *Ramos*, and as such it is confined to where the defendant will be parole ineligible—hence the reference to state law. On the other hand, *Simmons* is a constitutional requirement imposed on the States. If its applicability turned entirely on a defendant's technical status under state law at the time of sentencing, the constitutional requirement would be easily evaded by the artful crafting of a state statute. For example, if Virginia can define "conviction" to require an entry of judgment, it could just as easily define "conviction" to require that all final appeals be exhausted, or that all state and federal habeas options be foreclosed. And by delaying when the defendant's convictions count as strikes for parole ineligibility purposes until some point in time well *after* the capital murder sentencing phase, the State could convert the *Simmons* requirement into an opt-in constitutional rule.[30]

Simmons' applicability is therefore a question of federal law, and that case makes clear that the federal standard essentially disregards future hypothetical possibilities even if they might make the defendant parole *eligible* at some

[30] This is true even if one accepts the premise that *Simmons* requires us to presume that the *most recent* conviction will ultimately count as a strike regardless of what could happen under state law after the sentencing hearing. (The Virginia Supreme Court apparently adopted that view, which explains why that court counted the capital murder verdict as a strike at the time of the sentencing hearing, even though judgment had not yet been entered on the verdict. See *supra*, at 184.) Even accepting that premise, delaying the determination of parole ineligibility status until after the sentencing hearing would still mean that the defendant's *other* prior convictions would not count as strikes until well after the capital murder sentencing phase.

point.[31] The question in this case, then, boils down to whether the plurality's line between entry of judgment and a verdict is a demarcation of *Simmons*' applicability that is (1) consistent with *Simmons;* (2) a realistic and accurate assessment of the probabilities; and (3) a workable, clear rule. I believe the plurality fails on each score.

It is important to emphasize the precise basis for the uncertainty the plurality perceives. The plurality limits the relevant uncertainty to things known *before* the time of sentencing. Events developing the day *after* sentencing, which might lend uncertainty to a defendant's eventual parole ineligibility do not make *Simmons* inapplicable, the plurality says. *Ante,* at 176. What I understand the plurality to be concerned about is whether the facts, as known at or prior to sentencing, cast any doubt on whether, after sentencing, the defendant will become parole ineligible. Even if nothing definitive has happened yet by the time of sentencing, the facts as known at that time might well give rise to uncertainty as to the defendant's parole ineligibility.

The question, then, is what were the facts as known at the time of Ramdass' sentencing that might cast doubt on whether he would be found parole ineligible after sentencing. The facts to which the plurality points are, first, that judgment had not yet been entered on the verdict, and second, that the verdict could have been set aside if Ramdass had

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[31] The plurality's claim, *ante,* at 169, that Ramdass seeks an extension of *Simmons* is therefore unfounded. And its criticism that "[p]etitioner's proposed rule would require courts to evaluate the probability of future events" ignores the fact that *Simmons* itself did the very same thing. *Ante,* at 169. The irony of that comment, moreover, is that it criticizes the rule for requiring an assessment of the future on the ground that such an inquiry is inherently speculative. Yet speculation about the future is precisely what is required when the jury is asked to assess a defendant's future dangerousness. The speculation, however, becomes reasoned prediction rather than arbitrary guesswork only when the jury is permitted to learn of the defendant's future parole status. See *supra,* at 194–199. Unfortunately, that was not the case here.

filed a motion to set aside the verdict under Rule 3A:15(b) and the trial court had found that motion meritorious. But no motion to set aside the verdict had been filed or was pending; no legal basis for granting such a motion had (or has) ever been identified; and there was not the slightest indication from the Domino's Pizza robbery trial court that such a motion would have been found meritorious if it had been filed. In short, the plurality finds constitutionally significant uncertainty in the hypothetical possibility that a motion, if it had been filed, might have identified a trial error and the court possibly could have found the claim meritorious. The mere *availability* of a procedure for setting aside a verdict that is necessary for the defendant's parole ineligibility is enough, the plurality says, to make *Simmons* inapplicable.

Frankly, I do not see how *Simmons* can be found inapplicable on the basis of such a "hypothetical future developmen[t]." 512 U. S., at 166 (plurality opinion). The plurality offers no evidence whatsoever that this possibility—an "if only" wrapped in a "might have" inside of a "possibly so"—is at all more likely to occur than the "hypothetical future developments" that *Simmons* itself refused to countenance. Why is that possibility of setting aside the verdict any more likely than the fanciful scenarios dismissed in *Simmons?* Why is the certainty diminished merely because the trial judge has not yet entered judgment, when that fact has no bearing on whether a Rule 3A:15(b) motion will be granted? The plurality never tells us, for it simply declares, without support, elaboration, or explanation, that a verdict is more uncertain than a judgment is. See *supra,* at 192–193, and n. 17. The only reason it suggests for why the verdict here was uncertain is rather remarkable—that *Ramdass himself* said so. That is, the plurality relies upon the fact that a convicted murderer with minimal education and a history of drug experimentation including PCP and cocaine, App. 49, said "I don't know" when asked if he could ever be released

from prison. *Ante*, at 177. This evidence is thinner than gossamer.[32]

What's more, the plurality's assessment of certainties is internally inconsistent. As explained earlier, the standard for setting aside a verdict post-trial is the same regardless of whether judgment has been entered. Accordingly, if the verdict was uncertain in the Domino's Pizza case, that was also true for the Pizza Hut conviction. At the time of the sentencing hearing in the capital murder case, the deadline for filing a motion under the Rule had not expired for either the Domino's Pizza verdict or the Pizza Hut conviction. (The time for filing a motion for the Pizza Hut conviction expired on February 12, 21 days after judgment had been entered on that verdict. This was 13 days after the sentencing phase in the capital murder case ended.) Because there was a possibility that the Pizza Hut conviction could have been set aside before judgment was entered on the Domino's Pizza verdict (and therefore before Ramdass technically became parole ineligible), the certainty of the verdict was just as much in doubt for that conviction. The plurality, however, finds the Domino's Pizza verdict uncertain yet casts no doubt on the Pizza Hut conviction. How can this possibly be consistent? The plurality never says.

Finally, the plurality's approach is entirely boundless. If the kind of "hypothetical future developmen[t]" at issue here is sufficient to make *Simmons* inapplicable, would it

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[32] The plurality also attempts to distinguish the hypotheticals in *Simmons* from those in Ramdass' case by pointing out that the former hypotheticals, if they happened, would do so *after* sentencing. *Ante*, at 168–169. But the entire point of the hypotheticals is not whether they could occur before sentencing, but whether they could occur before the defendant was technically declared parole ineligible. In *Simmons*, that was true right up until the parole board made its determination. Simply because the nuances of state law may create an opportunity for undermining parole ineligibility earlier on does not make the possibility any less hypothetical or undermine the ineligibility any less; the same principle is at work either way.

be sufficient if, rather than having the possibility of a *recent* conviction being set aside by post-trial motion, an *old* prior conviction could be set aside on appeal before judgment had been entered on the Domino's Pizza verdict? Or under a State's postconviction habeas procedure? More to the point, if the mere *availability* of a post-trial procedure to set aside the verdict is enough, is the same true as well for the mere *availability* of an appeal or state habeas review, so long as the time had not expired for either? Old convictions necessary for a defendant's parole ineligibility can be set aside under these procedures as well. And under each procedure those prior convictions could potentially be set aside at the crucial moment.[33]

It is easy, in this case, to be distracted by the lack of an entry of judgment and the recentness of Ramdass' prior convictions. As the above examples demonstrate, however, these facts tend to detract from, rather than elucidate, the relevant issue. If *Simmons* is inapplicable because at least one of the defendant's prior convictions could be set aside before sentencing (or before the third strike becomes final, or before whatever time the plurality might think is the crucial moment), then it should not matter, under that reasoning, whether it is set aside by post-trial motion, on appeal, or through state (or federal) postconviction relief. What's more, the plurality's reasoning would hold true so long as these procedures are simply *available.* Accordingly, it would not matter whether a defendant's prior strikes were a day old, a year old, or 100 years old. Nor would it matter that judgment had been entered on those prior convictions. So long as such procedures for setting aside old convictions

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[33] It is true that these old convictions—like the Pizza Hut conviction—have had an entry of judgment and thus would count as strikes. But under state law, a defendant must have three strikes *at the same time* to be parole ineligible. If a strike were set aside before the defendant has all three, he is just as much parole *eligible* as he would be if judgment had never been entered on the verdict.

exist and remain technically available prior to a defendant's capital murder sentencing phase, the defendant's eventual parole ineligibility is just as uncertain at the crucial moment.

The plurality, however, never addresses any of this, but surely its holding today is an invitation to such possibilities. Indeed, if these possibilities make *Simmons* inapplicable, does this not invite the very same circumvention of *Simmons* that would result if the rule turned entirely on state law (see *supra*, at 201), by allowing a State to render *all* prior convictions uncertain simply by holding open *some* theoretical possibility for postconviction relief at all times? Given that appeals and various forms of postconviction relief undermine the certainty of a verdict or a "conviction" every bit as much as does a procedure like Rule 3A:15(b)—indeed, probably more so—the plurality's reasoning either draws an arbitrary line between these types of procedures, or it accepts that all of these possibilities make *Simmons* inapplicable, in which case that due process right is eviscerated entirely.[34] It is abundantly clear that the proclaimed "workable" rule the plurality claims to be following is an illusion. *Ante*, at 166.

No such arbitrary line-drawing is at all necessary to decide this case. It is entirely sufficient simply to hold that Virginia has offered not one reason for doubting that judgment would be entered on the Domino's Pizza robbery verdict or for doubting Ramdass' eventual parole ineligibility. Certainly it has offered no reason for thinking that the possibil-

[34] The plurality says "[t]he Commonwealth is entitled to some deference, in the context of its own parole laws, in determining the best reference point for making the ineligibility determination." *Ante*, at 170; see also *ante*, at 176 ("States may take different approaches and we see no support for a rule that would require a State to declare a conviction final for purposes of a three-strikes statute once a verdict has been rendered"). But the questions here are whether the *federal due process* standard must abide by every state-law distinction, and if not, is abiding by the entry-of-judgment distinction arbitrary, in light of the fact that that distinction has absolutely no bearing on whether the verdict will be set aside?

ity of setting aside the Domino's Pizza robbery verdict is at all more likely than the hypothetical future developments rejected in *Simmons*. This case thus falls squarely within *Simmons*.

Though it is unnecessary to decide it here, a guilty verdict is the proper line. A guilty verdict against the defendant is a natural breaking point in the uncertainties inherent in the trial process. Before that time, the burden is on the State to prove the accused's guilt beyond a reasonable doubt. A guilty verdict, however, means that the defendant's presumption of innocence—with all of its attendant trial safeguards—has been overcome. The verdict resolves the central question of the general issue of guilt. It marks the most significant point of the adversary proceeding, and reflects a fundamental shift in the probabilities regarding the defendant's fate. For that reason, it is the proper point at which a line separating the hypothetical from the probable should be drawn. Moreover, because the State itself can use the defendant's prior crimes to argue future dangerousness after a jury has rendered a verdict—as Virginia did here, see *supra*, at 182–183, and n. 2—that is also the point at which the defendant's *Simmons* right should attach.

V

In *Williams* v. *Taylor*, 529 U. S. 362, 405 (2000) (opinion of O'CONNOR, J.), we stated the standard for granting habeas relief under 28 U. S. C. § 2254(d)(1): "A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." As I have explained, the Virginia Supreme Court applied *Simmons* as if (a) its applicability was controlled entirely by state law and (b) the defendant's parole ineligibility is determined at the exact moment when the sentencing phase occurs. See *supra*, at 184–185. But state law does not control *Simmons*' applicability, nor does the due process right turn on whether the defend-

ant has already been found parole ineligible at the exact moment of sentencing. *Simmons* itself makes this entirely clear. Both aspects of the Virginia Supreme Court's holding, then, applied a "rule that contradicts the governing law set forth in" *Simmons*.

We also held in *Williams* that "[a] state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." 529 U. S., at 406. The Virginia Supreme Court's decision was also contrary to *Simmons* in this respect. Because the "hypothetical future developments" rejected in *Simmons* are materially indistinguishable from the future possibility here, the Virginia court's decision is contrary to *Simmons*.

Even assuming the correct rule had been applied, the Virginia Supreme Court's decision would be an "unreasonable application" of *Simmons*. That court held that the Pizza Hut conviction would count as a strike, but not the Domino's Pizza robbery verdict. The only distinction is the lack of an entry of judgment, and the only reason that matters is because the verdict may be set aside by a post-trial motion. But that possibility remains identical for both crimes. To disregard one of those hypothetical possibilities but not the other based on a state-law distinction that has absolutely no relevance to the probability that the verdict will be set aside is an unreasonable application of *Simmons*.[35]

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[35] Three remaining points should be addressed. First, *Teague* v. *Lane*, 489 U. S. 288 (1989), does not bar relief. *Teague*'s antiretroactivity doctrine is irrelevant here, as *Simmons* was decided before Ramdass' conviction became final. See 187 F. 3d 396, 404, n. 3 (CA4 1999) (case below). Nor is *Teague*'s bar of applying "new rules" on federal habeas review any barrier; because Ramdass' case falls squarely within *Simmons*, that case controls entirely, and no new rule is necessary.

The second point concerns the plurality's suggestion that Ramdass might have waived his *Simmons* claim. See *ante*, at 162–163, 177. It is not necessary to discuss the issue at length. It suffices to note that this

VI

Nothing in the above arguments should distract us from the fact that this is a simple case. The question turns on whether the hypothetical possibility that the trial judge might fail to sign a piece of paper entering judgment on a guilty verdict should mean that the defendant is precluded from arguing his parole ineligibility to the jury. We should also not be distracted by the plurality's red herring—the possibility of setting aside the verdict by a post-trial motion. Not only is that possibility indistinguishable from the nonexhaustive list of hypothetical future possibilities we dismissed in *Simmons*, but it also fails to distinguish this case from the many other possibilities that are part of the state criminal justice system, and fails to distinguish Ramdass' convictions from each other.

The plurality's convoluted understanding of *Simmons* and its diverse implications necessitate a fair amount of disentangling of its argument. But, once again, this should not divert us from the plain reality of this case. Juries want to know about parole ineligibility. We know how important

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is precisely the argument that Virginia raised on remand to the Virginia Supreme Court. That court was not persuaded by the argument, nor was any court during the entire state and federal habeas proceedings. See, *e. g.*, App. 219, 225–226, 281–284 (Magistrate's Report) (discussing its own and other courts' rejection of waiver argument); 187 F. 3d, at 402 (case below) (same). It is therefore not surprising that Virginia failed to argue waiver in its brief in opposition and arguments not raised therein are themselves normally deemed waived. See *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 75, n. 13 (1996).

Finally, that Ramdass' counsel argued that he would go to jail "for the rest of his life" does not at all satisfy *Simmons*' requirement. *Ante*, at 161. The entire point of *Simmons* is that the jury will often misunderstand what it means to sentence a defendant to "life." Consequently, that Ramdass was able to tell the jury he would get "life" simply does not help unless he is *also* permitted to tell the jury that life means life without the possibility of parole. Indeed, the very fact that the jury's question came *after* counsel made this argument demonstrates that the jury was uncertain about what that statement meant.

it is to their life-and-death decisionmaking. We know how misinformed they are likely to be if we do not give them this information. We know *Simmons* has worked,[36] and we know the States have wholeheartedly embraced it.[37]

Moreover, we know *this jury* thought the information was critical; we know *this jury* misunderstood what a "life" sentence meant; we know *this jury* would have recommended life instead of death if it had known that Ramdass was parole ineligible; and we know *this jury* did not get a clear answer to its question. We also know that Virginia entrusts to the jury the solemn duty of recommending life or death for the defendant. Why does the Court insist that the Constitution permits the wool to be pulled over their eyes?

I respectfully dissent.

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[36] See, *e. g.*, Finn, Washington Post, at A1 (recounting how, after Virginia adopted life without parole alternative in 1995, and after *Simmons*, "[t]he number of people given the death sentence in Virginia has plummeted," and describing "[s]imilar declines . . . in Georgia and Indiana" as well as in Maryland).

[37] See *Yarbrough* v. *Commonwealth*, 258 Va. 347, 519 S. E. 2d 602 (1999) (extending *Simmons* to apply even when State does not argue future dangerousness); *ante*, at 178.

Syllabus

PEGRAM ET AL. *v.* HERDRICH

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

No. 98–1949. Argued February 23, 2000—Decided June 12, 2000

Petitioners (collectively Carle) function as a health maintenance organization (HMO) owned by physicians providing prepaid medical services to participants whose employers contract with Carle for coverage. Respondent Herdrich was covered by Carle through her husband's employer, State Farm Insurance Company. After petitioner Pegram, a Carle physician, required Herdrich to wait eight days for an ultrasound of her inflamed abdomen, her appendix ruptured, causing peritonitis. She sued Carle in state court for, *inter alia*, fraud. Carle responded that the Employee Retirement Income Security Act of 1974 (ERISA) preempted the fraud counts and removed the case to federal court. The District Court granted Carle summary judgment on one fraud count, but granted Herdrich leave to amend the other. Her amended count alleged that the provision of medical services under terms rewarding physician owners for limiting medical care entailed an inherent or anticipatory breach of an ERISA fiduciary duty, since the terms created an incentive to make decisions in the physicians' self-interest, rather than the plan participants' exclusive interests. The District Court granted Carle's motion to dismiss on the ground that Carle was not acting as an ERISA fiduciary. The Seventh Circuit reversed the dismissal.

Held: Because mixed treatment and eligibility decisions by HMO physicians are not fiduciary decisions under ERISA, Herdrich does not state an ERISA claim. Pp. 218–237.

(a) Whether Carle is a fiduciary when acting through its physician owners depends on some background of fact and law about HMO organizations, medical benefit plans, fiduciary obligation, and the meaning of Herdrich's allegations. The defining feature of an HMO is receipt of a fixed fee for each patient enrolled under the terms of a contract to provide specified health care if needed. Like other risk bearing organizations, HMOs take steps to control costs. These measures are commonly complemented by specific financial incentives to physicians, rewarding them for decreasing utilization of health-care services, and penalizing them for excessive treatment. Hence, an HMO physician's financial interest lies in providing less care, not more. Herdrich argues that Carle's incentive scheme of annually paying physician owners the profit resulting from their own decisions rationing care distinguishes its plan

Syllabus

from HMOs generally, so that reviewing Carle's decision under a fiduciary standard would not open the door to claims against other HMOs. However, inducement to ration care is the very point of any HMO scheme, and rationing necessarily raises some risks while reducing others. Thus, any legal principle purporting to draw a line between good and bad HMOs would embody a judgment about socially acceptable medical risk that would turn on facts not readily accessible to courts and on social judgments not wisely required of courts unless resort cannot be had to the legislature. Because courts are not in a position to derive a sound legal principle to differentiate an HMO like Carle from other HMOs, this Court assumes that the decisions listed in Herdrich's count cannot be subject to a claim under fiduciary standards unless all such decisions by all HMOs acting through their physicians are judged by the same standards and subject to the same claims. Pp. 218–222.

(b) Under ERISA, a fiduciary is someone acting in the capacity of manager, administrator, or financial adviser to a "plan," and Herdrich's count accordingly charged Carle with a breach of fiduciary duty in discharging its obligations under State Farm's medical plan. The common understanding of "plan" is a scheme decided upon in advance. Here the scheme comprises a set of rules defining a beneficiary's rights and providing for their enforcement. When employers contract with an HMO to provide benefits to employees subject to ERISA, their agreement may, as here, provide elements of a plan by setting out the rules under which beneficiaries will be entitled to care. ERISA's provision that fiduciaries shall discharge their duties with respect to a plan "solely in the interest of the participants and beneficiaries," 29 U. S. C. § 1104(a)(1), is rooted in the common law of trusts, but an ERISA fiduciary may also have financial interests adverse to beneficiaries. Thus, in every case charging breach of ERISA fiduciary duty, the threshold question is not whether the actions of some person providing services under the plan adversely affected a beneficiary's interest, but whether that person was performing a fiduciary function when taking the action subject to complaint. Pp. 222–226.

(c) Herdrich claims that Carle became a fiduciary, acting through its physicians, when it contracted with State Farm. It then breached its duty to act solely in the beneficiaries' interest, making decisions affecting medical treatment while influenced by a scheme under which the physician owners ultimately profited from their own choices to minimize the medical services provided. Herdrich's count lists mixed eligibility and treatment decisions: decisions relying on medical judgments in order to make plan coverage determinations. Pp. 226–230.

(d) Congress did not intend an HMO to be treated as a fiduciary to the extent that it makes mixed eligibility decisions acting through its

physicians. Congress is unlikely to have thought of such decisions as fiduciary. The common law trustee's most defining concern is the payment of money in the beneficiary's interest, and mixed eligibility decisions have only a limited resemblance to that concern. Consideration of the consequences of Herdrich's contrary view leave no doubt as to Congress's intent. Recovery against for-profit HMOs for their mixed decisions would be warranted simply upon a showing that the profit incentive to ration care would generally affect such decisions, in derogation of the fiduciary standard to act in the patient's interest without possibility of conflict. And since the provision for profits is what makes a for-profit HMO a proprietary organization, Herdrich's remedy—return of profit to the plan for the participants' benefit—would be nothing less than elimination of the for-profit HMO. The Judiciary has no warrant to precipitate the upheaval that would follow a refusal to dismiss Herdrich's claim. Congress, which has promoted the formation of HMOs for 27 years, may choose to restrict its approval to certain preferred forms, but the Judiciary would be acting contrary to congressional policy if it were to entertain an ERISA fiduciary claim portending wholesale attacks on existing HMOs solely because of their structure. The Seventh Circuit's attempt to confine the fiduciary breach to cases where the sole purpose of delaying or withholding treatment is to increase the physician's financial reward would also lead to fatal difficulties. The HMO's defense would be that its physician acted for good medical reasons. For all practical purposes, every claim would boil down to a malpractice claim, and the fiduciary standard would be nothing but the traditional medical malpractice standard. The only value to plan participants of such an ERISA fiduciary action would be eligibility for attorney's fees if they won. A physician would also be subject to suit in federal court applying an ERISA standard of reasonable medical skill. This would, in turn, seem to preempt a state malpractice claim, even though ERISA does not preempt such claims absent a clear manifestation of congressional purpose, *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645. Pp. 231–237.

154 F. 3d 362, reversed.

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

Carter G. Phillips argued the cause for petitioners. With him on the briefs were *Virginia A. Seitz* and *Richard D. Raskin.*

James A. Feldman argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief

were *Solicitor General Waxman*, *Deputy Solicitor General Kneedler*, *Allen H. Feldman*, and *Mark S. Flynn*.

James P. Ginzkey argued the cause and filed a brief for respondent.*

JUSTICE SOUTER delivered the opinion of the Court.

The question in this case is whether treatment decisions made by a health maintenance organization, acting through its physician employees, are fiduciary acts within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U. S. C. § 1001 *et seq.* (1994 ed. and Supp. III). We hold that they are not.

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*Briefs of *amici curiae* urging reversal were filed for the American Association of Health Plans et al. by *Stephanie W. Kanwit*, *Daly D. E. Temchine*, *Kirsten M. Pullin*, *Jeffrey Gabardi*, *Louis Saccoccio*, *Stephen A. Bokat*, *Robin S. Conrad*, and *Sussan Mahallati Kysela;* and for the Washington Legal Foundation by *Lonie A. Hassel*, *William F. Hanrahan*, *Daniel J. Popeo*, and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the State of Illinois et al. by *James E. Ryan*, Attorney General of Illinois, *Joel D. Bertocchi*, Solicitor General, *Jacqueline Zydeck*, Assistant Attorney General, and *Dan Schweitzer*, and by the Attorneys General for their respective States as follows: *Bill Lockyer* of California, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Thomas J. Miller* of Iowa, *Tom Reilly* of Massachusetts, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *John J. Farmer, Jr.*, of New Jersey, *Michael F. Easley* of North Carolina, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Mike Fisher* of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *Paul G. Summers* of Tennessee, and *John Cornyn* of Texas; for the American College of Legal Medicine et al. by *Miles J. Zaremski;* for Health Care for All et al. by *Wendy E. Parmet*, *S. Stephen Rosenfeld*, and *Clare D. McGorrian;* for Health Law, Policy, and Ethics Scholars by *Louis R. Cohen*, *Ruth E. Kent*, and *Carol J. Banta;* and for the *Ehlmann* Plaintiffs by *George Parker Young*.

Briefs of *amici curiae* were filed for the American Medical Association by *Gary W. Howell*, *Thomas Campbell*, *Michael L. Ile*, *Anne M. Murphy*, and *Leonard A. Nelson;* and for the AARP et al. by *Mary Ellen Signorille*, *Sarah Lenz Lock*, *Melvin Radowitz*, *Paula Brantner*, *Jeffrey Lewis*, and *Vicki Gottlich*.

I

Petitioners, Carle Clinic Association, P. C., Health Alliance Medical Plans, Inc., and Carle Health Insurance Management Co., Inc. (collectively Carle), function as a health maintenance organization (HMO) organized for profit. Its owners are physicians providing prepaid medical services to participants whose employers contract with Carle to provide such coverage. Respondent, Cynthia Herdrich, was covered by Carle through her husband's employer, State Farm Insurance Company.

The events in question began when a Carle physician, petitioner Lori Pegram,[1] examined Herdrich, who was experiencing pain in the midline area of her groin. Six days later, Dr. Pegram discovered a six by eight centimeter inflamed mass in Herdrich's abdomen. Despite the noticeable inflammation, Dr. Pegram did not order an ultrasound diagnostic procedure at a local hospital, but decided that Herdrich would have to wait eight more days for an ultrasound, to be performed at a facility staffed by Carle more than 50 miles away. Before the eight days were over, Herdrich's appendix ruptured, causing peritonitis. See 154 F. 3d 362, 365, n. 1 (CA7 1998).

Herdrich sued Pegram and Carle in state court for medical malpractice, and she later added two counts charging state-law fraud. Carle and Pegram responded that ERISA preempted the new counts, and removed the case to federal court,[2] where they then sought summary judgment on the

[1] Although Lori Pegram, a physician owner of Carle, is listed as a petitioner, it is unclear to us that she retains a direct interest in the outcome of this case.

[2] Herdrich does not contest the propriety of removal before us, and we take no position on whether or not the case was properly removed. As we will explain, Herdrich's amended complaint alleged ERISA violations, over which the federal courts have jurisdiction, and we therefore have jurisdiction regardless of the correctness of the removal. See *Grubbs* v. *General Elec. Credit Corp.*, 405 U. S. 699 (1972); *Mackay* v. *Uinta Development Co.*, 229 U. S. 173 (1913).

state-law fraud counts. The District Court granted their motion as to the second fraud count but granted Herdrich leave to amend the one remaining. This she did by alleging that provision of medical services under the terms of the Carle HMO organization, rewarding its physician owners for limiting medical care, entailed an inherent or anticipatory breach of an ERISA fiduciary duty, since these terms created an incentive to make decisions in the physicians' self-interest, rather than the exclusive interests of plan participants.[3]

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[3] The specific allegations were these:

"11. Defendants are fiduciaries with respect to the Plan and under 29 [U. S. C. §]1109(a) are obligated to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries and

"a. for the exclusive purpose of:

"i. providing benefits to participants and their beneficiaries; and

"ii. defraying reasonable expenses of administering the Plan;

"b. with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and like aims.

"12. In breach of that duty:

"a. CARLE owner/physicians are the officers and directors of HAMP and CHIMCO and receive a year-end distribution, based in large part upon, supplemental medical expense payments made to CARLE by HAMP and CHIMCO;

"b. Both HAMP and CHIMCO are directed and controlled by CARLE owner/physicians and seek to fund their supplemental medical expense payments to CARLE:

"i. by contracting with CARLE owner/physicians to provide the medical services contemplated in the Plan and then having those contracted owner/physicians:

"(1) minimize the use of diagnostic tests;

"(2) minimize the use of facilities not owned by CARLE; and

"(3) minimize the use of emergency and non-emergency consultation and/or referrals to non-contracted physicians.

"ii. by administering disputed and non-routine health insurance claims and determining:

"(1) which claims are covered under the Plan and to what extent;

"(2) what the applicable standard of care is;

"(3) whether a course of treatment is experimental;

Herdrich sought relief under 29 U. S. C. § 1109(a), which provides that

> "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."

When Carle moved to dismiss the ERISA count for failure to state a claim upon which relief could be granted, the District Court granted the motion, accepting the Magistrate Judge's determination that Carle was not "involved [in these events] as" an ERISA fiduciary. App. to Pet. for Cert. 63a. The original malpractice counts were then tried to a jury, and Herdrich prevailed on both, receiving $35,000 in compensation for her injury. 154 F. 3d, at 367. She then appealed the dismissal of the ERISA claim to the Court of Appeals for the Seventh Circuit, which reversed. The court held that Carle was acting as a fiduciary when its physicians made the challenged decisions and that Herdrich's allegations were sufficient to state a claim:

> "Our decision does not stand for the proposition that the existence of incentives *automatically* gives rise to a breach of fiduciary duty. Rather, we hold that incentives can *rise* to the level of a breach where, as pleaded here, the fiduciary trust between plan participants and plan fiduciaries no longer exists (i. e., where physicians delay providing necessary treatment to, or withhold ad-

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"(4) whether a course of treatment is reasonable and customary; and

"(5) whether a medical condition is an emergency." App. to Pet. for Cert. 85a–86a.

> ministering proper care to, plan beneficiaries for the sole purpose of increasing their bonuses)." *Id.*, at 373.

We granted certiorari, 527 U. S. 1068 (1999), and now reverse the Court of Appeals.

II

Whether Carle is a fiduciary when it acts through its physician owners as pleaded in the ERISA count depends on some background of fact and law about HMOs, medical benefit plans, fiduciary obligation, and the meaning of Herdrich's allegations.

A

Traditionally, medical care in the United States has been provided on a "fee-for-service" basis. A physician charges so much for a general physical exam, a vaccination, a tonsillectomy, and so on. The physician bills the patient for services provided or, if there is insurance and the doctor is willing, submits the bill for the patient's care to the insurer, for payment subject to the terms of the insurance agreement. Cf. R. Rosenblatt, S. Law, & S. Rosenbaum, Law and the American Health Care System 543–544 (1997) (hereinafter Rosenblatt) (citing Weiner & de Lissovoy, Razing a Tower of Babel: A Taxonomy for Managed Care and Health Insurance Plans, 18 J. Health Politics, Policy & Law 75, 76–78 (Summer 1993)). In a fee-for-service system, a physician's financial incentive is to provide more care, not less, so long as payment is forthcoming. The check on this incentive is a physician's obligation to exercise reasonable medical skill and judgment in the patient's interest.

Beginning in the late 1960's, insurers and others developed new models for health-care delivery, including HMOs. Cf. Rosenblatt 546. The defining feature of an HMO is receipt of a fixed fee for each patient enrolled under the terms of a contract to provide specified health care if needed. The HMO thus assumes the financial risk of providing the bene-

fits promised: if a participant never gets sick, the HMO keeps the money regardless, and if a participant becomes expensively ill, the HMO is responsible for the treatment agreed upon even if its cost exceeds the participant's premiums.

Like other risk-bearing organizations, HMOs take steps to control costs. At the least, HMOs, like traditional insurers, will in some fashion make coverage determinations, scrutinizing requested services against the contractual provisions to make sure that a request for care falls within the scope of covered circumstances (pregnancy, for example), or that a given treatment falls within the scope of the care promised (surgery, for instance). They customarily issue general guidelines for their physicians about appropriate levels of care. See *id.*, at 568–570. And they commonly require utilization review (in which specific treatment decisions are reviewed by a decisionmaker other than the treating physician) and approval in advance (precertification) for many types of care, keyed to standards of medical necessity or the reasonableness of the proposed treatment. See Andresen, Is Utilization Review the Practice of Medicine?, Implications for Managed Care Administrators, 19 J. Legal Med. 431, 432 (Sept. 1998). These cost-controlling measures are commonly complemented by specific financial incentives to physicians, rewarding them for decreasing utilization of health-care services, and penalizing them for what may be found to be excessive treatment, see Rosenblatt 563–565; Iglehart, Health Policy Report: The American Health Care System—Managed Care, 327 New England J. Med. 742, 742–747 (1992). Hence, in an HMO system, a physician's financial interest lies in providing less care, not more. The check on this influence (like that on the converse, fee-for-service incentive) is the professional obligation to provide covered services with a reasonable degree of skill and judgment in the patient's interest. See Brief for American Medical Association as *Amicus Curiae* 17–21.

The adequacy of professional obligation to counter financial self-interest has been challenged no matter what the form of medical organization. HMOs became popular because fee-for-service physicians were thought to be providing unnecessary or useless services; today, many doctors and other observers argue that HMOs often ignore the individual needs of a patient in order to improve the HMOs' bottom lines. See, *e. g.*, 154 F. 3d, at 375–378 (citing various critics of HMOs).[4] In this case, for instance, one could argue that Pegram's decision to wait before getting an ultrasound for Herdrich, and her insistence that the ultrasound be done at a distant facility owned by Carle, reflected an interest in limiting the HMO's expenses, which blinded her to the need for immediate diagnosis and treatment.

B

Herdrich focuses on the Carle scheme's provision for a "year-end distribution," n. 3, *supra*, to the HMO's physician owners. She argues that this particular incentive device of annually paying physician owners the profit resulting from their own decisions rationing care can distinguish Carle's organization from HMOs generally, so that reviewing Carle's decisions under a fiduciary standard as pleaded in Herdrich's complaint would not open the door to like claims about other HMO structures. While the Court of Appeals agreed, we think otherwise, under the law as now written.

Although it is true that the relationship between sparing medical treatment and physician reward is not a subtle one under the Carle scheme, no HMO organization could survive without some incentive connecting physician reward with treatment rationing. The essence of an HMO is that salaries and profits are limited by the HMO's fixed membership fees. See Orentlicher, Paying Physicians More To Do Less: Financial Incentives to Limit Care, 30 U. Rich. L. Rev. 155,

[4] There are, of course, contrary perspectives, and we endorse neither side of the debate today.

174 (1996). This is not to suggest that the Carle provisions are as socially desirable as some other HMO organizational schemes; they may not be. See, *e. g.*, Grumbach, Osmond, Vranigan, Jaffe, & Bindman, Primary Care Physicians' Experience of Financial Incentives in Managed-Care Systems, 339 New England J. Med. 1516 (1998) (arguing that HMOs that reward quality of care and patient satisfaction would be preferable to HMOs that reward only physician productivity). But whatever the HMO, there must be rationing and inducement to ration.

Since inducement to ration care goes to the very point of any HMO scheme, and rationing necessarily raises some risks while reducing others (ruptured appendixes are more likely; unnecessary appendectomies are less so), any legal principle purporting to draw a line between good and bad HMOs would embody, in effect, a judgment about socially acceptable medical risk. A valid conclusion of this sort would, however, necessarily turn on facts to which courts would probably not have ready access: correlations between malpractice rates and various HMO models, similar correlations involving fee-for-service models, and so on. And, of course, assuming such material could be obtained by courts in litigation like this, any standard defining the unacceptably risky HMO structure (and consequent vulnerability to claims like Herdrich's) would depend on a judgment about the appropriate level of expenditure for health care in light of the associated malpractice risk. But such complicated factfinding and such a debatable social judgment are not wisely required of courts unless for some reason resort cannot be had to the legislative process, with its preferable forum for comprehensive investigations and judgments of social value, such as optimum treatment levels and health-care expenditure. Cf. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 665–666 (1994) (plurality opinion) ("Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex

and dynamic as that presented here" (quoting *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 331, n. 12 (1985))); *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 513 (1982) ("[T]he relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them. The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable" (footnote omitted)).

We think, then, that courts are not in a position to derive a sound legal principle to differentiate an HMO like Carle from other HMOs.[5] For that reason, we proceed on the assumption that the decisions listed in Herdrich's complaint cannot be subject to a claim that they violate fiduciary standards unless all such decisions by all HMOs acting through their owner or employee physicians are to be judged by the same standards and subject to the same claims.

C

We turn now from the structure of HMOs to the requirements of ERISA. A fiduciary within the meaning of ERISA must be someone acting in the capacity of manager, administrator, or financial adviser to a "plan," see 29 U. S. C. §§ 1002(21)(A)(i)–(iii), and Herdrich's ERISA count accordingly charged Carle with a breach of fiduciary duty in discharging its obligations under State Farm's medical plan. App. to Pet. for Cert. 85a–86a. ERISA's definition of an employee welfare benefit plan is ultimately circular: "any plan, fund, or program . . . to the extent that such plan, fund, or program was established . . . for the purpose of providing . . . through the purchase of insurance or otherwise . . . medical,

[5] They are certainly not capable of making that distinction on a motion to dismiss; if we accepted the Court of Appeals's reasoning, complaints against any flavor of HMO would have to proceed at least to the summary judgment stage.

surgical, or hospital care or benefits." § 1002(1)(A). One is thus left to the common understanding of the word "plan" as referring to a scheme decided upon in advance, see Webster's New International Dictionary 1879 (2d ed. 1957); Jacobson & Pomfret, Form, Function, and Managed Care Torts: Achieving Fairness and Equity in ERISA Jurisprudence, 35 Houston L. Rev. 985, 1050 (1998). Here the scheme comprises a set of rules that define the rights of a beneficiary and provide for their enforcement. Rules governing collection of premiums, definition of benefits, submission of claims, and resolution of disagreements over entitlement to services are the sorts of provisions that constitute a plan. See *Hansen* v. *Continental Ins. Co.*, 940 F. 2d 971, 977 (CA5 1991). Thus, when employers contract with an HMO to provide benefits to employees subject to ERISA, the provisions of documents that set up the HMO are not, as such, an ERISA plan; but the agreement between an HMO and an employer who pays the premiums may, as here, provide elements of a plan by setting out rules under which beneficiaries will be entitled to care.

D

As just noted, fiduciary obligations can apply to managing, advising, and administering an ERISA plan, the fiduciary function addressed by Herdrich's ERISA count being the exercise of "discretionary authority or discretionary responsibility in the administration of [an ERISA] plan," 29 U. S. C. § 1002(21)(A)(iii). And as we have already suggested, although Carle is not an ERISA fiduciary merely because it administers or exercises discretionary authority over its own HMO business, it may still be a fiduciary if it administers the plan.

In general terms, fiduciary responsibility under ERISA is simply stated. The statute provides that fiduciaries shall discharge their duties with respect to a plan "solely in the interest of the participants and beneficiaries," § 1104(a)(1), that is, "for the exclusive purpose of (i) providing benefits to

participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan," § 1104(a)(1)(A).[6] These responsibilities imposed by ERISA have the familiar ring of their source in the common law of trusts. See *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U. S. 559, 570 (1985) ("[R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility"). Thus, the common law (understood as including what were once the distinct rules of equity) charges fiduciaries with a duty of loyalty to guarantee beneficiaries' interests: "The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty. . . . It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries." 2A A. Scott & W. Fratcher, Trusts § 170, p. 311 (4th ed. 1987) (hereinafter Scott); see also G. Bogert & G. Bogert, Law of Trusts and Trustees § 543 (rev. 2d ed. 1980) ("Perhaps the most fundamental duty of a trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons"); *Central States, supra,* at 570–571; *Meinhard* v. *Salmon*, 249 N. Y. 458, 464, 164 N. E. 545, 546 (1928) (Cardozo, J.) ("Many

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[6] In addition, fiduciaries must discharge their duties

"(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

"(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

"(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter." 29 U. S. C. § 1104(a)(1).

forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior").

Beyond the threshold statement of responsibility, however, the analogy between ERISA fiduciary and common law trustee becomes problematic. This is so because the trustee at common law characteristically wears only his fiduciary hat when he takes action to affect a beneficiary, whereas the trustee under ERISA may wear different hats.

Speaking of the traditional trustee, Professor Scott's treatise admonishes that the trustee "is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries." 2A Scott § 170, at 311. Under ERISA, however, a fiduciary may have financial interests adverse to beneficiaries. Employers, for example, can be ERISA fiduciaries and still take actions to the disadvantage of employee beneficiaries, when they act as employers (*e. g.*, firing a beneficiary for reasons unrelated to the ERISA plan), or even as plan sponsors (*e. g.*, modifying the terms of a plan as allowed by ERISA to provide less generous benefits). Nor is there any apparent reason in the ERISA provisions to conclude, as Herdrich argues, that this tension is permissible only for the employer or plan sponsor, to the exclusion of persons who provide services to an ERISA plan.

ERISA does require, however, that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions. See *Hughes Aircraft Co.* v. *Jacobson*, 525 U. S. 432, 443–444 (1999); *Varity Corp.* v. *Howe*, 516 U. S. 489, 497 (1996). Thus, the statute does not describe fiduciaries simply as administrators of the plan, or managers or advisers. Instead it defines an administrator, for example, as a fiduciary only "to the extent" that he

acts in such a capacity in relation to a plan. 29 U. S. C. § 1002(21)(A). In every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.

E

The allegations of Herdrich's ERISA count that identify the claimed fiduciary breach are difficult to understand. In this count, Herdrich does not point to a particular act by any Carle physician owner as a breach. She does not complain about Pegram's actions, and at oral argument her counsel confirmed that the ERISA count could have been brought, and would have been no different, if Herdrich had never had a sick day in her life. Tr. of Oral Arg. 53–54.

What she does claim is that Carle, acting through its physician owners, breached its duty to act solely in the interest of beneficiaries by making decisions affecting medical treatment while influenced by the terms of the Carle HMO scheme, under which the physician owners ultimately profit from their own choices to minimize the medical services provided. She emphasizes the threat to fiduciary responsibility in the Carle scheme's feature of a year-end distribution to the physicians of profit derived from the spread between subscription income and expenses of care and administration. App. to Pet. for Cert. 86a.

The specific payout detail of the plan was, of course, a feature that the employer as plan sponsor was free to adopt without breach of any fiduciary duty under ERISA, since an employer's decisions about the content of a plan are not themselves fiduciary acts. *Lockheed Corp.* v. *Spink*, 517 U. S. 882, 887 (1996) ("Nothing in ERISA requires employers to establish employee benefit plans. Nor does ERISA mandate what kind of benefits employers must provide if they

choose to have such a plan").[7] Likewise it is clear that there was no violation of ERISA when the incorporators of the Carle HMO provided for the year-end payout. The HMO is not the ERISA plan, and the incorporation of the HMO preceded its contract with the State Farm plan. See 29 U. S. C. § 1109(b) (no fiduciary liability for acts preceding fiduciary status).

The nub of the claim, then, is that when State Farm contracted with Carle, Carle became a fiduciary under the plan, acting through its physicians. At once, Carle as fiduciary administrator was subject to such influence from the year-end payout provision that its fiduciary capacity was necessarily compromised, and its readiness to act amounted to anticipatory breach of fiduciary obligation.

F

The pleadings must also be parsed very carefully to understand what acts by physician owners acting on Carle's behalf are alleged to be fiduciary in nature.[8] It will help to keep

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[7] It does not follow that those who administer a particular plan design may not have difficulty in following fiduciary standards if the design is awkward enough. A plan might lawfully provide for a bonus for administrators who denied benefits to every 10th beneficiary, but it would be difficult for an administrator who received the bonus to defend against the claim that he had not been solely attentive to the beneficiaries' interests in carrying out his administrative duties. The important point is that Herdrich is not suing the employer, State Farm, and her claim cannot be analyzed as if she were.

[8] Herdrich argues that Carle is judicially estopped from denying its fiduciary status as to the relevant decisions, because it sought and sucessfully defended removal of Herdrich's state action to the Federal District Court on the ground that it was a fiduciary with respect to Herdrich's fraud claims. Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. See *Rissetto* v. *Plumbers & Steamfitters Local 343*, 94 F. 3d 597, 605 (CA9 1996). The fraud claims in Herdrich's initial complaint, however, could be read to allege breach of a fiduciary obligation to disclose physician incentives to limit care, whereas

two sorts of arguably administrative acts in mind. Cf. *Dukes* v. *U. S. Healthcare, Inc.*, 57 F. 3d 350, 361 (CA3 1995) (discussing dual medical/administrative roles of HMOs). What we will call pure "eligibility decisions" turn on the plan's coverage of a particular condition or medical procedure for its treatment. "Treatment decisions," by contrast, are choices about how to go about diagnosing and treating a patient's condition: given a patient's constellation of symptoms, what is the appropriate medical response?

These decisions are often practically inextricable from one another, as *amici* on both sides agree. See Brief for Washington Legal Foundation as *Amicus Curiae* 12; Brief for Health Law, Policy, and Ethics Scholars as *Amici Curiae* 10. This is so not merely because, under a scheme like Carle's, treatment and eligibility decisions are made by the same person, the treating physician. It is so because a great many and possibly most coverage questions are not simple yes-or-no questions, like whether appendicitis is a covered condition (when there is no dispute that a patient has appendicitis), or whether acupuncture is a covered procedure for pain relief (when the claim of pain is unchallenged). The more common coverage question is a when-and-how question. Al-

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her amended complaint alleges an obligation to avoid such incentives. Although we are not presented with the issue here, it could be argued that Carle is a fiduciary insofar as it has discretionary authority to administer the plan, and so it is obligated to disclose characteristics of the plan and of those who provide services to the plan, if that information affects beneficiaries' material interests. See, *e. g.*, *Glaziers and Glassworkers Union Local No. 252 Annuity Fund* v. *Newbridge Securities, Inc.*, 93 F. 3d 1171, 1179–1181 (CA3 1996) (discussing the disclosure obligations of an ERISA fiduciary); cf. *Varity Corp.* v. *Howe*, 516 U. S. 489, 505 (1996) (holding that ERISA fiduciaries may have duties to disclose information about plan prospects that they have no duty, or even power, to change).

But failure to disclose is no longer the allegation of the amended complaint. Because fiduciary duty to disclose is not necessarily coextensive with fiduciary responsibility for the subject matter of the disclosure, Carle is not estopped from contesting its fiduciary status with respect to the allegations of the amended complaint.

though coverage for many conditions will be clear and various treatment options will be indisputably compensable, physicians still must decide what to do in particular cases. The issue may be, say, whether one treatment option is so superior to another under the circumstances, and needed so promptly, that a decision to proceed with it would meet the medical necessity requirement that conditions the HMO's obligation to provide or pay for that particular procedure at that time in that case. The Government in its brief alludes to a similar example when it discusses an HMO's refusal to pay for emergency care on the ground that the situation giving rise to the need for care was not an emergency, Brief for United States as *Amicus Curiae* 20–21.[9] In practical terms, these eligibility decisions cannot be untangled from physicians' judgments about reasonable medical treatment, and in the case before us, Dr. Pegram's decision was one of that sort. She decided (wrongly, as it turned out) that Herdrich's condition did not warrant immediate action; the consequence of that medical determination was that Carle would not cover immediate care, whereas it would have done so if Dr. Pegram had made the proper diagnosis and judgment to treat. The eligibility decision and the treatment decision were inextricably mixed, as they are in countless medical administrative decisions every day.

The kinds of decisions mentioned in Herdrich's ERISA count and claimed to be fiduciary in character are just such mixed eligibility and treatment decisions: physicians' conclusions about when to use diagnostic tests; about seeking consultations and making referrals to physicians and facilities other than Carle's; about proper standards of care, the ex-

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[9] ERISA makes separate provision for suits to receive particular benefits. See 29 U. S. C. § 1132(a)(1)(B). We have no occasion to discuss the standards governing such a claim by a patient who, as in the example in text, was denied reimbursement for emergency care. Nor have we reason to discuss the interaction of such a claim with state-law causes of action, see *infra*, at 235–237.

perimental character of a proposed course of treatment, the reasonableness of a certain treatment, and the emergency character of a medical condition.

We do not read the ERISA count, however, as alleging fiduciary breach with reference to a different variety of administrative decisions, those we have called pure eligibility determinations, such as whether a plan covers an undisputed case of appendicitis. Nor do we read it as claiming breach by reference to discrete administrative decisions separate from medical judgments; say, rejecting a claim for no other reason than the HMO's financial condition. The closest Herdrich's ERISA count comes to stating a claim for a pure, unmixed eligibility decision is her general allegation that Carle determines "which claims are covered under the Plan and to what extent," App. to Pet. for Cert. 86a. But this vague statement, difficult to interpret in isolation, is given content by the other elements of the complaint, all of which refer to decisions thoroughly mixed with medical judgment. Cf. 5A C. Wright & A. Miller, Federal Practice and Procedure § 1357, pp. 320–321 (1990) (noting that, where specific allegations clarify the meaning of broader allegations, they may be used to interpret the complaint as a whole). Any lingering uncertainty about what Herdrich has in mind is dispelled by her brief, which explains that this allegation, like the others, targets medical necessity determinations. Brief for Respondent 19; see also *id.*, at 3.[10]

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[10] Though this case involves a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and the complaint should therefore be construed generously, we may use Herdrich's brief to clarify allegations in her complaint whose meaning is unclear. See C. Wright & A. Miller, Federal Practice and Procedure § 1364, pp. 480–481 (1990); *Southern Cross Overseas Agencies, Inc.* v. *Wah Kwong Shipping Group Ltd.*, 181 F. 3d 410, 428, n. 8 (CA3 1999); *Alicke* v. *MCI Communications Corp.*, 111 F. 3d 909, 911 (CADC 1997); *Early* v. *Bankers Life & Cas. Co.*, 959 F. 2d 75, 79 (CA7 1992).

III

A

Based on our understanding of the matters just discussed, we think Congress did not intend Carle or any other HMO to be treated as a fiduciary to the extent that it makes mixed eligibility decisions acting through its physicians. We begin with doubt that Congress would ever have thought of a mixed eligibility decision as fiduciary in nature. At common law, fiduciary duties characteristically attach to decisions about managing assets and distributing property to beneficiaries. See Bogert & Bogert, Law of Trusts and Trustees §§ 551, 741–747, 751–775, 781–799; 2A Scott §§ 176, 181; 3 *id.*, §§ 188–193; 3A *id.*, § 232. Trustees buy, sell, and lease investment property, lend and borrow, and do other things to conserve and nurture assets. They pay out income, choose beneficiaries, and distribute remainders at termination. Thus, the common law trustee's most defining concern historically has been the payment of money in the interest of the beneficiary.

Mixed eligibility decisions by an HMO acting through its physicians have, however, only a limited resemblance to the usual business of traditional trustees. To be sure, the physicians (like regular trustees) draw on resources held for others and make decisions to distribute them in accordance with entitlements expressed in a written instrument (embodying the terms of an ERISA plan). It is also true that the objects of many traditional private and public trusts are ultimately the same as the ERISA plans that contract with HMOs. Private trusts provide medical care to the poor; thousands of independent hospitals are privately held and publicly accountable trusts, and charitable foundations make grants to stimulate the provision of health services. But beyond this point the resemblance rapidly wanes. Traditional trustees administer a medical trust by paying out

money to buy medical care, whereas physicians making mixed eligibility decisions consume the money as well. Private trustees do not make treatment judgments, whereas treatment judgments are what physicians reaching mixed decisions do make, by definition. Indeed, the physicians through whom HMOs act make just the sorts of decisions made by licensed medical practitioners millions of times every day, in every possible medical setting: HMOs, fee-for-service proprietorships, public and private hospitals, military field hospitals, and so on. The settings bear no more resemblance to trust departments than a decision to operate turns on the factors controlling the amount of a quarterly income distribution. Thus, it is at least questionable whether Congress would have had mixed eligibility decisions in mind when it provided that decisions administering a plan were fiduciary in nature. Indeed, when Congress took up the subject of fiduciary responsibility under ERISA, it concentrated on fiduciaries' financial decisions, focusing on pension plans, the difficulty many retirees faced in getting the payments they expected, and the financial mismanagement that had too often deprived employees of their benefits. See, *e. g.*, S. Rep. No. 93–127, p. 5 (1973); S. Rep. No. 93–383, p. 17 (1973); *id.*, at 95. Its focus was far from the subject of Herdrich's claim.

Our doubt that Congress intended the category of fiduciary administrative functions to encompass the mixed determinations at issue here hardens into conviction when we consider the consequences that would follow from Herdrich's contrary view.

B

First, we need to ask how this fiduciary standard would affect HMOs if it applied as Herdrich claims it should be applied, not directed against any particular mixed decision that injured a patient, but against HMOs that make mixed decisions in the course of providing medical care for profit. Recovery would be warranted simply upon showing that the

profit incentive to ration care would generally affect mixed decisions, in derogation of the fiduciary standard to act solely in the interest of the patient without possibility of conflict. Although Herdrich is vague about the mechanics of relief, the one point that seems clear is that she seeks the return of profit from the pockets of the Carle HMO's owners, with the money to be given to the plan for the benefit of the participants. See 29 U. S. C. § 1109(a) (return of all profits is an appropriate ERISA remedy). Since the provision for profit is what makes the HMO a proprietary organization, her remedy in effect would be nothing less than elimination of the for-profit HMO. Her remedy might entail even more than that, although we are in no position to tell whether and to what extent nonprofit HMO schemes would ultimately survive the recognition of Herdrich's theory.[11] It is enough to recognize that the Judiciary has no warrant to precipitate the upheaval that would follow a refusal to dismiss Herdrich's ERISA claim. The fact is that for over 27 years the Congress of the United States has promoted the formation of HMO practices. The Health Maintenance Organization Act of 1973, 87 Stat. 914, 42 U. S. C. § 300e *et seq.*, allowed the formation of HMOs that assume financial risks for the provision of health-care services, and Congress has amended the Act several times, most recently in 1996. See 110 Stat. 1976, 42 U. S. C. § 300e (1994 ed., Supp. III). If Congress wishes to restrict its approval of HMO practice to certain

[11] Herdrich's theory might well portend the end of nonprofit HMOs as well, since those HMOs can set doctors' salaries. A claim against a nonprofit HMO could easily allege that salaries were excessively high because they were funded by limiting care, and some nonprofits actually use incentive schemes similar to that challenged here, see *Pulvers* v. *Kaiser Foundation Health Plan*, 99 Cal. App. 3d 560, 565, 160 Cal. Rptr. 392, 393–394 (1979) (rejecting claim against nonprofit HMO based on physician incentives). See Brody, Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms, 40 N. Y. L. S. L. Rev. 457, 493, and n. 152 (1996) (discussing ways in which nonprofit health providers may reward physician employees).

preferred forms, it may choose to do so. But the Federal Judiciary would be acting contrary to the congressional policy of allowing HMO organizations if it were to entertain an ERISA fiduciary claim portending wholesale attacks on existing HMOs solely because of their structure, untethered to claims of concrete harm.

C

The Court of Appeals did not purport to entertain quite the broadside attack that Herdrich's ERISA claim thus entails, see 154 F. 3d, at 373, and the second possible consequence of applying the fiduciary standard that requires our attention would flow from the difficulty of extending it to particular mixed decisions that on Herdrich's theory are fiduciary in nature.

The fiduciary is, of course, obliged to act exclusively in the interest of the beneficiary, but this translates into no rule readily applicable to HMO decisions or those of any other variety of medical practice. While the incentive of the HMO physician is to give treatment sparingly, imposing a fiduciary obligation upon him would not lead to a simple default rule, say, that whenever it is reasonably possible to disagree about treatment options, the physician should treat aggressively. After all, HMOs came into being because some groups of physicians consistently provided more aggressive treatment than others in similar circumstances, with results not perceived as justified by the marginal expense and risk associated with intervention; excessive surgery is not in the patient's best interest, whether provided by fee-for-service surgeons or HMO surgeons subject to a default rule urging them to operate. Nor would it be possible to translate fiduciary duty into a standard that would allow recovery from an HMO whenever a mixed decision influenced by the HMO's financial incentive resulted in a bad outcome for the patient. It would be so easy to allege, and to find, an economic influence when sparing care did not lead to a well patient, that

any such standard in practice would allow a factfinder to convert an HMO into a guarantor of recovery.

These difficulties may have led the Court of Appeals to try to confine the fiduciary breach to cases where "the sole purpose" of delaying or withholding treatment was to increase the physician's financial reward, *ibid.* But this attempt to confine mixed decision claims to their most egregious examples entails erroneous corruption of fiduciary obligation and would simply lead to further difficulties that we think fatal. While a mixed decision made solely to benefit the HMO or its physician would violate a fiduciary duty, the fiduciary standard condemns far more than that, in its requirement of "an eye single" toward beneficiaries' interests, *Donovan* v. *Bierwirth,* 680 F. 2d 263, 271 (CA2 1982). But whether under the Court of Appeals's rule or a straight standard of undivided loyalty, the defense of any HMO would be that its physician did not act out of financial interest but for good medical reasons, the plausibility of which would require reference to standards of reasonable and customary medical practice in like circumstances. That, of course, is the traditional standard of the common law. See W. Keeton, D. Dobbs, R. Keeton, & D. Owens, Prosser and Keeton on Law of Torts § 32, pp. 188–189 (5th ed. 1984). Thus, for all practical purposes, every claim of fiduciary breach by an HMO physician making a mixed decision would boil down to a malpractice claim, and the fiduciary standard would be nothing but the malpractice standard traditionally applied in actions against physicians.

What would be the value to the plan participant of having this kind of ERISA fiduciary action? It would simply apply the law already available in state courts and federal diversity actions today, and the formulaic addition of an allegation of financial incentive would do nothing but bring the same claim into a federal court under federal-question jurisdiction. It is true that in States that do not allow malpractice actions against HMOs the fiduciary claim would offer a plaintiff a

further defendant to be sued for direct liability, and in some cases the HMO might have a deeper pocket than the physician. But we have seen enough to know that ERISA was not enacted out of concern that physicians were too poor to be sued, or in order to federalize malpractice litigation in the name of fiduciary duty for any other reason. It is difficult, in fact, to find any advantage to participants across the board, except that allowing them to bring malpractice actions in the guise of federal fiduciary breach claims against HMOs would make them eligible for awards of attorney's fees if they won. See 29 U. S. C. § 1132(g)(1). But, again, we can be fairly sure that Congress did not create fiduciary obligations out of concern that state plaintiffs were not suing often enough, or were paying too much in legal fees.

The mischief of Herdrich's position would, indeed, go further than mere replication of state malpractice actions with HMO defendants. For not only would an HMO be liable as a fiduciary in the first instance for its own breach of fiduciary duty committed through the acts of its physician employee, but the physician employee would also be subject to liability as a fiduciary on the same basic analysis that would charge the HMO. The physician who made the mixed administrative decision would be exercising authority in the way described by ERISA and would therefore be deemed to be a fiduciary. See 29 CFR §§ 2509.75–5, Question D–1; 2509.75–8, Question D–3 (1993) (stating that an individual who exercises authority on behalf of an ERISA fiduciary in interpreting and administering a plan will be deemed a fiduciary). Hence the physician, too, would be subject to suit in federal court applying an ERISA standard of reasonable medical skill. This result, in turn, would raise a puzzling issue of preemption. On its face, federal fiduciary law applying a malpractice standard would seem to be a prescription for preemption of state malpractice law, since the new ERISA cause of action would cover the subject of a state-law malpractice claim. See 29 U. S. C. § 1144 (preempting state

laws that "relate to [an] employee benefit plan"). To be sure, *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 654–655 (1995), throws some cold water on the preemption theory; there, we held that, in the field of health care, a subject of traditional state regulation, there is no ERISA preemption without clear manifestation of congressional purpose. But in that case the convergence of state and federal law was not so clear as in the situation we are positing; the state-law standard had not been subsumed by the standard to be applied under ERISA. We could struggle with this problem, but first it is well to ask, again, what would be gained by opening the federal courthouse doors for a fiduciary malpractice claim, save for possibly random fortuities such as more favorable scheduling, or the ancillary opportunity to seek attorney's fees. And again, we know that Congress had no such haphazard boons in prospect when it defined the ERISA fiduciary, nor such a risk to the efficiency of federal courts as a new fiduciary malpractice jurisdiction would pose in welcoming such unheard-of fiduciary litigation.

IV

We hold that mixed eligibility decisions by HMO physicians are not fiduciary decisions under ERISA. Herdrich's ERISA count fails to state an ERISA claim, and the judgment of the Court of Appeals is reversed.

It is so ordered.

Syllabus

HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST, ET AL. *v.* SALOMON SMITH BARNEY INC. ET AL.

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

No. 99–579. Argued April 17, 2000—Decided June 12, 2000

The Employee Retirement Income Security Act of 1974 (ERISA) bars a fiduciary of an employee benefit plan from causing the plan to engage in certain prohibited transactions with a "party in interest," § 406(a), defined to encompass entities that a fiduciary might be inclined to favor at the expense of the plan's beneficiaries, see § 3(14). Section 406's prohibitions are subject to both statutory and regulatory exemptions. See §§ 408(a), (b). The Ameritech Pension Trust (APT), an ERISA pension plan, allegedly entered into a transaction prohibited by § 406(a) and not exempted by § 408 with respondent Salomon Smith Barney Inc. (Salomon), a nonfiduciary party in interest. APT's fiduciaries—its trustee, petitioner Harris Trust and Savings Bank, and its administrator, petitioner Ameritech Corporation—sued Salomon under § 502(a)(3), which authorizes a fiduciary, *inter alios*, to bring a civil action to obtain "appropriate equitable relief" to redress violations of ERISA Title I. Salomon moved for summary judgment, arguing that § 502(a)(3), when used to remedy a transaction prohibited by § 406(a), authorizes a suit only against the party expressly constrained by § 406(a)—the fiduciary who caused the plan to enter the transaction—and not against the counterparty to the transaction. The District Court denied the motion, holding that ERISA provides a private cause of action against nonfiduciaries who participate in a prohibited transaction, but granted Salomon's motion for certification of the issue for interlocutory appeal. The Seventh Circuit reversed, holding that the authority to sue under § 502(a)(3) does not extend to a suit against a nonfiduciary "party in interest" to a transaction barred by § 406(a).

Held: Section 502(a)(3)'s authorization to a plan "participant, beneficiary, or fiduciary" to bring a civil action for "appropriate equitable relief" extends to a suit against a nonfiduciary "party in interest" to a prohibited transaction barred by § 406(a). Pp. 245–254.

(a) In providing that "[a] *fiduciary* . . . shall not cause the plan to engage in a [prohibited] transaction" (emphasis added), § 406(a)(1) imposes a duty only on the fiduciary that causes the plan to engage in the transaction. However, this Court rejects the Seventh Circuit's and

Salomon's conclusion that, absent a substantive ERISA provision expressly imposing a duty on a nonfiduciary party in interest, the nonfiduciary party may not be held liable under § 502(a)(3), one of ERISA's remedial provisions. Because § 502(a)(3) itself imposes certain duties, liability under that provision does not depend on whether ERISA's substantive provisions impose a specific duty on the party being sued. While § 502(a)(3) does not authorize "appropriate equitable relief" *at large*, but only for the purpose of "redress[ing any] violations or . . . enforc[ing] any provisions" of ERISA or an ERISA plan, *e. g.*, *Peacock* v. *Thomas*, 516 U. S. 349, 353, the section admits of no limit (aside from the "appropriate equitable relief" caveat) on the universe of possible defendants. Indeed, § 502(a)(3) makes no mention at all of which parties may be proper defendants—the focus, instead, is on redressing the "*act or practice* which violates any provision of [ERISA Title I]." (Emphasis added.) Other provisions of ERISA, by contrast, expressly address who may be a defendant. See, *e. g.*, § 409(a). And, in providing that a "civil action may be brought *by a participant, beneficiary, or fiduciary*" (emphasis added), § 502(a) itself demonstrates Congress' care in delineating the universe of *plaintiffs* who may bring certain civil actions. The matter is conclusively resolved by § 502(*l*), which provides for assessment by the Secretary of Labor of a civil penalty against a fiduciary or "other person" who knowingly participates in a fiduciary's ERISA violation, defining the amount of such penalty by reference to the amount "ordered by a court to be paid by such . . . other person . . . in a judicial proceeding . . . by the Secretary under subsection . . . *(a)(5).*" (Emphasis added.) The plain implication is that the Secretary may bring a civil action under § 502(a)(5) against an "other person" who "knowing[ly] participat[es]" in a fiduciary's violation, notwithstanding the absence of any ERISA provision explicitly imposing a duty upon an "other person" not to engage in such knowing participation. It thus follows that a participant, beneficiary, or fiduciary may bring suit against an "other person" under the similarly worded subsection (a)(3). See *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 260. *Id.*, at 261, distinguished. Section 502(*l*), therefore, refutes the notion that § 502(a)(3) (or (a)(5)) liability hinges on whether the particular defendant labors under a duty expressly imposed by ERISA Title I's substantive provisions. Pp. 245–249.

(b) The Court rejects Salomon's argument that it would contravene common sense for Congress to impose civil liability on a party, such as a nonfiduciary party in interest to a § 406(a) transaction, that is not a "wrongdoer" in the sense of violating a duty expressly imposed by ERISA Title I's substantive provisions. This argument ignores the limiting principle explicit in § 502(a)(3): that the retrospective relief

sought be "appropriate equitable relief." The common law of trusts, which offers a starting point for ERISA analysis, *Hughes Aircraft Co.* v. *Jacobson*, 525 U. S. 432, 447, plainly countenances the sort of relief sought by petitioners against Salomon here, see *Moore* v. *Crawford*, 130 U. S. 122, 128. It also sets limits on restitution actions against defendants other than the principal "wrongdoer." Translated to the instant context, a transferee of ill-gotten plan assets may be held liable, if the transferee (assuming he has purchased for value) knew or should have known of the circumstances that rendered the transaction prohibited. Those circumstances, in turn, involve a showing that the *plan fiduciary*, with actual or constructive knowledge of the facts satisfying the elements of a § 406(a) transaction, caused the plan to engage in the transaction. *Lockheed Corp.* v. *Spink*, 517 U. S. 882, 888–889. The common law additionally prompts rejection of Salomon's complaint that the Court's view of § 502(a)(3) would incongruously allow not only the harmed beneficiaries, but also the culpable fiduciary, to seek restitution from the arguably less culpable counterparty-transferee. The common law sees no incongruity in such a rule: Although the fiduciary bases his cause of action upon his own wrongdoing, he may maintain the action because its purpose is to recover money for the plan. And while Salomon correctly observes that the antecedent violation of § 406(a)'s *per se* prohibitions on transacting with a party in interest was unknown at common law, the Court rejects as unsupported Salomon's suggestion that common-law liability should not attach to an act that does not violate a common-law duty. Thus, an action for restitution against a transferee of tainted plan assets satisfies § 502(a)(3)'s "appropriate[ness]" criterion. Such relief is also "equitable." See *Mertens*, *supra*, at 260. Pp. 249–253.

(c) The Court declines to depart from § 502(a)(3)'s text on the basis of two nontextual matters: (1) that the congressional Conference Committee rejected language that would have expressly imposed a duty on nonfiduciary parties to § 406(a) transactions, and (2) that the policy consequences of recognizing a § 502(a)(3) action in this case could be devastating because counterparties, faced with the prospect of liability for dealing with a plan, may charge higher rates or, worse, refuse altogether to transact with plans. In ERISA cases, the Court's analysis begins with the statutory language and, where that language is clear, it ends there as well. *Hughes Aircraft Co.* v. *Jacobson*, *supra*, at 438. Section 502(a)(3), as informed by § 502(*l*), satisfies this standard. Pp. 253–254.

184 F. 3d 646, reversed and remanded.

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

Robert A. Long, Jr., argued the cause for petitioners. With him on the briefs were *John M. Vine*, *Michael R. Bergmann*, and *Charles C. Jackson.*

Beth S. Brinkmann argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Waxman*, *Deputy Solicitor General Kneedler*, *Henry L. Solano*, *Allen H. Feldman*, *Nathaniel I. Spiller*, and *Elizabeth Hopkins.*

Peter C. Hein argued the cause for respondents. With him on the brief were *Andrew C. Houston*, *William F. Conlon*, and *Richard B. Kapnick.**

JUSTICE THOMAS delivered the opinion of the Court.

Section 406(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 879, bars a fiduciary of an employee benefit plan from causing the plan to engage in certain transactions with a "party in interest." 29 U. S. C. § 1106(a). Section 502(a)(3) authorizes a "participant, beneficiary, or fiduciary" of a plan to bring a civil action to obtain "appropriate equitable relief" to redress violations of ERISA Title I. 29 U. S. C. § 1132(a)(3). The question is whether that authorization extends to a suit against a nonfiduciary "party in interest" to a transaction barred by § 406(a). We hold that it does.

I

Responding to deficiencies in prior law regulating transactions by plan fiduciaries, Congress enacted ERISA § 406(a)(1), which supplements the fiduciary's general duty of

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**Mary Ellen Signorille*, *Melvin Radowitz*, *Paula Brantner*, and *Jeffrey Lewis* filed a brief for the AARP et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Council of Life Insurers et al. by *William J. Kilberg*, *Paul Blankenstein*, *Miguel A. Estrada*, and *Victoria E. Fimea;* and for the Bond Market Association et al. by *Michael R. Lazerwitz*, *Paul Saltzman*, and *Stuart J. Kaswell.*

loyalty to the plan's beneficiaries, § 404(a), by categorically barring certain transactions deemed "likely to injure the pension plan," *Commissioner* v. *Keystone Consol. Industries, Inc.*, 508 U. S. 152, 160 (1993). Section 406(a)(1) provides, among other things, that "[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . sale or exchange . . . of any property between the plan and a party in interest." 29 U. S. C. § 1106(a)(1)(A). Congress defined "party in interest" to encompass those entities that a fiduciary might be inclined to favor at the expense of the plan's beneficiaries. See § 3(14), 29 U. S. C. § 1002(14). Section 406's prohibitions are subject to both statutory and regulatory exemptions. See §§ 408(a), (b), 29 U. S. C. §§ 1108(a), (b).

This case comes to us on the assumption that an ERISA pension plan (the Ameritech Pension Trust (APT)) and a party in interest (respondent Salomon Smith Barney (Salomon)) entered into a transaction prohibited by § 406(a) and not exempted by § 408.[1] APT provides pension benefits to employees and retirees of Ameritech Corporation and its subsidiaries and affiliates. Salomon, during the late 1980's, provided broker-dealer services to APT, executing nondiscretionary equity trades at the direction of APT's fiduciaries, thus qualifying itself (we assume) as a "party in interest." See § 3(14)(B), 29 U. S. C. § 1002(14)(B) (defining "party in interest" as "a person providing services to [an employee benefit] plan"). During the same period, Salomon sold interests in several motel properties to APT for nearly $21 million. APT's purchase of the motel interests was directed by National Investment Services of America (NISA), an investment manager to which Ameritech had delegated investment

[1] Salomon has preserved for remand arguments that there is no § 406(a) prohibition because it is not a "party in interest" and that, in any event, the transaction is exempted by Prohibited Transaction Exemption 75–1, 40 Fed. Reg. 50847 (1975).

discretion over a portion of the plan's assets, and hence a fiduciary of APT, see § 3(21)(A)(i), 29 U. S. C. § 1002(21)(A)(i).

This litigation arose when APT's fiduciaries—its trustee, petitioner Harris Trust and Savings Bank, and its administrator, petitioner Ameritech Corporation—discovered that the motel interests were nearly worthless. Petitioners maintain that the interests had been worthless all along; Salomon asserts, to the contrary, that the interests declined in value due to a downturn in the motel industry. Whatever the true cause, petitioners sued Salomon in 1992 under § 502(a)(3), which authorizes a "participant, beneficiary, or fiduciary" to bring a civil action "to enjoin any act or practice which violates any provision of [ERISA Title I] . . . or . . . to obtain other appropriate equitable relief . . . to redress such violations." 29 U. S. C. § 1132(a)(3).

Petitioners claimed, among other things, that NISA, as plan fiduciary, had caused the plan to engage in a *per se* prohibited transaction under § 406(a) in purchasing the motel interests from Salomon, and that Salomon was liable on account of its participation in the transaction as a nonfiduciary party in interest. Specifically, petitioners pointed to § 406(a)(1)(A), 29 U. S. C. § 1106(a)(1)(A), which prohibits a "sale or exchange . . . of any property between the plan and a party in interest," and § 406(a)(1)(D), 29 U. S. C. § 1106(a)(1)(D), which prohibits a "transfer to . . . a party in interest . . . of any assets of the plan." Petitioners sought rescission of the transaction, restitution from Salomon of the purchase price with interest, and disgorgement of Salomon's profits made from use of the plan assets transferred to it. App. 41.

Salomon moved for summary judgment, arguing that § 502(a)(3), when used to remedy a transaction prohibited by § 406(a), authorizes a suit only against the party expressly constrained by § 406(a)—the fiduciary who caused the plan to enter the transaction—and not against the counterparty to the transaction. See § 406(a)(1), 29 U. S. C. § 1106(a)(1) ("A

fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction . . .” (emphasis added)). The District Court denied the motion, holding that ERISA does provide a private cause of action against nonfiduciaries who participate in a prohibited transaction, but granted Salomon’s subsequent motion for certification of the issue for interlocutory appeal under 28 U. S. C. § 1292(b).

The Court of Appeals for the Seventh Circuit reversed. 184 F. 3d 646 (1999). It began with the observation that § 406(a), by its terms and like several of its neighboring provisions, *e. g.*, § 404, governs only the conduct of fiduciaries, not of counterparties or other nonfiduciaries. See *id.*, at 650. The court next posited that “where ERISA does not expressly impose a duty, there can be no cause of action,” *ibid.*, relying upon dictum in our decision in *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 254 (1993), that § 502(a)(3) does not provide a private cause of action against a nonfiduciary for knowing participation in a fiduciary’s breach of duty. The Seventh Circuit saw no distinction between the *Mertens* situation (involving § 404) and the instant case (involving § 406), explaining that neither section expressly imposes a duty on nonfiduciaries. Finally, in the Seventh Circuit’s view, Congress’ decision to authorize the Secretary of Labor to impose a civil penalty on a nonfiduciary “party in interest” to a § 406 transaction, see § 502(i), simply confirms that Congress deliberately selected one enforcement tool (a civil penalty imposed by the Secretary) instead of another (a civil action under § 502(a)(3)). Accordingly, the Seventh Circuit held that a nonfiduciary cannot be liable under § 502(a)(3) for participating in a § 406 transaction and entered summary judgment in favor of Salomon.

In doing so, the Seventh Circuit departed from the uniform position of the Courts of Appeals that § 502(a)(3)—and the similarly worded § 502(a)(5), which authorizes civil actions by the Secretary—does authorize a civil action against a non-

fiduciary who participates in a transaction prohibited by § 406(a)(1). See *LeBlanc* v. *Cahill*, 153 F. 3d 134, 152–153 (CA4 1998) (§ 502(a)(3)); *Landwehr* v. *DuPree*, 72 F. 3d 726, 734 (CA9 1995) (same); *Herman* v. *South Carolina National Bank*, 140 F. 3d 1413, 1421–1422 (CA11 1998) (§ 502(a)(5)), cert. denied, 525 U. S. 1140 (1999); *Reich* v. *Stangl*, 73 F. 3d 1027, 1032 (CA10) (same), cert. denied, 519 U. S. 807 (1996); *Reich* v. *Compton*, 57 F. 3d 270, 287 (CA3 1995) (same). We granted certiorari, 528 U. S. 1068 (2000), and now reverse.

II

We agree with the Seventh Circuit's and Salomon's interpretation of § 406(a). They rightly note that § 406(a) imposes a duty only on the fiduciary that causes the plan to engage in the transaction. See § 406(a)(1), 29 U. S. C. § 1106(a)(1) ("A *fiduciary* with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction . . ." (emphasis added)). We reject, however, the Seventh Circuit's and Salomon's conclusion that, absent a substantive provision of ERISA expressly imposing a duty upon a nonfiduciary party in interest, the nonfiduciary party may not be held liable under § 502(a)(3), one of ERISA's remedial provisions. Petitioners contend, and we agree, that § 502(a)(3) itself imposes certain duties, and therefore that liability under that provision does not depend on whether ERISA's substantive provisions impose a specific duty on the party being sued.[2]

[2] Salomon asserts that petitioners waived this theory by neglecting to present it to the courts below. According to Salomon, petitioners' claim (until their merits brief in this Court) has been that Salomon may be sued under § 502(a)(3) only because Salomon "violated" § 406(a). But, even assuming that petitioners did not pellucidly articulate this theory before the Seventh Circuit, it appears to us that the Seventh Circuit understood the tenor of the argument—namely, that the § 406(a) transaction is the "act or practice" which violates § 406(a) and therefore may be redressed by a civil action brought under § 502(a)(3) against parties to the § 406(a) transaction, even if the defendant did not itself "violate" § 406(a). See 184 F. 3d 646,

Section 502 provides:

> "(a) . . .
>
> "A civil action may be brought—
>
> . . . . . .
>
> "(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of [ERISA Title I] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan." 29 U. S. C. § 1132(a)(3).

This language, to be sure, "does not . . . authorize 'appropriate equitable relief' *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or . . . enforc[ing] any provisions' of ERISA or an ERISA plan." *Peacock* v. *Thomas*, 516 U. S. 349, 353 (1996) (quoting *Mertens*, *supra*, at 253 (emphasis and alterations in original)). But § 502(a)(3) admits of no limit (aside from the "appropriate equitable relief" caveat, which we address *infra*) on the universe of possible defendants. Indeed, § 502(a)(3) makes no mention at all of which parties may be proper defendants—the focus, instead, is on redressing the "*act or practice* which violates any provision of [ERISA Title I]." 29 U. S. C. § 1132(a)(3) (emphasis added). Other provisions of ERISA, by contrast, do expressly address who may be a defendant. See, *e. g.*, § 409(a), 29 U. S. C. § 1109(a) (stating that "[*a*]*ny person who is a fiduciary* with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be per-

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650 (CA7 1999). Moreover, petitioners' current focus on the "act or practice"—*i. e.*, the § 406 *transaction*—is merely an argument in support of their § 502(a)(3) claim for equitable relief against Salomon, not an independent claim. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *Escondido*, 503 U. S. 519, 534 (1992).

sonally liable" (emphasis added)); § 502(*l*), 29 U. S. C. § 1132(*l*) (authorizing imposition of civil penalties only against a "fiduciary" who violates part 4 of Title I or "any other person" who knowingly participates in such a violation). And § 502(a) itself demonstrates Congress' care in delineating the universe of *plaintiffs* who may bring certain civil actions. See, *e. g.*, § 502(a)(3), 29 U. S. C. § 1132(a)(3) ("A civil action may be brought . . . *by a participant, beneficiary, or fiduciary* . . ." (emphasis added)); § 502(a)(5), 29 U. S. C. § 1132(a)(5) ("A civil action may be brought . . . *by the Secretary* . . ." (emphasis added)).

In light of Congress' precision in these respects, we would ordinarily assume that Congress' failure to specify proper defendants in § 502(a)(3) was intentional. See *Russello* v. *United States*, 464 U. S. 16, 23 (1983). But ERISA's "'comprehensive and reticulated'" scheme warrants a cautious approach to inferring remedies not expressly authorized by the text, *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 146 (1985) (quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U. S. 359, 361 (1980)), especially given the alternative and intuitively appealing interpretation, urged by Salomon, that § 502(a)(3) authorizes suits only against defendants upon whom a duty is imposed by ERISA's substantive provisions. In this case, however, § 502(*l*) resolves the matter—it compels the conclusion that defendant status under § 502(a)(3) may arise from duties imposed by § 502(a)(3) itself, and hence does not turn on whether the defendant is expressly subject to a duty under one of ERISA's substantive provisions.

Section 502(*l*) provides in relevant part:

> "(1) In the case of—
>
> "(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or
>
> "(B) any knowing participation in such a breach or violation by any other person,

> "the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.
>
> "(2) For purposes of paragraph (1), the term 'applicable recovery amount' means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—
>
> "(A) pursuant to any settlement agreement with the Secretary, or
>
> "(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section." 29 U. S. C. §§ 1132(*l*)(1)–(2).

Section 502(*l*) contemplates civil penalty actions by the Secretary against two classes of defendants, fiduciaries and "other person[s]." The latter class concerns us here. Paraphrasing, the Secretary shall assess a civil penalty against an "other person" who "knowing[ly] participat[es] in" "any . . . violation of . . . part 4 . . . by a fiduciary." And the amount of such penalty is defined by reference to the amount "ordered by a court to be paid by such . . . other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or *(a)(5)*." *Ibid.* (emphasis added).

The plain implication is that the Secretary may bring a civil action under § 502(a)(5) against an "other person" who "knowing[ly] participat[es]" in a fiduciary's violation; otherwise, there could be no "applicable recovery amount" from which to determine the amount of the civil penalty to be imposed on the "other person." This § 502(a)(5) action is available notwithstanding the absence of any ERISA provision explicitly imposing a duty upon an "other person" not to engage in such "knowing participation." And if the Secretary may bring suit against an "other person" under subsection (a)(5), it follows that a participant, beneficiary, or fi-

duciary may bring suit against an "other person" under the similarly worded subsection (a)(3). See *Mertens*, 508 U. S., at 260. Section 502(*l*), therefore, refutes the notion that § 502(a)(3) (or (a)(5)) liability hinges on whether the particular defendant labors under a duty expressly imposed by the substantive provisions of ERISA Title I.

Salomon invokes *Mertens* as articulating an alternative, more restrictive reading of § 502(*l*) that does not support the inference we have drawn. In *Mertens*, we suggested, in dictum, that the "other person[s]" in § 502(*l*) might be limited to the "cofiduciaries" made expressly liable under § 405(a) for knowingly participating in another fiduciary's breach of fiduciary responsibility. *Id.*, at 261. So read, § 502(*l*) would be consistent with the view that liability under § 502(a)(3) depends entirely on whether the particular defendant violated a duty expressly imposed by the substantive provisions of ERISA Title I. But the *Mertens* dictum did not discuss—understandably, since we were merely flagging the issue, see 508 U. S., at 255, 260–261—that ERISA defines the term "person" without regard to status as a cofiduciary (or, for that matter, as a fiduciary or party in interest), see § 3(9), 29 U. S. C. § 1002(9). Moreover, § 405(a) indicates that a cofiduciary is *itself* a fiduciary, see § 405(a), 29 U. S. C. § 1105(a) ("[A] fiduciary . . . shall be liable for a breach of fiduciary responsibility of another fiduciary . . ."), and § 502(*l*) clearly distinguishes between a "fiduciary," § 502(*l*)(1)(A), 29 U. S. C. § 1132(*l*)(1)(A), and an "other person," § 502(*l*)(1)(B), 29 U. S. C. § 1132(*l*)(1)(B).

III

Notwithstanding the text of § 502(a)(3) (as informed by § 502(*l*)), Salomon protests that it would contravene common sense for Congress to have imposed civil liability on a party, such as a nonfiduciary party in interest to a § 406(a) transaction, that is not a "wrongdoer" in the sense of violating a duty expressly imposed by the substantive provisions of ERISA Title I. Salomon raises the specter of § 502(a)(3)

suits being brought against innocent parties—even those having no connection to the allegedly unlawful "act or practice"—rather than against the true wrongdoer, *i. e.*, the fiduciary that caused the plan to engage in the transaction.

But this *reductio ad absurdum* ignores the limiting principle explicit in § 502(a)(3): that the retrospective relief sought be "appropriate equitable relief." The common law of trusts, which offers a "starting point for analysis [of ERISA] . . . [unless] it is inconsistent with the language of the statute, its structure, or its purposes," *Hughes Aircraft Co.* v. *Jacobson*, 525 U. S. 432, 447 (1999) (internal quotation marks omitted), plainly countenances the sort of relief sought by petitioners against Salomon here. As petitioners and *amicus curiae* the United States observe, it has long been settled that when a trustee in breach of his fiduciary duty to the beneficiaries transfers trust property to a third person, the third person takes the property subject to the trust, unless he has purchased the property for value and without notice of the fiduciary's breach of duty. The trustee or beneficiaries may then maintain an action for restitution of the property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person's profits derived therefrom. See, *e. g.*, Restatement (Second) of Trusts §§ 284, 291, 294, 295, 297 (1957); 4 A. Scott & W. Fratcher, Law of Trusts § 284, § 291.1, pp. 77–78, § 294.2, p. 101, § 297 (4th ed. 1989) (hereinafter Law of Trusts); 5 *id.*, § 470, at 363; 1 D. Dobbs, Law of Remedies § 4.7(1), pp. 660–661 (2d ed. 1993); G. Bogert, Law of Trusts and Trustees § 866, pp. 95–96 (rev. 2d ed. 1995). As we long ago explained in the analogous situation of property obtained by fraud:

> "Whenever the legal title to property is obtained through means or under circumstances 'which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of

> the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust.'" *Moore* v. *Crawford*, 130 U. S. 122, 128 (1889) (quoting 2 J. Pomeroy, Equity Jurisprudence § 1053, pp. 628–629 (1886)).

Importantly, that a transferee was not "the original wrongdoer" does not insulate him from liability for restitution. See also, *e. g.*, Restatement of Restitution ch. 7, Introductory Note, p. 522 (1937); 1 Dobbs, *supra*, § 4.3(2), at 597 ("The constructive trust is based on property, not wrongs"). It also bears emphasis that the common law of trusts sets limits on restitution actions against defendants other than the principal "wrongdoer." Only a transferee of ill-gotten trust assets may be held liable, and then only when the transferee (assuming he has purchased for value) knew or should have known of the existence of the trust and the circumstances that rendered the transfer in breach of the trust. Translated to the instant context, the transferee must be demonstrated to have had actual or constructive knowledge of the circumstances that rendered the transaction unlawful. Those circumstances, in turn, involve a showing that the *plan fiduciary*, with actual or constructive knowledge of the facts satisfying the elements of a § 406(a) transaction, caused the plan to engage in the transaction. *Lockheed Corp.* v. *Spink*, 517 U. S. 882, 888–889 (1996).[3]

[3] The issue of which party, as between the party seeking recovery and the defendant-transferee, bears the burden of proof on whether the transferee is a purchaser for value and without notice, is not currently before us, but may require resolution on remand. Cf. 4 Law of Trusts § 284, at 40 (noting conflict of authority in non-ERISA cases on which party bears the burden of proof).

The common law additionally leads us to reject Salomon's complaint that our view of § 502(a)(3) would incongruously allow not only the harmed beneficiaries, but also the culpable fiduciary, to seek restitution from the arguably less culpable counterparty-transferee. The common law sees no incongruity in such a rule, see Restatement (Second) of Trusts, *supra*, § 294, at 69 ("[A]n action can be maintained against the transferee either by the beneficiary or the trustee"); 4 Law of Trusts § 294.2, at 101, and for good reason: "Although the trustee bases his cause of action upon his own voluntary act, and even though the act was knowingly done in breach of his duty to the beneficiary, he is permitted to maintain the action, since the purpose of the action is to recover money or other property for the trust estate, and whatever he recovers he will hold subject to the trust." Restatement (Second) of Trusts, *supra*, § 294, Comment *c*.

But Salomon advances a more fundamental critique of the common-law analogy, reasoning that the antecedent violation here—a violation of § 406(a)'s *per se* prohibitions on transacting with a party in interest—was unknown at common law, and that common-law *liability* should not attach to an act that does not violate a common-law *duty*. While Salomon accurately characterizes § 406(a) as expanding upon the common law's arm's-length standard of conduct, see *Keystone Consol. Industries*, 508 U. S., at 160, we reject Salomon's unsupported suggestion that remedial principles of the common law are tethered to the precise contours of common-law duty.

We note, however, that our interpretation of § 502(a)(3) to incorporate common-law remedial principles does not necessarily foreclose accommodation of Salomon's underlying concern that ERISA should not be construed to require counterparties to transactions with a plan to monitor the plan for compliance with each of ERISA's intricate details. See, *e. g.*, Prohibited Transaction Exemption 75–1, § II(e), 40 Fed. Reg. 50847 (1975) (requiring that the plan maintain certain

records for a 6-year period). While we have no occasion to decide the matter here, it may be that such concerns should inform courts' determinations of what a transferee should (or should not) be expected to know when engaging in a transaction with a fiduciary. See Restatement (Second) of Trusts § 297(a), at 74 (defining "notice" to mean what a transferee "knows or *should* know" (emphasis added)). Cf. Prohibited Transaction Exemption 75–1, § II(e)(1), 40 Fed. Reg. 50847 (1975) (providing that a broker-dealer shall not be subject to civil penalties under § 502(i) as a § 406(a) "party in interest" or taxes under 26 U. S. C. § 4975 as a similarly defined "disqualified person" if such records are not maintained by the plan).

For these reasons, an action for restitution against a transferee of tainted plan assets satisfies the "appropriate[ness]" criterion in § 502(a)(3). Such relief is also "equitable" in nature. See *Mertens*, 508 U. S., at 260 ("[T]he 'equitable relief' awardable under § 502(a)(5) includes restitution of ill-gotten plan assets or profits . . ."); *ibid.* (explaining that, in light of the similarity of language in §§ 502(a)(3) and (5), that language should be deemed to have the same meaning in both subsections).

IV

We turn, finally, to two nontextual clues cited by Salomon and *amici*. First, Salomon urges us to consider, as the Seventh Circuit did, 184 F. 3d, at 652–653, the Conference Committee's rejection of language from the Senate bill that would have expressly imposed a duty on nonfiduciary parties to § 406(a) transactions. See Brief for Respondents 28–29 (quoting H. R. Rep. No. 93–2, p. 533 (1974) (with amendments as passed by the Senate), reprinted in 3 Legislative History of ERISA (Committee Print compiled for the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare by the Library of Congress), Ser. No. 93–406, p. 3780 (1976) (staff comment on House and Senate differences on § 409)); 3 Legislative History of ERISA, *supra*, at 5259 (staff

comment on House and Senate differences on § 409). Second, Salomon and *amici* submit that the policy consequences of recognizing a § 502(a)(3) action in this case could be devastating—counterparties, faced with the prospect of liability for dealing with a plan, may charge higher rates or, worse, refuse altogether to transact with plans.

We decline these suggestions to depart from the text of § 502(a)(3). In ERISA cases, "[a]s in any case of statutory construction, our analysis begins with the language of the statute. . . . And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft*, 525 U. S., at 438 (citation and internal quotation marks omitted). Section 502(a)(3), as informed by § 502(*l*), satisfies this standard.

Accordingly, we reverse the Seventh Circuit's judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

CARTER *v.* UNITED STATES

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

No. 99–5716. Argued April 19, 2000—Decided June 12, 2000

Having donned a ski mask and entered a bank, petitioner Carter confronted an exiting customer and pushed her back inside. She screamed, startling others in the bank. Undeterred, Carter ran inside and leaped over a counter and through one of the teller windows. A teller rushed into the manager's office. Meanwhile, Carter opened several teller drawers and emptied the money into a bag. After removing almost $16,000, he jumped back over the counter and fled. He was charged with violating 18 U. S. C. § 2113(a), which punishes "[w]hoever, by force and violence, or by intimidation, takes . . . any . . . thing of value [from a] bank." While not contesting the basic facts, Carter pleaded not guilty on the theory that he had not taken the bank's money "by force and violence, or by intimidation," as § 2113(a) requires. Before trial, he moved for a jury instruction on the offense described by § 2113(b) as a lesser included offense of the offense described by § 2113(a). Section 2113(b) entails less severe penalties than § 2113(a), punishing, *inter alia*, "[w]hoever takes and carries away, with intent to steal or purloin, any . . . thing of value exceeding $1,000 [from a] . . . bank." The District Court denied the motion. The jury, instructed on § 2113(a) alone, returned a guilty verdict, pursuant to which the District Court entered judgment. The Third Circuit affirmed.

Held: Because § 2113(b) requires three elements not required by § 2113(a), it is not a lesser included offense of § 2113(a), and petitioner is prohibited as a matter of law from obtaining a lesser included offense instruction on the offense described by § 2113(b). Pp. 260–274.

(a) In *Schmuck* v. *United States*, 489 U. S. 705, 716, this Court held that a defendant who requests a jury instruction on a lesser offense under Federal Rule of Criminal Procedure 31(c) must demonstrate that the elements of the lesser offense are a subset of the elements of the charged offense. This elements test requires a textual comparison of criminal statutes, which lends itself to certain and predictable outcomes. *Id.*, at 720. Here, the Government contends that three elements required by § 2113(b) are *not* required by § 2113(a). A "textual comparison" of the elements of the two offenses suggests that the Government is correct. Whereas § 2113(b) requires (1) that the defendant act "with intent to steal or purloin," (2) that the defendant "tak[e] and

carr[y] away" the property, and (3) that the property have a "value exceeding $1,000," § 2113(a) contains no such requirements. These extra clauses in subsection (b) cannot be regarded as mere surplusage; they mean something. *Potter* v. *United States*, 155 U. S. 438, 446. The Court rejects Carter's assertion that the foregoing application of the elements test is too rigid. Although he is correct that normal principles of statutory construction apply, the Court rejects his claim that such principles counsel a departure here from what is indicated by a straightforward reading of the text. Pp. 260–263.

(b) The Court rejects Carter's arguments pertinent to the general relationship between §§ 2113(a) and (b). His first contention—that it would be anomalous to impose criminal liability on a fence who receives bank property from a § 2113(b) violator, as the text of § 2113(c) plainly provides, but not on a fence who receives such property from a § 2113(a) violator, unless § 2113(b) is a lesser included offense of § 2113(a)—is unpersuasive because the anomaly, if it truly exists, is only an anomaly. It is doubtful that it rises to the level of absurdity. Cf. *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 509–511, 527. In any event, nothing in § 2113(c) purports to redefine the elements required by the text of §§ 2113(a) and (b). Although more substantial, Carter's second argument—that, insofar as §§ 2113(a) and (b) are *similar* to common-law robbery and larceny, the Court must assume that they require the *same* elements as their common-law predecessors, absent Congress' affirmative indication of an intent to displace the common-law scheme—is also unavailing because the canon on imputing common-law meaning applies only when Congress makes use of a statutory *term* with established meaning at common law. See, *e. g.*, *Morissette* v. *United States*, 342 U. S. 246, 263. Although "robbery" and "larceny" are terms with such meanings, neither term appears in the text of § 2113(a) or § 2113(b). While "robbery" appears in § 2113's title, the title of a statute is of use only when it sheds light on some ambiguous word or phrase in the statute itself. *E. g.*, *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212. Carter does not claim that this title illuminates any such ambiguous language. Pp. 263–267.

(c) The Court also rejects Carter's specific arguments concerning § 2113(b)'s three "extra" elements. Pp. 267–274.

(i) Carter is mistaken when he argues that an "intent to steal or purloin" requirement must be deemed implicit in § 2113(a) by virtue of this Court's cases interpreting criminal statutes silent as to *mens rea* to include broadly applicable scienter requirements, see, *e. g.*, *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 70. The presumption in favor of scienter generally requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct

from "otherwise innocent conduct." *Id.*, at 72. In this case, interpreting § 2113(a) not to apply to a person who engages in innocent, if aberrant, activity is accomplished simply by requiring general intent—*i. e.*, proof of knowledge with respect to the crime's *actus reus* (here, the taking of property of another by force or violence or intimidation). See, *e. g.*, *Staples* v. *United States*, 511 U. S. 600, 611–612. And once this mental state and *actus reus* are shown, the concerns underlying the presumption in favor of scienter are fully satisfied, for a forceful taking—even by a defendant taking under a good-faith claim of right—falls outside the realm of the "otherwise innocent." Thus, the presumption in favor of scienter does not justify reading a specific intent requirement—"intent to steal or purloin"—into § 2113(a). Carter's reliance on § 2113(a)'s legislative history is unavailing in light of this Court's approach to statutory interpretation, which begins by examining the text, see, *e. g.*, *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 475, not by psychoanalyzing those who enacted it, *Bank One Chicago, N. A.* v. *Midwest Bank & Trust Co.*, 516 U. S. 264, 279. Pp. 267–271.

(ii) Similarly, Carter's claim that § 2113(b)'s "takes and carries away" requirement should be deemed implicit in § 2113(a) also fails. His argument that "takes" in § 2113(a) is equivalent to "takes and carries away" in § 2113(b) is at war with the statute's text. His suggestion that the text is not dispositive because nothing in § 2113(a)'s evolution suggests that Congress sought to discard the common-law asportation requirement ignores the fact that the Court's inquiry begins with the textual product of Congress' efforts, not with speculation as to the internal thought processes of its Members. Congress is free to outlaw bank theft that does not involve asportation, and it hardly would have been absurd for Congress to do so, since the taking-without-asportation scenario has actually occurred. While the common law's decision to require asportation may have its virtues, Congress adopted a different view in § 2113(a), and it is not for this Court to question that choice. P. 272.

(iii) Finally, the Court disagrees with Carter's claim that § 2113(b)'s requirement that the property taken have a "value exceeding $1,000" is a *sentencing factor*, not an element of the crime. First, § 2113(b)'s structure strongly suggests that its two paragraphs—the first of which uses the phrase in question, requiring that the property taken have "value exceeding $1,000," the second of which refers to property of "value not exceeding $1,000"—describe distinct offenses. Each begins with the word "[w]hoever," proceeds to describe identically (apart from the differing valuation requirements) the elements of the offense, and concludes by stating the prescribed punishment. That these pro-

visions "stand on their own grammatical feet" strongly suggests that Congress intended the valuation requirement to be an element of each paragraph's offense, rather than a sentencing factor of some base § 2113(b) offense. *Jones* v. *United States*, 526 U. S. 227, 234. Furthermore, the steeply higher penalties—an enhancement from a 1-year to a 10-year maximum penalty on proof of valuation exceeding $1,000—leads to the conclusion that the valuation requirement is an element of § 2113(b)'s first paragraph. See, *e. g.*, *Castillo* v. *United States*, *ante*, at 127. Finally, the constitutional questions that would be raised by interpreting the valuation requirement to be a sentencing factor persuade the Court to adopt the view that the requirement is an element. See *Jones*, *supra*, at 239–252. Pp. 272–274.

185 F. 3d 863, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined, *post*, p. 275.

Donald J. McCauley argued the cause for petitioner. With him on the briefs were *Richard Coughlin*, *Jeffrey T. Green*, and *Joseph S. Miller*.

David C. Frederick argued the cause for the United States. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Robinson*, *Deputy Solicitor General Dreeben*, and *Thomas E. Booth*.*

JUSTICE THOMAS delivered the opinion of the Court.

In *Schmuck* v. *United States*, 489 U. S. 705 (1989), we held that a defendant who requests a jury instruction on a lesser offense under Rule 31(c) of the Federal Rules of Criminal Procedure must demonstrate that "the elements of the lesser offense are a subset of the elements of the charged offense." *Id.*, at 716. This case requires us to apply this elements test to the offenses described by 18 U. S. C. §§ 2113(a) and (b)

**Joshua L. Dratel* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

(1994 ed. and Supp. IV). The former punishes "[w]hoever, by force and violence, or by intimidation, takes . . . from the person or presence of another . . . any . . . thing of value belonging to, or in the . . . possession of, any bank . . . ." The latter, which entails less severe penalties, punishes, *inter alia*, "[w]hoever takes and carries away, with intent to steal or purloin, any . . . thing of value exceeding $1,000 belonging to, or in the . . . possession of, any bank . . . ." We hold that § 2113(b) requires an element not required by § 2113(a)—three in fact—and therefore is not a lesser included offense of § 2113(a). Petitioner is accordingly prohibited as a matter of law from obtaining a lesser included offense instruction on the offense described by § 2113(b).

I

On September 9, 1997, petitioner Floyd J. Carter donned a ski mask and entered the Collective Federal Savings Bank in Hamilton Township, New Jersey. Carter confronted a customer who was exiting the bank and pushed her back inside. She screamed, startling others in the bank. Undeterred, Carter ran into the bank and leaped over the customer service counter and through one of the teller windows. One of the tellers rushed into the manager's office. Meanwhile, Carter opened several teller drawers and emptied the money into a bag. After having removed almost $16,000 in currency, Carter jumped back over the counter and fled from the scene. Later that day, the police apprehended him.

A grand jury indicted Carter, charging him with violating § 2113(a). While not contesting the basic facts of the episode, Carter pleaded not guilty on the theory that he had not taken the bank's money "by force and violence, or by intimidation," as § 2113(a) requires. Before trial, Carter moved that the court instruct the jury on the offense described by § 2113(b) as a lesser included offense of the offense described by § 2113(a). The District Court, relying

on *United States* v. *Mosley*, 126 F. 3d 200 (CA3 1997),[1] denied the motion in a preliminary ruling. At the close of the Government's case, the District Court denied Carter's motion for a judgment of acquittal and indicated that the preliminary ruling denying the lesser included offense instruction would stand. The jury, instructed on § 2113(a) alone, returned a guilty verdict, and the District Court entered judgment pursuant to that verdict.

The Court of Appeals for the Third Circuit affirmed in an unpublished opinion, relying on its earlier decision in *Mosley*. Judgment order reported at 185 F. 3d 863 (1999). While the Ninth Circuit agrees with the Third that a lesser offense instruction is precluded in this context, see *United States* v. *Gregory*, 891 F. 2d 732, 734 (CA9 1989), other Circuits have held to the contrary, see *United States* v. *Walker*, 75 F. 3d 178, 180 (CA4 1996); *United States* v. *Brittain*, 41 F. 3d 1409, 1410 (CA10 1994). We granted certiorari to resolve the conflict, 528 U. S. 1060 (1999), and now affirm.

II

In *Schmuck*, *supra*, we were called upon to interpret Federal Rule of Criminal Procedure 31(c)'s provision that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged." We held that this provision requires application of an elements test, under which "one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense." 489 U. S., at 716.[2] The

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[1] We granted certiorari in *Mosley* to address the issue that we resolve today, *Mosley* v. *United States*, 523 U. S. 1019 (1997), but dismissed the petition in that case upon the death of the petitioner, 525 U. S. 120 (1998) *(per curiam)*.

[2] By "lesser offense," *Schmuck* meant lesser in terms of magnitude of punishment. When the elements of such a "lesser offense" are a subset of the elements of the charged offense, the "lesser offense" attains the status of a "lesser *included* offense."

elements test requires "a textual comparison of criminal statutes," an approach that, we explained, lends itself to "certain and predictable" outcomes. *Id.*, at 720.[3]

Applying the test, we held that the offense of tampering with an odometer, 15 U. S. C. §§ 1984 and 1990c(a) (1982 ed.), is not a lesser included offense of mail fraud, 18 U. S. C. § 1341. We explained that mail fraud requires two elements—(1) having devised or intending to devise a scheme to defraud (or to perform specified fraudulent acts), and (2) use of the mail for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts). The lesser offense of odometer tampering, however, requires the element of knowingly and willfully causing an odometer to be altered, an element that is absent from the offense of mail fraud. Accordingly, the elements of odometer tampering are not a subset of the elements of mail fraud, and a defendant charged with the latter is not entitled to an instruction on the former under Rule 31(c). *Schmuck*, *supra*, at 721–722.

Turning to the instant case, the Government contends that three elements required by § 2113(b)'s first paragraph are *not* required by § 2113(a): (1) specific intent to steal; (2) asportation; and (3) valuation exceeding $1,000. The statute provides:

> "§ 2113. Bank robbery and incidental crimes
>
> "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control,

[3] A defendant must also satisfy the "independent prerequisite . . . that the evidence at trial . . . be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *Schmuck*, 489 U. S., at 716, n. 8 (citing *Keeble* v. *United States*, 412 U. S. 205, 208 (1973)). In light of our holding that petitioner fails to satisfy the elements test, we need not address the latter requirement in this case.

> management, or possession of, any bank, credit union, or any savings and loan association . . .
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> . . . . . .
>
> "Shall be fined under this title or imprisoned not more than twenty years, or both.
>
> "(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or
>
> "Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

A "textual comparison" of the elements of these offenses suggests that the Government is correct. First, whereas subsection (b) requires that the defendant act "with intent to steal or purloin," subsection (a) contains no similar requirement. Second, whereas subsection (b) requires that the defendant "tak[e] and carr[y] away" the property, subsection (a) only requires that the defendant "tak[e]" the property. Third, whereas the first paragraph of subsection (b) requires that the property have a "value exceeding $1,000," subsection (a) contains no valuation requirement. These extra clauses in subsection (b) "cannot be regarded as mere surplusage; [they] mea[n] something." *Potter* v. *United States*, 155 U. S. 438, 446 (1894).

Carter urges that the foregoing application of *Schmuck*'s elements test is too rigid and submits that ordinary principles of statutory interpretation are relevant to the *Schmuck* inquiry. We do not dispute the latter proposition. The

Schmuck test, after all, requires an exercise in statutory interpretation before the comparison of elements may be made, and it is only sensible that normal principles of statutory construction apply. We disagree, however, with petitioner's conclusion that such principles counsel a departure in this case from what is indicated by a straightforward reading of the text.

III

We begin with the arguments pertinent to the general relationship between §§ 2113(a) and (b). Carter first contends that the structure of § 2113 supports the view that subsection (b) is a lesser included offense of subsection (a). He points to subsection (c) of § 2113, which imposes criminal liability on a person who knowingly "receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank . . . in violation of *subsection (b)*." (Emphasis added.) It would be anomalous, posits Carter, for subsection (c) to apply—as its text plainly provides—only to the fence who receives property from a violator of subsection (b) but not to the fence who receives property from a violator of subsection (a). The anomaly disappears, he concludes, only if subsection (b) is always violated when subsection (a) is violated—*i. e.*, only if subsection (b) is a lesser included offense of subsection (a).

But Carter's anomaly—even if it truly exists—is only an anomaly. Petitioner does not claim, and we tend to doubt, that it rises to the level of absurdity. Cf. *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 509–511 (1989); *id.*, at 527 (SCALIA, J., concurring in judgment). For example, it may be that violators of subsection (a) generally act alone, while violators of subsection (b) are commonly assisted by fences. In such a state of affairs, a sensible Congress may have thought it necessary to punish only the fences of property taken in violation of subsection (b). Or Congress may have thought that a defendant who violates subsection (a)

usually—if not inevitably—also violates subsection (b), so that the fence may be punished by reference to that latter violation. In any event, nothing in subsection (c) purports to redefine the elements required by the text of subsections (a) and (b).

Carter's second argument is more substantial. He submits that, insofar as subsections (a) and (b) are *similar* to the common-law crimes of robbery and larceny, we must assume that subsections (a) and (b) require the *same* elements as their common-law predecessors, at least absent Congress' affirmative indication (whether in text or legislative history) of an intent to displace the common-law scheme. While we (and the Government) agree that the statutory crimes at issue here bear a close resemblance to the common-law crimes of robbery and larceny, see Brief for United States 29 (citing 4 W. Blackstone, Commentaries *229, *232); accord, *post*, at 278–279, that observation is beside the point. The canon on imputing common-law meaning applies only when Congress makes use of a statutory *term* with established meaning at common law, and Carter does not point to any such term in the text of the statute.

This limited scope of the canon on imputing common-law meaning has long been understood. In *Morissette* v. *United States*, 342 U. S. 246 (1952), for example, we articulated the canon in this way:

> "[W]here Congress borrows *terms* of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed *word* in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Id.*, at 263 (emphasis added).

In other words, a "cluster of ideas" from the common law should be imported into statutory text only when Congress employs a common-law *term*, and not when, as here, Congress simply describes an offense analogous to a common-law crime without using common-law terms.

We made this clear in *United States* v. *Wells*, 519 U. S. 482 (1997). At issue was whether 18 U. S. C. § 1014—which punishes a person who "knowingly makes any false statement or report . . . for the purpose of influencing in any way the action" of a Federal Deposit Insurance Corporation insured bank "upon any application, advance, . . . commitment, or loan"—requires proof of the materiality of the "false statement." The defendants contended that since materiality was a required element of "false statement"-type offenses at common law, it must also be required by § 1014. Although JUSTICE STEVENS in dissent thought the argument to be meritorious, we rejected it:

> "[F]undamentally, we disagree with our colleague's apparent view that any term that is an element of a common-law crime carries with it every other aspect of that common-law crime when the term is used in a statute. JUSTICE STEVENS seems to assume that because 'false statement' is an element of perjury, and perjury criminalizes only material statements, a statute criminalizing 'false statements' covers only material statements. By a parity of reasoning, because common-law perjury involved statements under oath, a statute criminalizing a false statement would reach only statements under oath. It is impossible to believe that Congress intended to impose such restrictions *sub silentio*, however, and so *our rule on imputing common-law meaning to statutory terms does not sweep so broadly.*" 519 U. S., at 492, n. 10 (emphasis added; citation omitted).[4]

[4] The dissent claims that our decision in *United States* v. *Wells*, 519 U. S. 482 (1997), is not in point because we went on in *Wells* to discuss the evolution of the statute (specifically, a recodification of numerous sections),

Similarly, in *United States* v. *Turley*, 352 U. S. 407 (1957), we declined to look to the analogous common-law crime because the statutory term at issue—"stolen"—had no meaning at common law. See *id.*, at 411–412 ("[W]hile 'stolen' is constantly identified with larceny, the term was never at common law equated or exclusively dedicated to larceny" (internal quotation marks omitted)).

By contrast, we have not hesitated to turn to the common law for guidance when the relevant statutory text does contain a term with an established meaning at common law. In *Neder* v. *United States*, 527 U. S. 1 (1999), for example, we addressed whether materiality is required by federal statutes punishing a "scheme or artifice to defraud." *Id.*, at 20, and 20–21, nn. 3–4 (citing 18 U. S. C. §§ 1341, 1343, 1344). Unlike the statute in *Wells*, which contained no common-law term, these statutes did include a common-law term—"defraud." 527 U. S., at 22. Because common-law fraud required proof of materiality, we applied the canon to hold that these federal statutes implicitly contain a materiality requirement as well. *Id.*, at 23. Similarly, in *Evans* v. *United States*, 504 U. S. 255, 261–264 (1992), we observed that "extortion" in 18 U. S. C. § 1951 was a common-law term, and proceeded to interpret this term by reference to its meaning at common law.

Here, it is undisputed that "robbery" and "larceny" are terms with established meanings at common law. But nei-

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which revealed Congress' apparent care in retaining a materiality requirement in certain sections while omitting it in others, such as the one before us in *Wells*. According to the dissent, a similar statutory evolution is not present here. See *post*, at 286. But, even assuming the dissent is correct in this latter regard, the holding in *Wells* simply cannot be deemed to rest on our discussion of the statute's evolution. Rather, we characterized that discussion as supporting a result we had already reached on textual grounds. See 519 U. S., at 492 ("Statutory history confirms the natural reading").

ther term appears in the text of § 2113(a) or § 2113(b).[5] While the term "robbery" does appear in § 2113's title, the title of a statute "'[is] of use only when [it] shed[s] light on some ambiguous word or phrase'" in the statute itself. *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212 (1998) (quoting *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 528–529 (1947) (modifications in original)). And Carter does not claim that this title illuminates any such ambiguous language. Accordingly, the canon on imputing common-law meaning has no bearing on this case.

IV

We turn now to Carter's more specific arguments concerning the "extra" elements of § 2113(b). While conceding the absence of three of § 2113(b)'s requirements from the text of § 2113(a)—(1) "intent to steal or purloin"; (2) "takes *and carries away*," *i. e.*, asportation; and (3) "value exceeding $1,000" (first paragraph)—Carter claims that the first two should be deemed implicit in § 2113(a), and that the third is not an element at all.

A

As to "intent to steal or purloin," it will be recalled that the text of subsection (b) requires a specific "intent to steal or purloin," whereas subsection (a) contains no explicit *mens rea* requirement of any kind. Carter nevertheless argues that such a *specific intent* requirement must be deemed implicitly present in § 2113(a) by virtue of "our cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms

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[5] Congress could have simply punished "robbery" or "larceny" as some States have done (and as Congress itself has done elsewhere, see, *e. g.*, 18 U. S. C. §§ 2112, 2114, 2115), thereby leaving the definition of these terms to the common law, but Congress instead followed the more prevalent legislative practice of spelling out elements of these crimes. See 2 W. LaFave & A. Scott, Substantive Criminal Law § 8.11, p. 438, n. 6 (1986).

does not contain them." *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 70 (1994).[6] Properly applied to § 2113, however, the presumption in favor of scienter demands only that we read subsection (a) as requiring proof of *general intent*—that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime (here, the taking of property of another by force and violence or intimidation).

Before explaining why this is so under our cases, an example, *United States* v. *Lewis*, 628 F. 2d 1276, 1279 (CA10 1980), cert. denied, 450 U. S. 924 (1981), will help to make the distinction between "general" and "specific" intent less esoteric. In *Lewis*, a person entered a bank and took money from a teller at gunpoint, but deliberately failed to make a quick getaway from the bank in the hope of being arrested so that he would be returned to prison and treated for alcoholism. Though this defendant knowingly engaged in the acts of using force and taking money (satisfying "general intent"), he did not intend permanently to deprive the bank of its possession of the money (failing to satisfy "specific intent").[7] See generally 1 W. LaFave & A. Scott, Substantive Criminal

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[6] This interpretive principle exists quite apart from the canon on imputing common-law meaning. See, *e. g.*, *X-Citement Video*, 513 U. S., at 70 (applying presumption in favor of scienter to statute proscribing the shipping or receiving of visual depictions of minors engaging in sexually explicit conduct, without first inquiring as to the existence of a common-law antecedent to this offense); *Staples* v. *United States*, 511 U. S. 600 (1994) (similar).

[7] The dissent claims that the *Lewis* court determined that the jury could have found specific intent to steal on the facts presented, and thus disputes our characterization of the case as illustrating a situation where a defendant acts only with general intent. *Post*, at 283–284 (citing *Lewis*, 628 F. 2d, at 1279). The dissent fails to acknowledge, however, that the *Lewis* court made this determination only because some evidence suggested that, if the defendant had not been arrested, he would have kept the stolen money. *Ibid.* The *Lewis* court, implicitly acknowledging the possibility that some defendant (if not Lewis) might unconditionally intend to turn himself in after completing a bank theft, proceeded to hold, in the alternative, that § 2113(a) covers a defendant who acts only with general intent. See *ibid.*

Law § 3.5, p. 315 (1986) (distinguishing general from specific intent).

The presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from "otherwise innocent conduct." *X-Citement Video*, *supra*, at 72. In *Staples* v. *United States*, 511 U. S. 600 (1994), for example, to avoid criminalizing the innocent activity of gun ownership, we interpreted a federal firearms statute to require proof that the defendant knew that the weapon he possessed had the characteristics bringing it within the scope of the statute. *Id.*, at 611–612. See also, *e. g.*, *Liparota* v. *United States*, 471 U. S. 419, 426 (1985); *Morissette*, 342 U. S., at 270–271. By contrast, some situations may call for implying a specific intent requirement into statutory text. Suppose, for example, a statute identical to § 2113(b) but without the words "intent to steal or purloin." Such a statute would run the risk of punishing seemingly innocent conduct in the case of a defendant who peaceably takes money believing it to be his. Reading the statute to require that the defendant possess general intent with respect to the *actus reus*—*i. e.*, that he know that he is physically taking the money—would fail to protect the innocent actor. The statute therefore would need to be read to require not only general intent, but also specific intent—*i. e.*, that the defendant take the money with "intent to steal or purloin."

In this case, as in *Staples*, a general intent requirement suffices to separate wrongful from "otherwise innocent" conduct. Section 2113(a) certainly should not be interpreted to apply to the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, if aberrant activity), but this result is accomplished simply by requiring, as *Staples* did, general intent—*i. e.*, proof of knowledge with respect to the *actus reus* of the crime. And once this mental state and *actus reus* are shown, the concerns underlying the presumption in favor of scienter are fully satis-

fied, for a forceful taking—even by a defendant who takes under a good-faith claim of right—falls outside the realm of the "otherwise innocent." Thus, the presumption in favor of scienter does not justify reading a specific intent requirement—"intent to steal or purloin"—into § 2113(a).[8]

Independent of his reliance upon the presumption in favor of scienter, Carter argues that the legislative history of § 2113 supports the notion that an "intent to steal" requirement should be read into § 2113(a). Carter points out that, in 1934, Congress enacted what is now § 2113(a), but with the adverb "feloniously" (which all agree is equivalent to "intent to steal") modifying the verb "takes." Act of May 18, 1934, ch. 304, § 2(a), 48 Stat. 783. In 1937, Congress added what is now § 2113(b). Act of Aug. 24, 1937, ch. 747, 50 Stat. 749. Finally, in 1948, Congress made two changes to § 2113, deleting "feloniously" from what is now § 2113(a) and dividing the "robbery" and "larceny" offenses into their own separate subsections. 62 Stat. 796.

Carter concludes that the 1948 deletion of "feloniously" was merely a stylistic change, and that Congress had no intention, in deleting that word, to drop the requirement that the defendant "feloniously" take the property—that is, with intent to steal.[9] Such reasoning, however, misunder-

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[8] Numerous Courts of Appeals agree. While holding that § 2113(a)'s version of bank robbery is not a specific intent crime, these courts have construed the statute to contain a general intent requirement. See *United States* v. *Gonyea*, 140 F. 3d 649, 653–654, and n. 10 (CA6 1998) (collecting cases).

[9] Relatedly, Carter argues that, even if a sensible Congress might have deleted "feloniously," the 1948 Congress did not adequately explain an intention to do so in the legislative history to the 1948 Act. He points to the House Report, which states that Congress intended only to make "changes in phraseology." H. R. Rep. No. 304, 80th Cong., 1st Sess., A135 (1947). Carter further suggests that the phraseology concern with "feloniously" was that Congress in the 1948 codification generally desired to delete references to felonies and misdemeanors in view of the statutory definition of those terms in the former 18 U. S. C. § 1. Carter fails, how-

stands our approach to statutory interpretation. In analyzing a statute, we begin by examining the text, see, *e. g.*, *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 475 (1992), not by "psychoanalyzing those who enacted it," *Bank One Chicago, N. A.* v. *Midwest Bank & Trust Co.*, 516 U. S. 264, 279 (1996) (SCALIA, J., concurring in part and concurring in judgment). While "feloniously" no doubt would be sufficient to convey a specific intent requirement akin to the one spelled out in subsection (b), the word simply does not appear in subsection (a).

Contrary to the dissent's suggestion, *post*, at 283–284, this reading is not a fanciful one. The absence of a specific intent requirement from subsection (a), for example, permits the statute to reach cases like *Lewis*, see *supra*, at 268, where an ex-convict robs a bank because he wants to be apprehended and returned to prison. (The Government represents that indictments on this same fact pattern (which invariably plead out and hence do not result in reported decisions) are brought "as often as every year," Brief for United States 22, n. 13.) It can hardly be said, therefore, that it would have been absurd to delete "feloniously" in order to reach such defendants. And once we have made that determination, our inquiry into legislative motivation is at an end. Cf. *Bock Laundry Machine Co.*, 490 U. S., at 510–511.[10]

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ever, to acknowledge that the House Report does not give that reason for the deletion of "feloniously" from § 2113, even though it explicitly does so in connection with the simultaneous elimination of similar language from other sections. See, *e. g.*, H. R. Rep. No. 304, *supra*, at A67 ("References to offenses as felonies or misdemeanors were omitted in view of definitive section 1 of this title") (explaining revisions to 18 U. S. C. § 751). As is often the case, the legislative history, even if it is relevant, supports conflicting inferences and provides scant illumination.

[10] Carter claims further support in *Prince* v. *United States*, 352 U. S. 322 (1957), for his view that § 2113(a) implicitly requires a specific "intent to steal." But *Prince* did not discuss the elements of that subsection, let alone compare them to the elements of subsection (b).

B

Turning to the second element in dispute, it will be recalled that, whereas subsection (b) requires that the defendant "tak[e] and carr[y] away the property," subsection (a) requires only that the defendant "tak[e]" the property. Carter contends that the "takes" in subsection (a) is equivalent to "takes and carries away" in subsection (b). While Carter seems to acknowledge that the argument is at war with the text of the statute, he urges that text should not be dispositive here because nothing in the evolution of § 2113(a) suggests that Congress sought to discard the asportation requirement from that subsection.

But, again, our inquiry focuses on an analysis of the textual product of Congress' efforts, not on speculation as to the internal thought processes of its Members. Congress is certainly free to outlaw bank theft that does not involve asportation, and it hardly would have been absurd for Congress to do so, since the taking-without-asportation scenario is no imagined hypothetical. See, *e. g.*, *State* v. *Boyle*, 970 S. W. 2d 835, 836, 838–839 (Mo. Ct. App. 1998) (construing state statutory codification of common-law robbery to apply to defendant who, after taking money by threat of force, dropped the money on the spot). Indeed, a leading treatise applauds the deletion of the asportation requirement from the elements of robbery. See 2 LaFave & Scott, Substantive Criminal Law § 8.11, at 439. No doubt the common law's decision to require asportation also has its virtues. But Congress adopted a different view in § 2113(a), and it is not for us to question that choice.

C

There remains the requirement in § 2113(b)'s first paragraph that the property taken have a "value exceeding $1,000"—a requirement notably absent from § 2113(a). Carter, shifting gears from his previous arguments, concedes the textual point but claims that the valuation require-

ment does not affect the *Schmuck* elements analysis because it is a *sentencing factor*, not an element. We disagree. The structure of subsection (b) strongly suggests that its two paragraphs—the first of which requires that the property taken have "value exceeding $1,000," the second of which refers to property of "value not exceeding $1,000"—describe distinct offenses. Each begins with the word "[w]hoever," proceeds to describe identically (apart from the differing valuation requirements) the elements of the offense, and concludes by stating the prescribed punishment. That these provisions "stand on their own grammatical feet" strongly suggests that Congress intended the valuation requirement to be an element of each paragraph's offense, rather than a sentencing factor of some base § 2113(b) offense. *Jones* v. *United States*, 526 U. S. 227, 234 (1999). Even aside from the statute's structure, the "steeply higher penalties"—an enhancement from a 1-year to a 10-year maximum penalty on proof of valuation exceeding $1,000—leads us to conclude that the valuation requirement is an element of the first paragraph of subsection (b). See *Castillo* v. *United States*, *ante*, at 127; *Jones*, 526 U. S., at 233. Finally, the constitutional questions that would be raised by interpreting the valuation requirement to be a sentencing factor persuade us to adopt the view that the valuation requirement is an element. See *id.*, at 239–252.

The dissent agrees that the valuation requirement of subsection (b)'s first paragraph is an element, but nonetheless would hold that subsection (b) is a lesser included offense of subsection (a). *Post*, at 287–289. The dissent reasons that the "value *not* exceeding $1,000" component of § 2113(b)'s *second* paragraph is not an element of the offense described in that paragraph. Hence, the matter of value does not prevent § 2113(b)'s second paragraph from being a lesser included offense of § 2113(a). And if a defendant wishes to receive an instruction on the first paragraph of § 2113(b)—which entails more severe penalties than the sec-

ond paragraph, but is a more realistic option from the jury's standpoint in a case such as this one where the value of the property clearly exceeds $1,000—the dissent sees no reason to bar him from making that election, even though the "value exceeding $1,000" element of § 2113(b)'s first paragraph is clearly absent from § 2113(a).

This novel maneuver creates a problem, however. Since subsection (a) contains no valuation requirement, a defendant indicted for violating that subsection who requests an instruction under subsection (b)'s first paragraph would effectively "waive . . . his [Fifth Amendment] right to notice by indictment of the 'value exceeding $1,000' element." *Post*, at 289. But this same course would not be available to the prosecutor who seeks the insurance policy of a lesser included offense instruction under that same paragraph after determining that his case may have fallen short of proving the elements of subsection (a). For, whatever authority defense counsel may possess to waive a defendant's constitutional rights, see generally *New York* v. *Hill*, 528 U. S. 110 (2000), a prosecutor has no such power. Thus, the prosecutor would be disabled from obtaining a lesser included offense instruction under Rule 31(c), a result plainly contrary to *Schmuck*, in which we explicitly rejected an interpretive approach to the Rule that would have permitted "the defendant, by in effect waiving his right to notice, . . . [to] obtain a lesser [included] offense instruction in circumstances where the constitutional restraint of notice to the defendant would prevent the prosecutor from seeking an identical instruction," 489 U. S., at 718.

* * *

We hold that § 2113(b) is not a lesser included offense of § 2113(a), and therefore that petitioner is not entitled to a jury instruction on § 2113(b). The judgment of the Third Circuit is affirmed.

It is so ordered.

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

At common law, robbery meant larceny *plus* force, violence, or putting in fear. Because robbery was an aggravated form of larceny at common law, larceny was a lesser included offense of robbery. Congress, I conclude, did not depart from that traditional understanding when it rendered "Bank robbery and incidental crimes" federal offenses. Accordingly, I would hold that petitioner Carter is not prohibited as a matter of law from obtaining an instruction on bank larceny as a lesser included offense. The Court holds that Congress, in 18 U. S. C. § 2113, has dislodged bank robbery and bank larceny from their common-law mooring. I dissent from that determination.

I

The Court presents three reasons in support of its conclusion that a lesser included offense instruction was properly withheld in this case under the elements-based test of *Schmuck* v. *United States*, 489 U. S. 705 (1989). First, the Court holds that bank larceny contains an "intent to steal" requirement that bank robbery lacks. *Ante*, at 267–271. Second, the Court concludes that larceny contains a requirement of carrying away, or "asportation," while robbery does not. *Ante*, at 272. And third, the Court states that the "value exceeding $1,000" requirement in the first paragraph of the larceny statute is an element for which no equivalent exists in the robbery statute. *Ante*, at 272–274. The Court's first and second points, I conclude, are mistaken. As for the third, I agree with the Court that the "value exceeding $1,000" requirement is an element essential to sustain a conviction for the higher degree of bank larceny. I would hold, however, that Carter was not disqualified on that account from obtaining the lesser included offense instruction he sought.

I note at the outset that the structure of § 2113 points strongly toward the conclusion that bank larceny is a lesser included offense of bank robbery. Section 2113(c) imposes criminal liability on any person who knowingly "receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank . . . in violation of subsection (b)." If bank larceny, covered in § 2113(b), contains an intent or asportation element not included in bank robbery, covered in § 2113(a), then § 2113(c) creates an anomaly. As the Court concedes, *ante*, at 263–264, under today's decision the fence who gets his loot from a bank larcenist will necessarily receive property "stolen . . . in violation of subsection (b)," but the one who gets his loot from a bank robber will not. Once it is recognized that bank larceny is a lesser included offense of bank robbery, however, the anomaly vanishes. Because anyone who violates § 2113(a) necessarily commits the lesser included offense described in § 2113(b), a person who knowingly receives stolen property from a bank robber is just as guilty under § 2113(c) as one who knowingly receives stolen property from a bank larcenist.[1]

I emphasize as well that the title of § 2113 is "Bank robbery and incidental crimes." This Court has repeatedly recognized that "'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt'

[1] I further note, and the Court does not dispute, that under today's holding the Double Jeopardy Clause would not bar the Government from bringing a bank larceny prosecution against a defendant who has already been acquitted—or, indeed, convicted—by a jury of bank robbery on the same facts. See *Blockburger* v. *United States*, 284 U. S. 299 (1932) (Double Jeopardy Clause does not bar consecutive prosecutions for a single act if each charged offense requires proof of an element that the other does not); Tr. of Oral Arg. 46–47 (in response to Court's inquiry, counsel for the Government stated that, under the Government's construction of § 2113, if a jury acquitted a defendant on an indictment for bank robbery, it would be open to the prosecution thereafter to seek the defendant's reindictment for bank larceny).

about the meaning of a statute." *Almendarez-Torres* v. *United States*, 523 U. S. 224, 234 (1998) (quoting *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 528–529 (1947)).[2] Robbery, all agree, was an offense at common law, and this Court has consistently instructed that courts should ordinarily read federal criminal laws in accordance with their common-law origins, if Congress has not directed otherwise. See *Neder* v. *United States*, 527 U. S. 1, 21 (1999) ("[W]here Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." (internal quotation marks and modifications omitted)); *Evans* v. *United States*, 504 U. S. 255, 259 (1992) ("It is a familiar 'maxim that a statutory term is generally presumed to have its common-law meaning.' ") (quoting *Taylor* v. *United States*, 495 U. S. 575, 592 (1990)); *United States* v. *Turley*, 352 U. S. 407, 411 (1957) ("We recognize that where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning."). As we explained in *Morissette* v. *United States*, 342 U. S. 246 (1952):

> "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary

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[2] The majority says that courts may use a statutory title or heading only to "shed light on some ambiguous word or phrase," but not as a guide to a statute's overall meaning. See *ante*, at 267. Our cases have never before imposed such a wooden and arbitrary limitation, and for good reason: A statute's meaning can be elusive, and its title illuminating, even where a court cannot pinpoint a discrete word or phrase as the source of the ambiguity.

> direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Id.*, at 263.

In interpreting § 2113, then, I am guided by the common-law understanding of "robbery and incidental crimes." At common law, as the Government concedes, robbery was an aggravated form of larceny. Specifically, the common law defined larceny as "the felonious taking, and carrying away, of the personal goods of another." 4 W. Blackstone, Commentaries on the Laws of England 230 (1769) (Blackstone) (internal quotation marks omitted). Robbery, in turn, was larceny effected by taking property from the person or presence of another by means of force or putting in fear. Brief for United States 29–30 (citing 2 W. LaFave & A. Scott, Substantive Criminal Law § 8.11, pp. 437–438 (1986) (LaFave & Scott)). Larceny was therefore a lesser included offense of robbery at common law. See 4 Blackstone 241 (robbery is "[o]pen and violent larciny from the person" (emphasis deleted)); 2 E. East, Pleas of the Crown § 124, p. 707 (1803) (robbery is a species of "aggravated larceny"); 2 W. Russell & C. Greaves, Crimes and Misdemeanors *101 ("robbery is an aggravated species of larceny").

Closer inspection of the common-law elements of both crimes confirms the relationship. The elements of common-law larceny were also elements of robbery. First and most essentially, robbery, like larceny, entailed an intentional taking. See 4 Blackstone 241 (robbery is "the felonious and forcible taking, from the person of another, of goods or money to any value, by putting him in fear"); 2 East, *supra*, at 707 (robbery is the "felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear"). Second, as the above quotations indicate, the taking in a robbery had to be "felonious," a common-law term of art signifying an intent to steal. See 4 Blackstone 232 ("This taking, and carrying away, must also be *felonious;* that is, done *animo*

furandi [with intent to steal]: or, as the civil law expresses it, *lucri causa* [for the sake of gain]."); Black's Law Dictionary 555 (5th ed. 1979) ("Felonious" is "[a] technical word of law which means done with intent to commit crime"). And third, again like larceny, robbery contained an asportation requirement. See 2 LaFave & Scott § 8.11, at 439 ("Just as larceny requires that the thief both 'take' (secure dominion over) and 'carry away' (move slightly) the property in question, so too robbery under the traditional view requires both a taking and an asportation (in the sense of at least a slight movement) of the property." (footnotes omitted)). Unlike larceny, however, robbery included one further essential component: an element of force, violence, or intimidation. See 4 Blackstone 242 ("[P]utting in fear is the criterion that distinguishes robbery from other larcinies.").[3]

Precedent thus instructs us to presume that Congress has adhered to the altogether clear common-law understanding

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[3] English courts continue to recognize larceny as a lesser included offense of robbery. See, *e. g.*, *Regina* v. *Skivington*, 51 Crim. App. 167, 170 (C. A. 1967) ("[L]arceny is an ingredient of robbery, and if the honest belief that a man has a claim of right is a defence to larceny, then it negatives one of the ingredients in the offense of robbery . . . ."). After the enactment of the Theft Act, 1968, which consolidated the crimes of larceny, embezzlement, and fraudulent conversion into the single crime of theft, see *Director of Public Prosecutions* v. *Gomez*, 96 Crim. App. 359, 377 (H. L. 1992) (Lord Lowry, dissenting), English courts reaffirmed that theft remains a lesser included offense of robbery, see *Regina* v. *Guy*, 93 Crim. App. 108, 111 (C. A. 1991) ("[Section 8(1) of the Theft Act, 1968] makes it clear that robbery is theft with an additional ingredient, namely the use of force, or putting or seeking to put any person in fear of being subjected to force. Therefore anyone guilty of robbery must, by statutory definition, also be guilty of theft.").

Leading commentators agree that larceny is a lesser included offense of robbery. See, *e. g.*, 2 LaFave & Scott § 8.11, at 437 ("Robbery . . . may be thought of as aggravated larceny . . . ."); 3 C. Wright, Federal Practice and Procedure § 515, p. 22 (2d ed. 1982) ("Robbery necessarily includes larceny . . . .").

that larceny is a lesser included offense of robbery, unless Congress has affirmatively indicated its design, in codifying the crimes of robbery and larceny, to displace their common-law meanings and relationship.

Far from signaling an intent to depart from the common law, the codification of § 2113's predecessor statute suggests that Congress intended to adhere to the traditional ranking of larceny as a lesser included offense of robbery. There is no indication at any point during the codification of the two crimes that Congress meant to install new conceptions of larceny and robbery severed from their common-law foundations.

Prior to 1934, federal law did not criminalize bank robbery or larceny; these crimes were punishable only under state law. Congress enacted the precursor to § 2113(a) in response to an outbreak of bank robberies committed by John Dillinger and others who evaded capture by state authorities by moving from State to State. See *Jerome* v. *United States*, 318 U. S. 101, 102 (1943) (1934 Act aimed at "interstate operations by gangsters against banks—activities with which local authorities were frequently unable to cope"). In bringing federal law into this area, Congress did not aim to reshape robbery by altering the common-law definition of that crime. On the contrary, Congress chose language that practically jumped out of Blackstone's Commentaries:

> "Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both." Act of May 18, 1934, ch. 304, § 2(a), 48 Stat. 783.

It soon became apparent, however, that this legislation left a gap: It did not reach the thief who intentionally, though not violently, stole money from a bank. Within a few years, federal law enforcers endeavored to close the gap. In a letter to the Speaker of the House, the Attorney General conveyed the Executive Branch's official position: "The fact that the statute is limited to robbery and does not include larceny and burglary has led to some incongruous results." See H. R. Rep. No. 732, 75th Cong., 1st Sess., 1 (1937) (reprinting letter). In particular, the Attorney General cited the example of a thief apprehended after taking $11,000 from a bank while a teller was temporarily absent. *Id.*, at 1–2. He therefore asked Congress to amend the bank robbery statute, specifically to add a larceny provision shorn of any force, violence, or fear requirement. *Id.*, at 2. Congress responded by passing an Act "[t]o amend the bank robbery statute to include burglary and larceny." Act of Aug. 24, 1937, ch. 747, 50 Stat. 749. The Act's new larceny provision, which Congress placed in the very same section as the robbery provision, punished "whoever shall take and carry away, with intent to steal or purloin," property, money, or anything of value from a bank. *Ibid.* There is not the slightest sign that, when this new larceny provision was proposed in terms tracking the common-law formulation, the Attorney General advocated any change in the definition of robbery from larceny *plus* to something less. Nor is there any sign that Congress meant to order such a change. The Act left in place the 1934 Act's definition of bank robbery, which continued to include the word "feloniously," requiring (as the Court concedes, *ante*, at 270) proof by the Government of an intent to steal. 50 Stat. 749.

In its 1948 codification of federal crimes, Congress delineated the bank robbery and larceny provisions of §§ 2113(a) and 2113(b) and placed these provisions under the title "Bank robbery and incidental crimes." Act of June 25, 1948, § 2113,

62 Stat. 796–797. In this codification, Congress deleted the word "feloniously" from the robbery provision, leaving the statute in substantially its present form.

II

That 1948 deletion forms the basis of the Government's prime argument against characterizing § 2113(b) as a lesser included offense of § 2113(a), namely, that robbery, unlike larceny, no longer requires a specific intent to steal. The Government concedes that to gain a conviction for robbery at common law, the prosecutor had to prove the perpetrator's intent to steal. The Government therefore acknowledges that when Congress uses the terms "rob" or "robbery" "without further elaboration," Congress intends to retain the common-law meaning of robbery. Brief for United States 16, n. 9. But the Government contends that the 1948 removal of "feloniously" from § 2113(a) showed Congress' purpose to dispense with any requirement of intent to steal.

It is true that the larceny provision contains the words "intent to steal" while the current robbery provision does not.[4] But the element-based comparison called for by *Schmuck* is not so rigid as to require that the compared statutes contain identical words. Nor does *Schmuck* counsel deviation from our traditional practice of interpreting federal criminal statutes consistently with their common-law origins in the absence of affirmative congressional indication to the contrary. Guided by the historical understanding of the relationship between robbery and larceny both at common law and as brought into the federal criminal code, I conclude that the offense of bank robbery under § 2113(a), like the offense of bank larceny under § 2113(b), has always included and continues to include a requirement of intent to steal.

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[4] Notably, the Court would read a requirement of intent to steal into § 2113(b) even if that provision did not contain such words. *Ante*, at 269.

This traditional reading of the robbery statute makes common sense. The Government agrees that to be convicted of robbery, the defendant must resort to force and violence, or intimidation, to accomplish his purpose. But what purpose could this be other than to steal? The Government describes two scenarios in which, it maintains, a person could commit bank robbery while nonetheless lacking intent to steal. One scenario involves a terrorist who temporarily takes a bank's money or property aiming only to disrupt the bank's business; the other involves an ex-convict, unable to cope with life in a free society, who robs a bank because he wants to be apprehended and returned to prison. Brief for United States 22, n. 13.

The Government does not point to any cases involving its terrorist scenario, and I know of none. To illustrate its ex-convict scenario, the Government cites *United States* v. *Lewis*, 628 F. 2d 1276 (CA10 1980), which appears to be the only reported federal case presenting this staged situation. The facts of *Lewis*—a case on which the Court relies heavily, see *ante*, at 268, 271—were strange, to say the least. Hoping to be sent back to prison where he could receive treatment for his alcoholism and have time to pursue his writing hobby, Lewis called a local detective and informed him of his intention to rob a bank. 628 F. 2d, at 1277. He also discussed his felonious little plans with the police chief, undercover police officers, and a psychologist. *Ibid.* He even allowed his picture to be taken so that it could be posted in local banks for identification. *Ibid.* Following his much-awaited heist, Lewis was arrested in the bank's outer foyer by officers who had him under surveillance. *Id.*, at 1278.

I am not sure whether a defendant exhibiting this kind of "bizarre behavior," *ibid.*, should in fact be deemed to lack a specific intent to steal. (The Tenth Circuit, I note, determined that specific intent was present in *Lewis*, for "[t]he jury, charged with the duty to infer from conflicting evidence the defendant's intent, could have concluded that

if Lewis was not arrested he would have kept the money and spent it." *Id.*, at 1279.) But whatever its proper disposition, this sort of case is extremely rare—the Government represents that, nationwide, such indictments are brought no more than once per year. Brief for United States 22, n. 13. Moreover, unlike a John Dillinger who foils state enforcers by robbing banks in Chicago and lying low in South Bend, the thief who orchestrates his own capture at the hands of the local constable hardly poses the kind of problem that one would normally expect to trigger a federal statutory response. In sum, I resist the notion—apparently embraced by the Court, see *ante*, at 271—that Congress' purpose in deleting the word "feloniously" from §2113(a) was to grant homesick ex-convicts like Lewis their wish to return to prison. Nor can I credit the suggestion that Congress' concern was to cover the Government's fictional terrorist, or the frustrated account holder who "withdraws" $100 by force or violence, believing the money to be rightfully his, or the thrill seeker who holds up a bank with the intent of driving around the block in a getaway car and then returning the loot, or any other defendant whose exploits are seldom encountered outside the pages of law school exams.

Indeed, there is no cause to suspect that the 1948 deletion of "feloniously" was intended to effect any substantive change at all. Nothing indicates that Congress removed that word in response to any assertion or perception of prosecutorial need. Nor is there any other reason to believe that it was Congress' design to alter the elements of the offense of robbery. Rather, the legislative history suggests that Congress intended only to make "changes in phraseology." H. R. Rep. No. 304, 80th Cong., 1st Sess., A135 (1947). See *Prince* v. *United States*, 352 U. S. 322, 326, n. 5 (1957) ("The legislative history indicates that no substantial change was made in this [1948] revision" of §2113); *Morissette*, 342 U. S., at 269, n. 28 ("The 1948 Revision was not intended to create new crimes but to recodify

those then in existence."). As the Third Circuit has recognized, "it seems that the deletion of 'feloniously' was a result of Congress' effort to delete references to felonies and misdemeanors from the code, inasmuch as both terms were defined in 18 U. S. C. § 1," a statute that has since been repealed.[5] *United States* v. *Mosley*, 126 F. 3d 200, 205 (CA3 1997). See also *United States* v. *Richardson*, 687 F. 2d 952, 957 (CA7 1982) (giving the same account of the 1948 revision). I would not attribute to Congress a design to create a robbery offense stripped of the requirement of larcenous intent in the absence of any affirmative indication of such a design.[6]

Our decision in *Prince* supports this conclusion. The petitioner in that case had entered a bank, displayed a revolver, and robbed the bank. He was convicted of robbery and of entering the bank with the intent to commit a felony, both crimes prohibited by § 2113(a). The trial judge sentenced him, consecutively, to 20 years for the robbery and 15 years for the entering-with-intent crime. 352 U. S., at 324. This Court reversed the sentencing decision. The entering-with-intent crime, we held, merges with the robbery crime once the latter crime is consummated. Thus, we explained, the punishment could not exceed 20 years, the sentence authorized for a consummated robbery. *Id.*, at 329. In reaching our decision in *Prince*, we noted that, when the federal bank robbery proscription was enlarged in 1937 to add the entering-with-intent and larceny provisions, "[i]t was manifestly the purpose of Congress to establish lesser offenses."

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[5] The various classes of federal felonies and misdemeanors are now defined at 18 U. S. C. § 3559.

[6] Congress could have provided such an affirmative indication in any number of ways. The simplest would have been to say so in the statute, *e. g.:* "It shall not be a defense that the accused person lacked an intent to steal." Cf. 18 U. S. C. § 645 (criminalizing embezzlement by judicial officers, and providing that "[i]t shall not be a defense that the accused person had any interest in [the embezzled] moneys or fund").

Id., at 327. We further stated that the "heart of the [entering] crime is the intent to steal," and that "[t]his mental element merges into the completed crime if the robbery is consummated." *Id.*, at 328. *Prince* thus conveys the Court's comprehension that an intent to steal is central not only to the entry and larceny crimes, but to robbery as well.

United States v. *Wells*, 519 U. S. 482 (1997), relied on by the Court, *ante*, at 265, is not in point. In that case, we held that the offense of making a false statement to a federally insured bank, 18 U. S. C. § 1014, did not include a requirement of materiality. We reached that holding only after concluding that the defendants in that case had not "come close to showing that at common law the term 'false statement' acquired any implication of materiality that came with it into § 1014." 519 U. S., at 491. Indeed, the defendants made "no claims about the settled meaning of 'false statement' at common law." *Ibid.* Moreover, we held that "Congress did not codify the crime of perjury or comparable common-law crimes in § 1014; . . . it simply consolidated 13 statutory provisions relating to financial institutions" to create a single regulatory offense. *Ibid.* Three of those 13 provisions, we observed, had contained express materiality requirements and lost them in the course of consolidation. *Id.*, at 492–493. From this fact, we inferred that "Congress deliberately dropped the term 'materiality' without intending materiality to be an element of § 1014." *Id.*, at 493. Here, by contrast, it is clear that Congress' aim was to codify the common-law offenses of bank robbery and bank larceny; that intent to steal was an element of common-law robbery brought into § 2113(a) via the word "feloniously"; and that Congress' deletion of that word was not intended to have any substantive effect, much less to dispense with the requirement of intent to steal.

Having accepted the Government's argument concerning intent to steal, the Court goes on to agree with the Government that robbery, unlike larceny, does not require that

the defendant carry away the property. As with intent to steal, the historical linkage of the two crimes reveals the Court's error. It is true that § 2113(b) includes the phrase "takes and carries away" while § 2113(a) says only "takes." Both crimes, however, included an asportation requirement at common law. See *supra,* at 279. Indeed, the text of §§ 2113(a) and (b)—which the Court maintains must be the primary focus of lesser included offense analysis—mirrors the language of the common law quite precisely. At common law, larceny was typically described as a crime involving both a "taking" and a "*carrying away.*" See 4 Blackstone 231 (helpfully reminding us that "*cepit et asportavit* was the old law-latin"). Robbery, on the other hand, was often defined in "somewhat undetailed language," LaFave & Scott § 8.11, at 438, n. 6, that made no mention of "carrying away," see 4 Blackstone 231, but was nevertheless consistently interpreted to encompass an element of asportation. The Court overlooks completely this feature of the common-law terminology. I note, moreover, that the asportation requirement, both at common law and under § 2113, is an extremely modest one: even a slight movement will do. See LaFave & Scott § 8.11, at 439; 2 Russell & Greaves, Crimes and Misdemeanors, at *152–*153. The text of §§ 2113(a) and (b) thus tracks the common law. The Court's conclusory statement notwithstanding, nothing in the evolution of the statute suggests that "Congress adopted a different view in § 2113(a)," *ante,* at 272, deliberately doing away with the minimal asportation requirement in prosecutions for bank robbery. I would hold, therefore, that both crimes continue to contain an asportation requirement.

Finally, the Court concludes that the "value exceeding $1,000" requirement of the first paragraph of § 2113(b) is an element of the offense described in that paragraph. I agree with this conclusion and with the reasoning in support of it. See *ante,* at 273. It bears emphasis, however, that the lesser degree of bank larceny defined in § 2113(b)'s second para-

graph contains no dollar value element even arguably impeding its classification as a lesser included offense of bank robbery. The Government does not contend that the "value not exceeding $1,000" component of that paragraph is an element of the misdemeanor offense, and such a contention would make scant sense. Surely Congress did not intend that a defendant charged only with the lower grade of bank larceny could successfully defend against that charge by showing that he stole *more* than $1,000. In other words, if a defendant commits larceny without exhibiting the distinguishing characteristics of robbery (force and violence, or intimidation), he has necessarily committed at least the lesser degree of larceny, whether he has taken $500 or $5,000. Under *Schmuck*, then, a defendant charged with bank robbery in violation of § 2113(a) is not barred as a matter of law from obtaining a jury instruction on bank larceny as defined in the second paragraph of § 2113(b).

I see no reason why a defendant charged with bank robbery, which securely encompasses as a lesser included offense the statutory equivalent of petit larceny, should automatically be denied an instruction on the statutory equivalent of grand larceny if he wants one. It is clear that petit and grand larceny were two grades of the same offense at common law. See 4 Blackstone 229 (petit and grand larceny are "considerably distinguished in their punishment, but not otherwise"). And, as earlier explained, *supra*, at 278–279, robbery at common law was an aggravated form of that single offense. One of the key purposes of *Schmuck*'s elements test is to allow easy comparison between two discrete crimes. See 489 U. S., at 720–721. That purpose would be frustrated if an element that exists only to distinguish a more culpable from a less culpable grade of the same crime were sufficient to prevent the defendant from getting a lesser included offense instruction as to the more culpable grade. I would therefore hold that a defendant charged with the felony of bank robbery is not barred as a matter of

law from requesting and receiving an instruction describing as a lesser included offense the felony grade of bank larceny.[7]

To be sure, any request by the defendant for an instruction covering the higher grade of bank larceny would be tantamount to a waiver of his right to notice by indictment of the "value exceeding $1,000" element. See *Stirone* v. *United States*, 361 U. S. 212, 215 (1960) (Fifth Amendment requires the Government to get a grand jury indictment before it may prosecute any felony). The constitutional requirement of notice would likely prevent the prosecution from obtaining the same instruction without the defendant's consent. I would limit any such asymmetry, however, to the unusual circumstance presented here, where an element serves only to distinguish a more culpable from a less culpable grade of the very same common-law crime and where the less culpable grade is, in turn, a lesser included offense of the crime charged.

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In sum, I would hold that a defendant charged with bank robbery as defined in 18 U. S. C. § 2113(a) is not barred as a matter of law from obtaining a jury instruction on bank larceny as defined in 18 U. S. C. § 2113(b). In reaching the opposite conclusion, the Court gives short shrift to the common-law origin and statutory evolution of § 2113. The Court's woodenly literal construction gives rise to practical anomalies, see *supra*, at 276, and n. 1, and effectively shrinks the jury's choices while enlarging the prosecutor's options. I dissent.

[7] The court could instruct the jury as to the common elements of both grades of bank larceny, and then add that in order to return a conviction of the higher grade, the jury must also find that the value of the stolen property exceeded $1,000. See Tr. of Oral Arg. 35; 3 L. Sand, J. Siffert, W. Loughlin, & S. Reiss, Modern Federal Jury Instructions ¶ 53.03, p. 53–55 (1999) ("The issue of valuation should be considered by the jury only after they have determined that the defendant is guilty of some type of bank larceny within the meaning of section 2113(b).").

Syllabus

SANTA FE INDEPENDENT SCHOOL DISTRICT *v.* DOE, INDIVIDUALLY AND AS NEXT FRIEND FOR HER MINOR CHILDREN, ET AL.

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

No. 99–62. Argued March 29, 2000—Decided June 19, 2000

Prior to 1995, a student elected as Santa Fe High School's student council chaplain delivered a prayer over the public address system before each home varsity football game. Respondents, Mormon and Catholic students or alumni and their mothers, filed a suit challenging this practice and others under the Establishment Clause of the First Amendment. While the suit was pending, petitioner school district (District) adopted a different policy, which authorizes two student elections, the first to determine whether "invocations" should be delivered at games, and the second to select the spokesperson to deliver them. After the students held elections authorizing such prayers and selecting a spokesperson, the District Court entered an order modifying the policy to permit only nonsectarian, nonproselytizing prayer. The Fifth Circuit held that, even as modified by the District Court, the football prayer policy was invalid.

Held: The District's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause. Pp. 301–317.

(a) The Court's analysis is guided by the principles endorsed in *Lee* v. *Weisman*, 505 U. S. 577. There, in concluding that a prayer delivered by a rabbi at a graduation ceremony violated the Establishment Clause, the Court held that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way that establishes a state religion or religious faith, or tends to do so, *id.*, at 587. The District argues unpersuasively that these principles are inapplicable because the policy's messages are private student speech, not public speech. The delivery of a message such as the invocation here—on school property, at school-sponsored events, over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as "private" speech. Although the District relies heavily on this Court's cases addressing public forums, *e. g.*, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, it is clear that the District's

pregame ceremony is not the type of forum discussed in such cases. The District simply does not evince an intent to open its ceremony to indiscriminate use by the student body generally, see, *e. g.*, *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260, 270, but, rather, allows only one student, the same student for the entire season, to give the invocation, which is subject to particular regulations that confine the content and topic of the student's message. The majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced. See *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 235. Moreover, the District has failed to divorce itself from the invocations' religious content. The policy involves both perceived and actual endorsement of religion, see *Lee*, 505 U. S., at 590, declaring that the student elections take place because the District "has chosen to permit" student-delivered invocations, that the invocation "shall" be conducted "by the high school student council" "[u]pon advice and direction of the high school principal," and that it must be consistent with the policy's goals, which include "solemniz[ing] the event." A religious message is the most obvious method of solemnizing an event. Indeed, the only type of message expressly endorsed in the policy is an "invocation," a term which primarily describes an appeal for divine assistance and, as used in the past at Santa Fe High School, has always entailed a focused religious message. A conclusion that the message is not "private speech" is also established by factors beyond the policy's text, including the official setting in which the invocation is delivered, see, *e. g.*, *Wallace* v. *Jaffree*, 472 U. S. 38, 73, 76, by the policy's sham secular purposes, see *id.*, at 75, and by its history, which indicates that the District intended to preserve its long-sanctioned practice of prayer before football games, see *Lee*, 505 U. S., at 596. Pp. 301–310.

(b) The Court rejects the District's argument that its policy is distinguishable from the graduation prayer in *Lee* because it does not coerce students to participate in religious observances. The first part of this argument—that there is no impermissible government coercion because the pregame messages are the product of student choices—fails for the reasons discussed above explaining why the mechanism of the dual elections and student speaker do not turn public speech into private speech. The issue resolved in the first election was whether a student would deliver prayer at varsity football games, and the controversy in this case demonstrates that the students' views are not unanimous on that issue. One of the Establishment Clause's purposes is to remove debate over this kind of issue from governmental supervision or control. See *Lee*, 505 U. S., at 589. Although the ultimate choice of student speaker is attributable to the students, the District's de-

cision to hold the constitutionally problematic election is clearly a choice attributable to the State, *id.*, at 587. The second part of the District's argument—that there is no coercion here because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary—is unpersuasive. For some students, such as cheerleaders, members of the band, and the team members themselves, attendance at football games is mandated, sometimes for class credit. The District's argument also minimizes the immense social pressure, or truly genuine desire, felt by many students to be involved in the extracurricular event that is American high school football. *Id.*, at 593. The Constitution demands that schools not force on students the difficult choice between attending these games and avoiding personally offensive religious rituals. See *id.*, at 596. Pp. 310–313.

(c) The Court also rejects the District's argument that respondents' facial challenge to the policy necessarily must fail because it is premature: No invocation has as yet been delivered under the policy. This argument assumes that the Court is concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship because she chooses to attend a school event. But the Constitution also requires that the Court keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded, *Lynch* v. *Donnelly*, 465 U. S. 668, 694, and guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. See, *e. g.*, *Bowen* v. *Kendrick*, 487 U. S. 589, 602; *Lemon* v. *Kurtzman*, 403 U. S. 602, 612. As discussed above, the policy's text and the circumstances surrounding its enactment reveal that it has such a purpose. Another constitutional violation warranting the Court's attention is the District's implementation of an electoral process that subjects the issue of prayer to a majoritarian vote. Through its election scheme, the District has established a governmental mechanism that turns the school into a forum for religious debate and empowers the student body majority to subject students of minority views to constitutionally improper messages. The award of that power alone is not acceptable. Cf. *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217. For the foregoing reasons, the policy is invalid on its face. Pp. 313–317.

168 F. 3d 806, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST,

Syllabus

C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 318.

Jay Alan Sekulow argued the cause for petitioner. With him on the briefs were *Colby M. May*, *James M. Henderson, Sr.*, *Mark N. Troobnick*, *Walter M. Weber*, *Paul D. Clement*, *John G. Stepanovich*, *Thomas P. Monaghan*, *Stuart J. Roth*, *John P. Tuskey*, *Joel H. Thornton*, *David A. Cortman*, and *Kelly Shackelford*.

John Cornyn, Attorney General of Texas, argued the cause for the State of Texas et al. as *amici curiae* urging reversal. With him on the brief were *Andy Taylor*, First Assistant Attorney General, *Linda S. Eads*, Deputy Attorney General, *Gregory S. Coleman*, Solicitor General, *Julie Caruthers Parsley*, Deputy Solicitor General, and *Meredith B. Parenti*, Assistant Solicitor General.

Anthony P. Griffin argued the cause for respondents. With him on the briefs were *Douglas Laycock* and *Steven R. Shapiro*.*

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*Briefs of *amici curiae* urging reversal were filed for the Christian Legal Society by *Steffen N. Johnson*, *Stephen M. Shapiro*, *Michael W. McConnell*, and *Kimberlee W. Colby;* for Liberty Counsel et al. by *Mathew D. Staver* and *Jerry Falwell, Jr.;* for the Northstar Legal Center by *Jordan W. Lorence;* for Spearman Independent School District et al. by *Roger D. Hepworth;* for the Texas Association of School Boards Legal Assistance Fund by *David M. Feldman* and *Myra C. Schexnayder;* for the Texas Justice Foundation et al. by *Linda L. Schlueter;* for Senator James M. Inhofe et al. by *Barry C. Hodge;* for Congressman Steve Largent et al. by *Brett M. Kavanaugh;* for Marian Ward et al. by *Kelly J. Coghlan;* and for Texas Public School Students et al. by *John L. Carter*.

Briefs of *amici curiae* urging affirmance were filed for the American Jewish Congress et al. by *Walter E. Dellinger* and *Marc D. Stern;* and for the Baptist Joint Committee on Public Affairs et al. by *Derek H. Davis* and *Melissa Rogers*.

Briefs of *amici curiae* were filed for the Rutherford Institute by *John W. Whitehead*, *Steven H. Aden*, and *James A. Hayes, Jr.;* and for the Student Press Law Center by *Richard A. Simpson* and *S. Mark Goodman*.

JUSTICE STEVENS delivered the opinion of the Court.

Prior to 1995, the Santa Fe High School student who occupied the school's elective office of student council chaplain delivered a prayer over the public address system before each varsity football game for the entire season. This practice, along with others, was challenged in District Court as a violation of the Establishment Clause of the First Amendment. While these proceedings were pending in the District Court, the school district adopted a different policy that permits, but does not require, prayer initiated and led by a student at all home games. The District Court entered an order modifying that policy to permit only nonsectarian, nonproselytizing prayer. The Court of Appeals held that, even as modified by the District Court, the football prayer policy was invalid. We granted the school district's petition for certiorari to review that holding.

I

The Santa Fe Independent School District (District) is a political subdivision of the State of Texas, responsible for the education of more than 4,000 students in a small community in the southern part of the State. The District includes the Santa Fe High School, two primary schools, an intermediate school and the junior high school. Respondents are two sets of current or former students and their respective mothers. One family is Mormon and the other is Catholic. The District Court permitted respondents (Does) to litigate anonymously to protect them from intimidation or harassment.[1]

[1] A decision, the Fifth Circuit Court of Appeals noted, that many District officials "apparently neither agreed with nor particularly respected." 168 F. 3d 806, 809, n. 1 (CA5 1999). About a month after the complaint was filed, the District Court entered an order that provided, in part:

"[A]ny further attempt on the part of District or school administration, officials, counsellors, teachers, employees or servants of the School District, parents, students or anyone else, overtly or covertly to ferret out the identities of the Plaintiffs in this cause, by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping', will

Respondents commenced this action in April 1995 and moved for a temporary restraining order to prevent the District from violating the Establishment Clause at the imminent graduation exercises. In their complaint the Does alleged that the District had engaged in several proselytizing practices, such as promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises. They also alleged that the District allowed students to read Christian invocations and benedictions from the stage at graduation ceremonies,[2] and to deliver overtly Christian prayers over the public address system at home football games.

On May 10, 1995, the District Court entered an interim order addressing a number of different issues.[3] With re-

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cease immediately. ANYONE TAKING ANY ACTION ON SCHOOL PROPERTY, DURING SCHOOL HOURS, OR WITH SCHOOL RESOURCES OR APPROVAL FOR PURPOSES OF ATTEMPTING TO ELICIT THE NAMES OR IDENTITIES OF THE PLAINTIFFS IN THIS CAUSE OF ACTION, BY OR ON BEHALF OF ANY OF THESE INDIVIDUALS, WILL FACE THE HARSHEST POSSIBLE CONTEMPT SANCTIONS FROM THIS COURT, AND MAY ADDITIONALLY FACE CRIMINAL LIABILITY. The Court wants these proceedings addressed on their merits, and not on the basis of intimidation or harassment of the participants on either side." App. 34–35.

[2] At the 1994 graduation ceremony the senior class president delivered this invocation:

"Please bow your heads.

"Dear heavenly Father, thank you for allowing us to gather here safely tonight. We thank you for the wonderful year you have allowed us to spend together as students of Santa Fe. We thank you for our teachers who have devoted many hours to each of us. Thank you, Lord, for our parents and may each one receive the special blessing. We pray also for a blessing and guidance as each student moves forward in the future. Lord, bless this ceremony and give us all a safe journey home. In Jesus' name we pray." *Id.*, at 19.

[3] For example, it prohibited school officials from endorsing or participating in the baccalaureate ceremony sponsored by the Santa Fe Ministerial Alliance, and ordered the District to establish policies to deal with

spect to the impending graduation, the order provided that "non-denominational prayer" consisting of "an invocation and/or benediction" could be presented by a senior student or students selected by members of the graduating class. The text of the prayer was to be determined by the students, without scrutiny or preapproval by school officials. References to particular religious figures "such as Mohammed, Jesus, Buddha, or the like" would be permitted "as long as the general thrust of the prayer is non-proselytizing." App. 32.

In response to that portion of the order, the District adopted a series of policies over several months dealing with prayer at school functions. The policies enacted in May and July for graduation ceremonies provided the format for the August and October policies for football games. The May policy provided:

> " 'The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be part of the graduation exercise. If so chosen the class shall elect by secret ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing

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"manifest First Amendment infractions of teachers, counsellors, or other District or school officials or personnel, such as ridiculing, berating or holding up for inappropriate scrutiny or examination the beliefs of any individual students. Similarly, the School District will establish or clarify existing procedures for excluding overt or covert sectarian and proselytizing religious teaching, such as the use of blatantly denominational religious terms in spelling lessons, denominational religious songs and poems in English or choir classes, denominational religious stories and parables in grammar lessons and the like, while at the same time allowing for frank and open discussion of moral, religious, and societal views and beliefs, which are non-denominational and non-judgmental." *Id.*, at 34.

> their graduation ceremonies.'" 168 F. 3d 806, 811 (CA5 1999) (emphasis deleted).

The parties stipulated that after this policy was adopted, "the senior class held an election to determine whether to have an invocation and benediction at the commencement [and that the] class voted, by secret ballot, to include prayer at the high school graduation." App. 52. In a second vote the class elected two seniors to deliver the invocation and benediction.[4]

In July, the District enacted another policy eliminating the requirement that invocations and benedictions be "nonsectarian and nonproselytising," but also providing that if the District were to be enjoined from enforcing that policy, the May policy would automatically become effective.

The August policy, which was titled "Prayer at Football Games," was similar to the July policy for graduations. It also authorized two student elections, the first to determine whether "invocations" should be delivered, and the second to select the spokesperson to deliver them. Like the July policy, it contained two parts, an initial statement that omitted any requirement that the content of the invocation be "nonsectarian and nonproselytising," and a fallback provision that automatically added that limitation if the preferred policy should be enjoined. On August 31, 1995, according to the parties' stipulation: "[T]he district's high school students voted to determine whether a student would deliver prayer at varsity football games. . . . The students chose to allow a

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[4] The student giving the invocation thanked the Lord for keeping the class safe through 12 years of school and for gracing their lives with two special people and closed: "Lord, we ask that You keep Your hand upon us during this ceremony and to help us keep You in our hearts through the rest of our lives. In God's name we pray. Amen." *Id.*, at 53. The student benediction was similar in content and closed: "Lord, we ask for Your protection as we depart to our next destination and watch over us as we go our separate ways. Grant each of us a safe trip and keep us secure throughout the night. In Your name we pray. Amen." *Id.*, at 54.

student to say a prayer at football games." *Id.*, at 65. A week later, in a separate election, they selected a student "to deliver the prayer at varsity football games." *Id.*, at 66.

The final policy (October policy) is essentially the same as the August policy, though it omits the word "prayer" from its title, and refers to "messages" and "statements" as well as "invocations."[5] It is the validity of that policy that is before us.[6]

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[5] Despite these changes, the school did not conduct another election, under the October policy, to supersede the results of the August policy election.

[6] It provides:

"STUDENT ACTIVITIES:

"PRE-GAME CEREMONIES AT FOOTBALL GAMES

"The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

"Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

"If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

"The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

"Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a mes-

The District Court did enter an order precluding enforcement of the first, open-ended policy. Relying on our decision in *Lee* v. *Weisman*, 505 U. S. 577 (1992), it held that the school's "action must not 'coerce anyone to support or participate in' a religious exercise." App. to Pet. for Cert. E7. Applying that test, it concluded that the graduation prayers appealed "to distinctively Christian beliefs,"[7] and that delivering a prayer "over the school's public address system prior to each football and baseball game coerces student participation in religious events."[8] Both parties appealed, the District contending that the enjoined portion of the October policy was permissible and the Does contending that both alternatives violated the Establishment Clause. The Court of Appeals majority agreed with the Does.

The decision of the Court of Appeals followed Fifth Circuit precedent that had announced two rules. In *Jones* v. *Clear Creek Independent School Dist.*, 977 F. 2d 963 (1992), that court held that student-led prayer that was approved by a vote of the students and was nonsectarian and nonproselytizing was permissible at high school graduation ceremonies. On the other hand, in later cases the Fifth Circuit made it clear that the *Clear Creek* rule applied only to high school

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sage or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing." *Id.*, at 104–105.

[7] "The graduation prayers at issue in the instant case, in contrast, are infused with explicit references to Jesus Christ and otherwise appeal to distinctively Christian beliefs. The Court accordingly finds that use of these prayers during graduation ceremonies, considered in light of the overall manner in which they were delivered, violated the Establishment Clause." App. to Pet. for Cert. E8.

[8] *Id.*, at E8–E9.

graduations and that school-encouraged prayer was constitutionally impermissible at school-related sporting events. Thus, in *Doe* v. *Duncanville Independent School Dist.*, 70 F. 3d 402 (1995), it had described a high school graduation as "a significant, once in-a-lifetime event" to be contrasted with athletic events in "a setting that is far less solemn and extraordinary." *Id.*, at 406–407.[9]

In its opinion in this case, the Court of Appeals explained:

> "The controlling feature here is the same as in *Duncanville:* The prayers are to be delivered *at football games*—hardly the sober type of annual event that can be appropriately solemnized with prayer. The distinction to which [the District] points is simply one without difference. Regardless of whether the prayers are selected by vote or spontaneously initiated at these frequently-recurring, informal, school-sponsored events, school officials are present and have the authority to stop the prayers. Thus, as we indicated in *Duncanville*, our decision in *Clear Creek II* hinged on the singular context and singularly serious nature of a graduation ceremony. Outside that nurturing context, a Clear Creek Prayer Policy cannot survive. We therefore reverse the district court's holding that [the District's] alternative Clear Creek Prayer Policy can be extended to football games, irrespective of the presence of the nonsectarian, nonproselytizing restrictions." 168 F. 3d, at 823.

The dissenting judge rejected the majority's distinction between graduation ceremonies and football games. In his

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[9] Because the dissent overlooks this case, it incorrectly assumes that a "prayer-only policy" at football games was permissible in the Fifth Circuit. See *post*, at 323 (opinion of REHNQUIST, C. J.).

opinion the District's October policy created a limited public forum that had a secular purpose[10] and provided neutral accommodation of noncoerced, private, religious speech.[11]

We granted the District's petition for certiorari, limited to the following question: "Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause." 528 U. S. 1002 (1999). We conclude, as did the Court of Appeals, that it does.

II

The first Clause in the First Amendment to the Federal Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions. *Wallace* v. *Jaffree*, 472 U. S. 38, 49–50 (1985). In *Lee* v. *Weisman*, 505 U. S. 577 (1992), we held that a prayer delivered by a rabbi at a middle school graduation ceremony violated that Clause. Although this case involves student prayer at a different

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[10] "There are in fact several secular reasons for allowing a brief, serious message before football games—some of which [the District] has listed in its policy. At sporting events, messages and/or invocations can promote, among other things, honest and fair play, clean competition, individual challenge to be one's best, importance of team work, and many more goals that the majority could conceive would it only pause to do so.

"Having again relinquished all editorial control, [the District] has created a limited public forum for the students to give brief statements or prayers concerning the value of those goals and the methods for achieving them." 168 F. 3d, at 835.

[11] "The majority fails to realize that what is at issue in this *facial challenge* to this school policy is the neutral accommodation of non-coerced, private, religious speech, which allows students, selected by students, to express their personal viewpoints. The state is not involved. The school board has neither scripted, supervised, endorsed, suggested, nor edited these personal viewpoints. Yet the majority imposes a judicial curse upon sectarian religious speech." *Id.*, at 836.

type of school function, our analysis is properly guided by the principles that we endorsed in *Lee*.

As we held in that case:

> "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Id.*, at 587 (citations omitted) (quoting *Lynch* v. *Donnelly*, 465 U. S. 668, 678 (1984)).

In this case the District first argues that this principle is inapplicable to its October policy because the messages are private student speech, not public speech. It reminds us that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 250 (1990) (opinion of O'CONNOR, J.). We certainly agree with that distinction, but we are not persuaded that the pregame invocations should be regarded as "private speech."

These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events. Of course, not every message delivered under such circumstances is the government's own. We have held, for example, that an individual's contribution to a government-created forum was not government speech. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995). Although the District relies heavily on *Rosenberger* and similar cases involving such

forums,[12] it is clear that the pregame ceremony is not the type of forum discussed in those cases.[13] The Santa Fe school officials simply do not "evince either 'by policy or by practice,' any intent to open the [pregame ceremony] to 'indiscriminate use,' . . . by the student body generally." *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260, 270 (1988) (quoting *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 47 (1983)). Rather, the school allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is subject to particular regulations that confine the content and topic of the student's message, see *infra*, at 306–307, 309. By comparison, in *Perry* we rejected a claim that the school had created a limited public forum in its school mail system despite the fact that it had allowed far more speakers to address a much broader range of topics than the policy at issue here.[14] As we concluded in *Perry*, "selective access does not transform government property into a public forum." 460 U. S., at 47.

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[12] See, *e. g.*, Brief for Petitioner 44–48, citing *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995) (limited public forum); *Widmar* v. *Vincent*, 454 U. S. 263 (1981) (limited public forum); *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753 (1995) (traditional public forum); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993) (limited public forum). Although the District relies on these public forum cases, it does not actually argue that the pregame ceremony constitutes such a forum.

[13] A conclusion that the District had created a public forum would help shed light on whether the resulting speech is public or private, but we also note that we have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause. See, *e. g.*, *Pinette*, 515 U. S., at 772 (O'Connor, J., concurring in part and concurring in judgment) ("I see no necessity to carve out . . . an exception to the endorsement test for the public forum context").

[14] The school's internal mail system in *Perry* was open to various private organizations such as "[l]ocal parochial schools, church groups, YMCA's, and Cub Scout units." 460 U. S., at 39, n. 2.

Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum. Here, however, Santa Fe's student election system ensures that only those messages deemed "appropriate" under the District's policy may be delivered. That is, the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.

Recently, in *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217 (2000), we explained why student elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits are constitutionally problematic:

> "To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here." *Id.*, at 235.

Like the student referendum for funding in *Southworth*, this student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority.[15] Because "fundamental rights may not be

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[15] If instead of a choice between an invocation and no pregame message, the first election determined whether a political speech should be made, and the second election determined whether the speaker should be a Democrat or a Republican, it would be rather clear that the public address system was being used to deliver a partisan message reflecting the viewpoint of the majority rather than a random statement by a private individual.

The fact that the District's policy provides for the election of the speaker only after the majority has voted on her message identifies an obvious distinction between this case and the typical election of a "stu-

submitted to vote; they depend on the outcome of no elections," *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943), the District's elections are insufficient safeguards of diverse student speech.

In *Lee*, the school district made the related argument that its policy of endorsing only "civic or nonsectarian" prayer was acceptable because it minimized the intrusion on the audience as a whole. We rejected that claim by explaining that such a majoritarian policy "does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront." 505 U. S., at 594. Similarly, while Santa Fe's majoritarian election might ensure that *most* of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense.

Moreover, the District has failed to divorce itself from the religious content in the invocations. It has not succeeded in doing so, either by claiming that its policy is "'one of neutrality rather than endorsement'"[16] or by characterizing the individual student as the "circuit-breaker"[17] in the process. Contrary to the District's repeated assertions that it has adopted a "hands-off" approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee*, the "degree of school involvement" makes it clear that the pregame prayers bear "the imprint of the State and thus put school-age children who objected in an untenable position." *Id.*, at 590.

The District has attempted to disentangle itself from the religious messages by developing the two-step student

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dent body president, or even a newly elected prom king or queen." *Post*, at 321.

[16] Brief for Petitioner 19 (quoting *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 248 (1990) (plurality opinion)).

[17] Tr. of Oral Arg. 7.

election process. The text of the October policy, however, exposes the extent of the school's entanglement. The elections take place at all only because the school "board *has chosen to permit* students to deliver a brief invocation and/or message." App. 104 (emphasis added). The elections thus "shall" be conducted "by the high school student council" and "[u]pon advice and direction of the high school principal." *Id.*, at 104–105. The decision whether to deliver a message is first made by majority vote of the entire student body, followed by a choice of the speaker in a separate, similar majority election. Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the "statement or invocation" be "consistent with the goals and purposes of this policy," which are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." *Ibid.*

In addition to involving the school in the selection of the speaker, the policy, by its terms, invites and encourages religious messages. The policy itself states that the purpose of the message is "to solemnize the event." A religious message is the most obvious method of solemnizing an event. Moreover, the requirements that the message "promote good sportsmanship" and "establish the appropriate environment for competition" further narrow the types of message deemed appropriate, suggesting that a solemn, yet nonreligious, message, such as commentary on United States foreign policy, would be prohibited.[18] Indeed, the only type of message that is expressly endorsed in the text is an "invocation"—a term that primarily describes an appeal for divine

[18] THE CHIEF JUSTICE's hypothetical of the student body president asked by the school to introduce a guest speaker with a biography of her accomplishments, see *post*, at 325 (dissenting opinion), obviously would pose no problems under the Establishment Clause.

assistance.[19] In fact, as used in the past at Santa Fe High School, an "invocation" has always entailed a focused religious message. Thus, the expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy. The results of the elections described in the parties' stipulation[20] make it clear that the students understood that the central question before them was whether prayer should be a part of the pregame ceremony.[21] We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions' significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment.

The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, which remains subject to the control of school officials. It is fair to assume that the pregame ceremony is

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[19] See, *e. g.*, Webster's Third New International Dictionary 1190 (1993) (defining "invocation" as "a prayer of entreaty that is usu[ally] a call for the divine presence and is offered at the beginning of a meeting or service of worship").

[20] See *supra*, at 297–298, and n. 4.

[21] Even if the plain language of the October policy were facially neutral, "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S., at 777 (O'Connor, J., concurring in part and concurring in judgment); see also *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 534–535 (1993) (making the same point in the Free Exercise Clause context).

clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that "[t]he board has chosen to permit" the elected student to rise and give the "statement or invocation."

In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. In cases involving state participation in a religious activity, one of the relevant questions is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." *Wallace*, 472 U. S., at 73, 76 (O'CONNOR, J., concurring in judgment); see also *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 777 (1995) (O'CONNOR, J., concurring in part and concurring in judgment). Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.

The text and history of this policy, moreover, reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school. When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to "distinguis[h] a sham secular purpose from a sincere one." *Wallace*, 472 U. S., at 75 (O'CONNOR, J., concurring in judgment).

According to the District, the secular purposes of the policy are to "foste[r] free expression of private persons . . . as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis[h] an appropriate environment for competition." Brief for Petitioner 14. We note, however, that the District's approval of only one specific kind of message, an "invocation," is not necessary to further any of these purposes. Additionally, the fact that only one student is permitted to give a content-limited message suggests that this policy does little to "foste[r] free expression." Furthermore, regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school. And it is unclear what type of message would be both appropriately "solemnizing" under the District's policy and yet nonreligious.

Most striking to us is the evolution of the current policy from the long-sanctioned office of "Student Chaplain" to the candidly titled "Prayer at Football Games" regulation. This history indicates that the District intended to preserve the practice of prayer before football games. The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy. Given these observations, and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular "state-sponsored religious practice." *Lee*, 505 U. S., at 596.

School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherants "that they are outsiders, not full members of the political community, and an ac-

companying message to adherants that they are insiders, favored members of the political community." *Lynch*, 465 U. S., at 688 (O'CONNOR, J., concurring). The delivery of such a message—over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as "private" speech.

III

The District next argues that its football policy is distinguishable from the graduation prayer in *Lee* because it does not coerce students to participate in religious observances. Its argument has two parts: first, that there is no impermissible government coercion because the pregame messages are the product of student choices; and second, that there is really no coercion at all because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary.

The reasons just discussed explaining why the alleged "circuit-breaker" mechanism of the dual elections and student speaker do not turn public speech into private speech also demonstrate why these mechanisms do not insulate the school from the coercive element of the final message. In fact, this aspect of the District's argument exposes anew the concerns that are created by the majoritarian election system. The parties' stipulation clearly states that the issue resolved in the first election was "whether a student would deliver prayer at varsity football games," App. 65, and the controversy in this case demonstrates that the views of the students are not unanimous on that issue.

One of the purposes served by the Establishment Clause is to remove debate over this kind of issue from governmental supervision or control. We explained in *Lee* that the "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere." 505 U. S., at 589. The two student elections au-

thorized by the policy, coupled with the debates that presumably must precede each, impermissibly invade that private sphere. The election mechanism, when considered in light of the history in which the policy in question evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games. The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause. Although it is true that the ultimate choice of student speaker is "attributable to the students," Brief for Petitioner 40, the District's decision to hold the constitutionally problematic election is clearly "a choice attributable to the State," *Lee,* 505 U. S., at 587.

The District further argues that attendance at the commencement ceremonies at issue in *Lee* "differs dramatically" from attendance at high school football games, which it contends "are of no more than passing interest to many students" and are "decidedly extracurricular," thus dissipating any coercion. Brief for Petitioner 41. Attendance at a high school football game, unlike showing up for class, is certainly not required in order to receive a diploma. Moreover, we may assume that the District is correct in arguing that the informal pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony.

There are some students, however, such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit. The District also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience. As we noted in *Lee*, "[l]aw reaches past formalism." 505 U. S., at 595. To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is "formalistic in the extreme." *Ibid.* We stressed in *Lee* the

obvious observation that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." *Id.*, at 593. High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students for "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Id.*, at 596.

Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship. For "the government may no more use social pressure to enforce orthodoxy than it may use more direct means." *Id.*, at 594. As in *Lee*, "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Id.*, at 592. The constitutional command will not permit the District "to exact religious conformity from a student as the price" of joining her classmates at a varsity football game.[22]

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[22] "We think the Government's position that this interest suffices to force students to choose between compliance or forfeiture demonstrates fundamental inconsistency in its argumentation. It fails to acknowledge that what for many of Deborah's classmates and their parents was a spiritual

The Religion Clauses of the First Amendment prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools. See, *e. g., Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 395 (1993); *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226 (1990); *Wallace*, 472 U. S., at 59. Indeed, the common purpose of the Religion Clauses "is to secure religious liberty." *Engel* v. *Vitale*, 370 U. S. 421, 430 (1962). Thus, nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.

IV

Finally, the District argues repeatedly that the Does have made a premature facial challenge to the October policy that necessarily must fail. The District emphasizes, quite correctly, that until a student actually delivers a solemnizing message under the latest version of the policy, there can be no certainty that any of the statements or invocations will be religious. Thus, it concludes, the October policy necessarily survives a facial challenge.

This argument, however, assumes that we are concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious wor-

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imperative was for Daniel and Deborah Weisman religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands." *Lee*, 505 U. S., at 595–596.

ship because she chooses to attend a school event. But the Constitution also requires that we keep in mind "the myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch*, 465 U. S., at 694 (O'CONNOR, J., concurring), and that we guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. Another is the implementation of a governmental electoral process that subjects the issue of prayer to a majoritarian vote.

The District argues that the facial challenge must fail because "Santa Fe's Football Policy cannot be invalidated on the basis of some 'possibility or even likelihood' of an unconstitutional application." Brief for Petitioner 17 (quoting *Bowen* v. *Kendrick*, 487 U. S. 589, 613 (1988)). Our Establishment Clause cases involving facial challenges, however, have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose. Writing for the Court in *Bowen*, THE CHIEF JUSTICE concluded that "[a]s in previous cases involving facial challenges on Establishment Clause grounds, *e. g.*, *Edwards* v. *Aguillard*, [482 U. S. 578 (1987)]; *Mueller* v. *Allen*, 463 U. S. 388 (1983), we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971) . . . , which guides '[t]he general nature of our inquiry in this area,' *Mueller* v. *Allen*, *supra*, at 394." 487 U. S., at 602. Under the *Lemon* standard, a court must invalidate a statute if it lacks "a secular legislative purpose." *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971). It is therefore proper, as part of this facial challenge, for us to examine the purpose of the October policy.

As discussed, *supra*, at 306–307, 309, the text of the October policy alone reveals that it has an unconstitutional purpose. The plain language of the policy clearly spells out the extent of school involvement in both the election of the speaker

and the content of the message. Additionally, the text of the October policy specifies only one, clearly preferred message—that of Santa Fe's traditional religious "invocation." Finally, the extremely selective access of the policy and other content restrictions confirm that it is not a content-neutral regulation that creates a limited public forum for the expression of student speech. Our examination, however, need not stop at an analysis of the text of the policy.

This case comes to us as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause. One of those practices was the District's long-established tradition of sanctioning student-led prayer at varsity football games. The narrow question before us is whether implementation of the October policy insulates the continuation of such prayers from constitutional scrutiny. It does not. Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment. Whether a government activity violates the Establishment Clause is "in large part a legal question to be answered on the basis of judicial interpretation of social facts. . . . Every government practice must be judged in its unique circumstances . . . ." *Lynch*, 465 U. S., at 693–694 (O'CONNOR, J., concurring). Our discussion in the previous sections, *supra*, at 307–310, demonstrates that in this case the District's direct involvement with school prayer exceeds constitutional limits.

The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.

Therefore, the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation. We need not wait for the inevitable to confirm and magnify the constitutional injury. In *Wallace*, for example, we invalidated Alabama's as yet unimplemented and voluntary "moment of silence" statute based on our conclusion that it was enacted "for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day." 472 U. S., at 60; see also *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 532 (1993). Therefore, even if no Santa Fe High School student were ever to offer a religious message, the October policy fails a facial challenge because the attempt by the District to encourage prayer is also at issue. Government efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail.

This policy likewise does not survive a facial challenge because it impermissibly imposes upon the student body a majoritarian election on the issue of prayer. Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone, regardless of the students' ultimate use of it, is not acceptable.[23] Like the referendum in *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S.

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[23] THE CHIEF JUSTICE accuses us of "essentially invalidat[ing] all student elections," see *post*, at 321. This is obvious hyperbole. We have concluded that the resulting religious message under this policy would be attributable to the school, not just the student, see *supra*, at 301–310. For this reason, we now hold only that the District's decision to allow the student majority to control whether students of minority views are subjected to a school-sponsored prayer violates the Establishment Clause.

217 (2000), the election mechanism established by the District undermines the essential protection of minority viewpoints. Such a system encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise. Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred.[24] No further injury is required for the policy to fail a facial challenge.

To properly examine this policy on its face, we "must be deemed aware of the history and context of the community and forum," *Pinette*, 515 U. S., at 780 (O'CONNOR, J., concurring in part and concurring in judgment). Our examination of those circumstances above leads to the conclusion that this policy does not provide the District with the constitutional safe harbor it sought. The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.

The judgment of the Court of Appeals is, accordingly, affirmed.

It is so ordered.

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[24] THE CHIEF JUSTICE contends that we have "misconstrue[d] the nature . . . [of] the policy as being an election on 'prayer' and 'religion,'" *post*, at 320. We therefore reiterate that the District has stipulated to the facts that the most recent election was held "to determine whether a student would deliver *prayer* at varsity football games," that the "students chose to allow a student to say a *prayer* at football games," and that a second election was then held "to determine which student would deliver the *prayer*." App. 65–66 (emphases added). Furthermore, the policy was titled "*Prayer* at Football Games." *Id.*, at 99 (emphasis added). Although the District has since eliminated the word "prayer" from the policy, it apparently viewed that change as sufficiently minor as to make holding a new election unnecessary.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The Court distorts existing precedent to conclude that the school district's student-message program is invalid on its face under the Establishment Clause. But even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." Presidential Proclamation, 1 Messages and Papers of the Presidents, 1789–1897, p. 64 (J. Richardson ed. 1897).

We do not learn until late in the Court's opinion that respondents in this case challenged the district's student-message program at football games before it had been put into practice. As the Court explained in *United States* v. *Salerno*, 481 U. S. 739, 745 (1987), the fact that a policy might "operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." See also *Bowen* v. *Kendrick*, 487 U. S. 589, 612 (1988). While there is an exception to this principle in the First Amendment overbreadth context because of our concern that people may refrain from speech out of fear of prosecution, *Los Angeles Police Dept.* v. *United Reporting Publishing Corp.*, 528 U. S. 32, 38–40 (1999), there is no similar justification for Establishment Clause cases. No speech will be "chilled" by the existence of a government policy that might unconstitutionally endorse religion over nonreligion. Therefore, the question is not whether the district's policy *may be* applied in violation of the Establishment Clause, but whether it inevitably will be.

The Court, venturing into the realm of prophecy, decides that it "need not wait for the inevitable" and invalidates the district's policy on its face. See *ante*, at 316. To do so, it applies the most rigid version of the oft-criticized test of *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971).[1]

Lemon has had a checkered career in the decisional law of this Court. See, *e. g.*, *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 398–399 (1993) (SCALIA, J., concurring in judgment) (collecting opinions criticizing *Lemon*); *Wallace* v. *Jaffree*, 472 U. S. 38, 108–114 (1985) (REHNQUIST, J., dissenting) (stating that *Lemon*'s "three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service" (internal quotation marks omitted)); *Committee for Public Ed. and Religious Liberty* v. *Regan*, 444 U. S. 646, 671 (1980) (STEVENS, J., dissenting) (deriding "the sisyphean task of trying to patch together the blurred, indistinct, and variable barrier described in *Lemon*"). We have even gone so far as to state that it has never been binding on us. *Lynch* v. *Donnelly*, 465 U. S. 668, 679 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. . . . In two cases, the Court did not even apply the *Lemon* 'test' [citing *Marsh*

[1] The Court rightly points out that in facial challenges in the Establishment Clause context, we have looked to *Lemon*'s three factors to "guid[e] [t]he general nature of our inquiry." *Ante*, at 314 (internal quotation marks omitted) (citing *Bowen* v. *Kendrick*, 487 U. S. 589, 602 (1988)). In *Bowen*, we looked to *Lemon* as such a guide and determined that a federal grant program was not invalid on its face, noting that "[i]t has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds." 487 U. S., at 612 (internal quotation marks omitted). But here the Court, rather than looking to *Lemon* as a guide, applies *Lemon*'s factors stringently and ignores *Bowen*'s admonition that mere anticipation of unconstitutional applications does not warrant striking a policy on its face.

v. *Chambers*, 463 U. S. 783 (1983), and *Larson* v. *Valente*, 456 U. S. 228 (1982)]"). Indeed, in *Lee* v. *Weisman*, 505 U. S. 577 (1992), an opinion upon which the Court relies heavily today, we mentioned, but did not feel compelled to apply, the *Lemon* test. See also *Agostini* v. *Felton*, 521 U. S. 203, 233 (1997) (stating that *Lemon*'s entanglement test is merely "an aspect of the inquiry into a statute's effect"); *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973) (stating that the *Lemon* factors are "no more than helpful signposts").

Even if it were appropriate to apply the *Lemon* test here, the district's student-message policy should not be invalidated on its face. The Court applies *Lemon* and holds that the "policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events." *Ante*, at 317. The Court's reliance on each of these conclusions misses the mark.

First, the Court misconstrues the nature of the "majoritarian election" permitted by the policy as being an election on "prayer" and "religion."[2] See *ante*, at 314, 317. To the contrary, the election permitted by the policy is a two-fold process whereby students vote first on whether to have a student speaker before football games at all, and second, if the students vote to have such a speaker, on who that speaker will be. App. 104–105. It is conceivable that the election could become one in which student candidates campaign on platforms that focus on whether or not they will

[2] The Court attempts to support its misinterpretation of the nature of the election process by noting that the district stipulated to facts about the most recent election. See *ante*, at 317, n. 24. Of course, the most recent election was conducted under the *previous* policy—a policy that required an elected student speaker to give a pregame invocation. See App. 65–66, 99–100. There has not been an election under the policy at issue here, which expressly allows the student speaker to give a message as opposed to an invocation.

pray if elected. It is also conceivable that the election could lead to a Christian prayer before 90 percent of the football games. If, upon implementation, the policy operated in this fashion, we would have a record before us to review whether the policy, as applied, violated the Establishment Clause or unduly suppressed minority viewpoints. But it is possible that the students might vote not to have a pregame speaker, in which case there would be no threat of a constitutional violation. It is also possible that the election would not focus on prayer, but on public speaking ability or social popularity. And if student campaigning did begin to focus on prayer, the school might decide to implement reasonable campaign restrictions.[3]

But the Court ignores these possibilities by holding that merely granting the student body the power to elect a speaker that may choose to pray, "regardless of the students' ultimate use of it, is not acceptable." *Ante*, at 316. The Court so holds despite that any speech that may occur as a result of the election process here would be *private*, not *government*, speech. The elected student, not the government, would choose what to say. Support for the Court's holding cannot be found in any of our cases. And it essentially invalidates all student elections. A newly elected student body president, or even a newly elected prom king or queen, could use opportunities for public speaking to say prayers. Under the Court's view, the mere grant of power

[3] The Court's reliance on language regarding the student referendum in *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217 (2000), to support its conclusion with respect to the election process is misplaced. That case primarily concerned free speech, and, more particularly, mandated financial support of a public forum. But as stated above, if this case were in the "as applied" context and we were presented with the appropriate record, our language in *Southworth* could become more applicable. In fact, *Southworth* itself demonstrates the impropriety of making a decision with respect to the election process without a record of its operation. There we remanded in part for a determination of how the referendum functions. See *id.*, at 235–236.

to the students to vote for such offices, in light of the fear that those elected might publicly pray, violates the Establishment Clause.

Second, with respect to the policy's purpose, the Court holds that "the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation." *Ante,* at 316. But the policy itself has plausible secular purposes: "[T]o solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." App. 104–105. Where a governmental body "expresses a plausible secular purpose" for an enactment, "courts should generally defer to that stated intent." *Wallace,* 472 U. S., at 74–75 (O'CONNOR, J., concurring in judgment); see also *Mueller* v. *Allen,* 463 U. S. 388, 394–395 (1983) (stressing this Court's "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute"). The Court grants no deference to—and appears openly hostile toward—the policy's stated purposes, and wastes no time in concluding that they are a sham.

For example, the Court dismisses the secular purpose of solemnization by claiming that it "invites and encourages religious messages." *Ante,* at 306; Cf. *Lynch,* 465 U. S., at 693 (O'CONNOR, J., concurring) (discussing the "legitimate secular purposes of solemnizing public occasions"). The Court so concludes based on its rather strange view that a "religious message is the most obvious means of solemnizing an event." *Ante,* at 306. But it is easy to think of solemn messages that are not religious in nature, for example urging that a game be fought fairly. And sporting events often begin with a solemn rendition of our national anthem, with its concluding verse "And this be our motto: 'In God is our trust.'" Under the Court's logic, a public school that spon-

sors the singing of the national anthem before football games violates the Establishment Clause. Although the Court apparently believes that solemnizing football games is an illegitimate purpose, the voters in the school district seem to disagree. Nothing in the Establishment Clause prevents them from making this choice.[4]

The Court bases its conclusion that the true purpose of the policy is to endorse student prayer on its view of the school district's history of Establishment Clause violations and the context in which the policy was written, that is, as "the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause." *Ante,* at 308–309, 315. But the context—attempted compliance with a District Court order—actually demonstrates that the school district was acting diligently to come within the governing constitutional law. The District Court ordered the school district to formulate a policy consistent with Fifth Circuit precedent, which permitted a school district to have a prayer-only policy. See *Jones* v. *Clear Creek Independent School Dist.*, 977 F. 2d 963 (CA5 1992). But the school district went further than required by the District Court order and eventually settled on a policy that gave the student speaker a choice to deliver either an

[4] The Court also determines that the use of the term "invocation" in the policy is an express endorsement of that type of message over all others. See *ante,* at 306–307. A less cynical view of the policy's text is that it permits many types of messages, including invocations. That a policy tolerates religion does not mean that it improperly endorses it. Indeed, as the majority reluctantly admits, the Free Exercise Clause mandates such tolerance. See *ante,* at 313 ("[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday"); see also *Lynch* v. *Donnelly,* 465 U. S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

invocation or a message. In so doing, the school district exhibited a willingness to comply with, and exceed, Establishment Clause restrictions. Thus, the policy cannot be viewed as having a sectarian purpose.[5]

The Court also relies on our decision in *Lee* v. *Weisman*, 505 U. S. 577 (1992), to support its conclusion. In *Lee*, we concluded that the content of the speech at issue, a graduation prayer given by a rabbi, was "directed and controlled" by a school official. *Id.*, at 588. In other words, at issue in *Lee* was *government* speech. Here, by contrast, the potential speech at issue, if the policy had been allowed to proceed, would be a message or invocation selected or created by a student. That is, if there were speech at issue here, it would be *private* speech. The "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," applies with particular force to the question of endorsement. *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 250 (1990) (plurality opinion) (emphasis in original).

Had the policy been put into practice, the students may have chosen a speaker according to wholly secular criteria—like good public speaking skills or social popularity—and the student speaker may have chosen, on her own accord, to deliver a religious message. Such an application of the policy

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[5] *Wallace* v. *Jaffree*, 472 U. S. 38 (1985), is distinguishable on these grounds. There we struck down an Alabama statute that added an express reference to prayer to an existing statute providing a moment of silence for meditation. *Id.*, at 59. Here the school district added a secular alternative to a policy that originally provided only for prayer. More importantly, in *Wallace*, there was "unrebutted evidence" that pointed to a wholly religious purpose, *id.*, at 58, and Alabama "conceded in the courts below that the purpose of the statute was to make prayer part of daily classroom activity," *id.*, at 77–78 (O'CONNOR, J., concurring in judgment). There is no such evidence or concession here.

would likely pass constitutional muster. See *Lee*, *supra*, at 630, n. 8 (SOUTER, J., concurring) ("If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would be harder to attribute an endorsement of religion to the State").

Finally, the Court seems to demand that a government policy be completely neutral as to content or be considered one that endorses religion. See *ante*, at 305. This is undoubtedly a new requirement, as our Establishment Clause jurisprudence simply does not mandate "content neutrality." That concept is found in our First Amendment *speech* cases and is used as a guide for determining when we apply strict scrutiny. For example, we look to "content neutrality" in reviewing loudness restrictions imposed on speech in public forums, see *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989), and regulations against picketing, see *Boos* v. *Barry*, 485 U. S. 312 (1988). The Court seems to think that the fact that the policy is not content neutral somehow controls the Establishment Clause inquiry. See *ante*, at 305.

But even our speech jurisprudence would not require that all public school actions with respect to student speech be content neutral. See, *e. g.*, *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675 (1986) (allowing the imposition of sanctions against a student speaker who, in nominating a fellow student for elective office during an assembly, referred to his candidate in terms of an elaborate sexually explicit metaphor). Schools do not violate the First Amendment every time they restrict student speech to certain categories. But under the Court's view, a school policy under which the student body president is to solemnize the graduation ceremony by giving a favorable introduction to the guest speaker would be facially unconstitutional. Solemnization "invites and encourages" prayer and the policy's content limitations

prohibit the student body president from giving a solemn, yet nonreligious, message like "commentary on United States foreign policy." See *ante*, at 306.

The policy at issue here may be applied in an unconstitutional manner, but it will be time enough to invalidate it if that is found to be the case. I would reverse the judgment of the Court of Appeals.

Syllabus

MILLER, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY, ET AL. *v.* FRENCH ET AL.

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

No. 99–224. Argued April 18, 2000—Decided June 19, 2000*

In 1975, prison inmates at Indiana's Pendleton Correctional Facility brought a class action, and the District Court issued an injunction, which remains in effect, to remedy violations of the Eighth Amendment regarding conditions of confinement. Congress subsequently enacted the Prison Litigation Reform Act of 1995 (PLRA), which, as relevant here, sets a standard for the entry and termination of prospective relief in civil actions challenging prison conditions. Specifically, 18 U. S. C. § 3626(b)(2) provides that a defendant or intervenor may move to terminate prospective relief under an existing injunction that does not meet that standard; § 3626(b)(3) provides that a court may not terminate such relief if it makes certain findings; and § 3626(e)(2) dictates that a motion to terminate such relief "shall operate as a stay" of that relief beginning 30 days after the motion is filed and ending when the court rules on the motion. In 1997, petitioner prison officials (hereinafter State) filed a motion to terminate the remedial order under § 3626(b). Respondent prisoners moved to enjoin the operation of the automatic stay, arguing that § 3626(e)(2) violates due process and separation of powers principles. The District Court enjoined the stay, the State appealed, and the United States intervened to defend § 3626(e)(2)'s constitutionality. In affirming, the Seventh Circuit concluded that § 3626(e)(2) precluded courts from exercising their equitable powers to enjoin the stay, but that the statute, so construed, was unconstitutional on separation of powers grounds.

Held:

1. Congress clearly intended to make operation of the PLRA's automatic stay provision mandatory, precluding courts from exercising their equitable power to enjoin the stay. The Government contends that (1) the Court should not interpret a statute as displacing courts' traditional equitable authority to preserve the status quo pending resolution on the merits absent the clearest command to the contrary and (2) reading § 3626(e)(2) to remove that equitable power would

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*Together with No. 99–582, *United States* v. *French et al.*, also on certiorari to the same court.

raise serious separation of powers questions, and therefore should be avoided under the canon of constitutional doubt. But where, as here, Congress has made its intent clear, this Court must give effect to that intent. *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, 215. Under § 3626(e)(2), a stay is automatic once a state defendant has filed a § 3626(b) motion, and the command that it "shall operate as a stay during" the specified time period indicates that it is mandatory throughout that period. The statute's plain meaning would be subverted were § 3626(e)(2) interpreted merely as a burden-shifting mechanism that does not prevent courts from suspending the stay. Viewing the automatic stay provision in the context of § 3626 as a whole confirms the Court's conclusion. Section 3626(e)(4) provides for an appeal from an order *preventing* the automatic stay's operation, not from the *denial* of a motion to enjoin a stay. This provision's one-way nature only makes sense if the stay is required to operate during a specific time period, such that any attempt by a district court to circumvent the mandatory stay is immediately reviewable. Mandamus is not a more appropriate remedy because it is granted only in the exercise of sound discretion. Given that curbing the courts' equitable discretion was a principal objective of the PLRA, it would have been odd for Congress to have left § 3626(e)(2)'s enforcement to that discretion. Section 3626(e)(3) also does not support the Government's view, for it only permits the stay's starting point to be delayed for up to 90 days; it does not affect the stay's operation once it begins. While construing § 3626(e)(2) to remove courts' equitable discretion raises constitutional questions, the canon of constitutional doubt permits the Court to avoid such questions only where the saving construction is not plainly contrary to Congress' intent. Pp. 336–341.

2. Section 3626(e) does not violate separation of powers principles. The Constitution prohibits one branch of the Government from encroaching on the central prerogatives of another. Article III gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior Article III courts. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 218–219. Respondents contend that § 3626(e)(2) violates the separation of powers principle by legislatively suspending a final judgment of an Article III court in violation of *Plaut* and *Hayburn's Case*, 2 Dall. 409. Unlike the situation in *Hayburn's Case*, § 3626(e)(2) does not involve direct review of a judicial decision by the Legislative or Executive Branch. Nor does it involve the reopening of a final judgment, as was addressed in *Plaut*. *Plaut* was careful to distinguish legislation that attempted to reopen the dismissal of a money damages suit from that altering the prospective effect of injunctions entered by Article III courts. Prospective relief under

a continuing, executory decree remains subject to alteration due to changes in the underlying law. Cf. *Landgraf* v. *USI Film Products*, 511 U. S. 244, 273. This conclusion follows from the Court's decision in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 432 *(Wheeling Bridge II)*, that prospective relief it issued in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518 *(Wheeling Bridge I)*, became unenforceable after Congress altered the law underlying the ongoing relief. Applied here, the *Wheeling Bridge II* principles demonstrate that § 3626(e)(2)'s automatic stay does not unconstitutionally suspend or reopen an Article III court's judgment. It does not tell judges when, how, or what to do, but reflects the change implemented by § 3626(b), which establishes new standards for prospective relief. As *Plaut* and *Wheeling Bridge II* instruct, when Congress changes the law underlying the judgment awarding such relief, that relief is no longer enforceable to the extent it is inconsistent with the new law. Although the remedial injunction here is a final judgment for purposes of appeal, it is not the last word of the judicial department, for it is subject to the court's continuing supervisory jurisdiction, and therefore may be altered according to subsequent changes in the law. For the same reasons, § 3626(e)(2) does not violate the separation of powers principle articulated in *United States* v. *Klein*, 13 Wall. 128, where the Court found unconstitutional a statute purporting to prescribe rules of decision to the Federal Judiciary in cases pending before it. That § 3626(e)(2) does not itself amend the legal standard does not help respondents; when read in the context of § 3626 as a whole, the provision does not prescribe a rule of decision but imposes the consequences of the court's application of the new legal standard. Finally, Congress' imposition of the time limit in § 3626(e)(2) does not offend the structural concerns underlying the separation of powers. Whether that time is so short that it deprives litigants of an opportunity to be heard is a due process question not before this Court. Nor does the Court have occasion to decide here whether there could be a time constraint on judicial action that was so severe that it implicated structural separation of powers concerns. Pp. 341–350.

178 F. 3d 437, reversed and remanded.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Scalia, Kennedy, and Thomas, JJ., joined, and in which Souter and Ginsburg, JJ., joined as to Parts I and II. Souter, J., filed an opinion concurring in part and dissenting in part, in which Ginsburg, J., joined, *post*, p. 350. Breyer, J., filed a dissenting opinion, in which Stevens, J., joined, *post*, p. 353.

Counsel

Jon Laramore, Deputy Attorney General of Indiana, argued the cause for petitioners in No. 99–224. With him on the briefs were *Karen M. Freeman-Wilson*, Attorney General, *Jeffrey A. Modisett*, former Attorney General, and *Wayne E. Uhl* and *Geoffrey G. Slaughter*, Deputy Attorneys General.

Deputy Solicitor General Underwood argued the cause for the United States in No. 99–582. With her on the briefs were *Solicitor General Waxman*, *Acting Assistant Attorney General Lee*, *Irving L. Gornstein*, and *Mark L. Gross*.

Kenneth J. Falk argued the cause for respondents in both cases. With him on the brief were *Jacquelyn E. Bowie*, *Hamid R. Kashani*, *Steven R. Shapiro*, and *Elizabeth Alexander*.†

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†Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *John Cornyn*, Attorney General of Texas, *Andy Taylor*, First Assistant Attorney General, *Shane Phelps*, Deputy Attorney General, *Gregory S. Coleman*, Solicitor General, *Charles K. Eldred*, Assistant Attorney General, and *Robert Rigsby*, Acting Corporation Counsel of the District of Columbia, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Robert A. Russell, Jr.*, of Arkansas, *Bill Lockyer* of California, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *James E. Ryan* of Illinois, *Carla J. Stovall* of Kansas, *J. Joseph Curran, Jr.*, of Maryland, *Jennifer M. Granholm* of Michigan, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *John J. Farmer, Jr.*, of New Jersey, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Charlie Condon* of South Carolina, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *Jan Graham* of Utah, *Christine O. Gregoire* of Washington, and *Gay Woodhouse* of Wyoming; for Americans for Effective Law Enforcement, Inc., et al. by *Wayne W. Schmidt*, *Bernard J. Farber*, *James P. Manak*, and *Richard Weintraub;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* for the National Governors' Association et al. by *Richard Ruda* and *James I. Crowley;* and for the Washington Legal Foundation et al. by *Paul D. Clement*, *Daniel J. Popeo*, and *R. Shawn Gunnarson*.

Briefs of *amici curiae* urging affirmance were filed for Public Citizen by *Alan B. Morrison* and *David C. Vladeck;* for Arizona State Prison

JUSTICE O'CONNOR delivered the opinion of the Court.

The Prison Litigation Reform Act of 1995 (PLRA) establishes standards for the entry and termination of prospective relief in civil actions challenging prison conditions. §§ 801–810, 110 Stat. 1321–66 to 1321–77. If prospective relief under an existing injunction does not satisfy these standards, a defendant or intervenor is entitled to "immediate termination" of that relief. 18 U. S. C. § 3626(b)(2) (1994 ed., Supp. IV). And under the PLRA's "automatic stay" provision, a motion to terminate prospective relief "shall operate as a stay" of that relief during the period beginning 30 days after the filing of the motion (extendable to up to 90 days for "good cause") and ending when the court rules on the motion. §§ 3626(e)(2), (3). The superintendent of Indiana's Pendleton Correctional Facility, which is currently operating under an ongoing injunction to remedy violations of the Eighth Amendment regarding conditions of confinement, filed a motion to terminate prospective relief under the PLRA. Respondent prisoners moved to enjoin the operation of the automatic stay provision of § 3626(e)(2), arguing that it is unconstitutional. The District Court enjoined the stay, and the Court of Appeals for the Seventh Circuit affirmed. We must decide whether a district court may enjoin the operation of the PLRA's automatic stay provision and, if not, whether that provision violates separation of powers principles.

I

A

This litigation began in 1975, when four inmates at what is now the Pendleton Correctional Facility brought a class

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System Inmates by *John P. Frank;* and for Erwin Chemerinsky et al. by *Mr. Chemerinsky, pro se.*

Sarah B. Vandenbraak, *Michael D. Hess*, *Leonard J. Koerner*, and *Lorna B. Goodman* filed a brief for the Association of State Correctional Administrators et al. as *amici curiae.*

action under Rev. Stat. § 1979, 42 U. S. C. § 1983, on behalf of all persons who were, or would be, confined at the facility against the predecessors in office of petitioners (hereinafter State). 1 Record, Doc. No. 1, p. 2. After a trial, the District Court found that living conditions at the prison violated both state and federal law, including the Eighth Amendment's prohibition against cruel and unusual punishment, and the court issued an injunction to correct those violations. *French* v. *Owens*, 538 F. Supp. 910 (SD Ind. 1982), aff'd in part, vacated and remanded in part, 777 F. 2d 1250 (CA7 1985). While the State's appeal was pending, this Court decided *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89 (1984), which held that the Eleventh Amendment deprives federal courts of jurisdiction over claims for injunctive relief against state officials based on state law. Accordingly, the Court of Appeals for the Seventh Circuit remanded the action to the District Court for reconsideration. 777 F. 2d, at 1251. On remand, the District Court concluded that most of the state law violations also ran afoul of the Eighth Amendment, and it issued an amended remedial order to address those constitutional violations. The order also accounted for improvements in living conditions at the Pendleton facility that had occurred in the interim. *Ibid.*

The Court of Appeals affirmed the amended remedial order as to those aspects governing overcrowding and double celling, the use of mechanical restraints, staffing, and the quality of food and medical services, but it vacated those portions pertaining to exercise and recreation, protective custody, and fire and occupational safety standards. *Id.*, at 1258. This ongoing injunctive relief has remained in effect ever since, with the last modification occurring in October 1988, when the parties resolved by joint stipulation the remaining issues related to fire and occupational safety standards. 1 Record, Doc. No. 14.

B

In 1996, Congress enacted the PLRA. As relevant here, the PLRA establishes standards for the entry and termination of prospective relief in civil actions challenging conditions at prison facilities. Specifically, a court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U. S. C. § 3626(a)(1)(A) (1994 ed., Supp. IV). The same criteria apply to existing injunctions, and a defendant or intervenor may move to terminate prospective relief that does not meet this standard. See § 3626(b)(2). In particular, § 3626(b)(2) provides:

> "In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."

A court may not terminate prospective relief, however, if it "makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means necessary to correct the violation." § 3626(b)(3). The PLRA also requires courts to rule "promptly" on motions to terminate prospective relief, with mandamus available to remedy a court's failure to do so. § 3626(e)(1).

Finally, the provision at issue here, § 3626(e)(2), dictates that, in certain circumstances, prospective relief shall be

stayed pending resolution of a motion to terminate. Specifically, subsection (e)(2), entitled "Automatic Stay," states:

> "Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period—
>
> "(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); . . .
>
> "(ii) . . . and
>
> "(B) ending on the date the court enters a final order ruling on the motion."

As one of several 1997 amendments to the PLRA, Congress permitted courts to postpone the entry of the automatic stay for not more than 60 days for "good cause," which cannot include general congestion of the court's docket. § 123, 111 Stat. 2470, codified at 18 U. S. C. § 3626(e)(3).*

C

On June 5, 1997, the State filed a motion under § 3626(b) to terminate the prospective relief governing the conditions of confinement at the Pendleton Correctional Facility. 1 Record, Doc. No. 16. In response, the prisoner class moved for a temporary restraining order or preliminary injunction to enjoin the operation of the automatic stay, arguing that § 3626(e)(2) is unconstitutional as both a violation of the Due Process Clause of the Fifth Amendment and separation of powers principles. The District Court granted

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*As originally enacted, § 3626(e)(2) provided that "[a]ny prospective relief subject to a pending motion [for termination] shall be automatically stayed during the period . . . beginning on the 30th day after such motion is filed . . . and ending on the date the court enters a final order ruling on the motion." § 802, 110 Stat. 1321–68 to 1321–69. The 1997 amendments to the PLRA revised the automatic stay provision to its current form, and Congress specified that the 1997 amendments "shall apply to pending cases." 18 U. S. C. § 3626 note (1994 ed., Supp. IV).

the prisoners' motion, enjoining the automatic stay. See *id.*, Doc. No. 23; see also *French* v. *Duckworth*, 178 F. 3d 437, 440–441 (CA7 1999). The State appealed, and the United States intervened pursuant to 28 U. S. C. § 2403(a) to defend the constitutionality of § 3626(e)(2).

The Court of Appeals for the Seventh Circuit affirmed the District Court's order, concluding that although § 3626(e)(2) precluded courts from exercising their equitable powers to enjoin operation of the automatic stay, the statute, so construed, was unconstitutional on separation of powers grounds. See 178 F. 3d, at 447–448. The court reasoned that Congress drafted § 3626(e)(2) in unequivocal terms, clearly providing that a motion to terminate under § 3626(b)(2) "*shall* operate" as a stay during a specified time period. *Id.*, at 443. While acknowledging that courts should not lightly assume that Congress meant to restrict the equitable powers of the federal courts, the Court of Appeals found "it impossible to read this language as doing anything less than that." *Ibid.* Turning to the constitutional question, the court characterized § 3626(e)(2) as "a self-executing legislative determination that a specific decree of a federal court . . . must be set aside at least for a period of time." *Id.*, at 446. As such, it concluded that § 3626(e)(2) directly suspends a court order in violation of the separation of powers doctrine under *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211 (1995), and mandates a particular rule of decision, at least during the pendency of the § 3626(b)(2) termination motion, contrary to *United States* v. *Klein*, 13 Wall. 128 (1872). See 178 F. 3d, at 446. Having concluded that § 3626(e)(2) is unconstitutional on separation of powers grounds, the Court of Appeals did not reach the prisoners' due process claims. Over the dissent of three judges, the court denied rehearing en banc. See *id.*, at 448–453 (Easterbrook, J., dissenting from denial of rehearing en banc).

We granted certiorari, 528 U. S. 1045 (1999), to resolve a conflict among the Courts of Appeals as to whether

§ 3626(e)(2) permits federal courts, in the exercise of their traditional equitable authority, to enjoin operation of the PLRA's automatic stay provision and, if not, to review the Court of Appeals' judgment that § 3626(e)(2), so construed, is unconstitutional. Compare *Ruiz* v. *Johnson*, 178 F. 3d 385 (CA5 1999) (holding that district courts retain the equitable discretion to suspend the automatic stay and that § 3626(e)(2) is therefore constitutional); *Hadix* v. *Johnson*, 144 F. 3d 925 (CA6 1998) (same), with 178 F. 3d 437 (CA7 1999) (case below).

II

We address the statutory question first. Both the State and the prisoner class agree, as did the majority and dissenting judges below, that § 3626(e)(2) precludes a district court from exercising its equitable powers to enjoin the automatic stay. The Government argues, however, that § 3626(e)(2) should be construed to leave intact the federal courts' traditional equitable discretion to "stay the stay," invoking two canons of statutory construction. First, the Government contends that we should not interpret a statute as displacing courts' traditional equitable authority to preserve the status quo pending resolution on the merits "[a]bsent the clearest command to the contrary." *Califano* v. *Yamasaki*, 442 U. S. 682, 705 (1979). Second, the Government asserts that reading § 3626(e)(2) to remove that equitable power would raise serious separation of powers questions, and therefore should be avoided under the canon of constitutional doubt. Like the Court of Appeals, we do not lightly assume that Congress meant to restrict the equitable powers of the federal courts, and we agree that constitutionally doubtful constructions should be avoided where "fairly possible." *Communications Workers* v. *Beck*, 487 U. S. 735, 762 (1988). But where Congress has made its intent clear, "we must give effect to that intent." *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, 215 (1962).

The text of § 3626(e)(2) provides that "[a]ny motion to . . . terminate prospective relief made under subsection (b) *shall operate as a stay*" during a fixed period of time, *i. e.*, from 30 (or 90) days after the motion is filed until the court enters a final order ruling on the motion. 18 U. S. C. § 3626(e)(2) (1994 ed., Supp. IV) (emphasis added). The stay is "automatic" once a state defendant has filed a § 3626(b) motion, and the statutory command that such a motion "shall operate as a stay during the [specified time] period" indicates that the stay is *mandatory* throughout that period of time. See *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion").

Nonetheless, the Government contends that reading the statute to preserve courts' traditional equitable powers to enter appropriate injunctive relief is consistent with this text because, in its view, § 3626(e)(2) is simply a burden-shifting mechanism. That is, the purpose of the automatic stay provision is merely to relieve defendants of the burden of establishing the prerequisites for a stay and to eliminate courts' discretion to deny a stay, even if those prerequisites are established, based on the public interest or hardship to the plaintiffs. Thus, under this reading, nothing in § 3626(e)(2) prevents courts from subsequently suspending the automatic stay by applying the traditional standards for injunctive relief.

Such an interpretation, however, would subvert the plain meaning of the statute, making its mandatory language merely permissive. Section 3626(e)(2) states that a motion to terminate prospective relief "*shall operate* as a stay *during*" the specified time period from 30 (or 90) days after the filing of the § 3626(b) motion *until* the court rules on that motion. (Emphasis added.) Thus, not only does the statute employ the mandatory term "shall," but it also specifies the points at which the operation of the stay is to begin and end. In other words, contrary to JUSTICE BREYER's suggestion

that the language of § 3626(e)(2) "says nothing . . . about the district court's power to modify or suspend the operation of the 'stay,'" *post,* at 358 (dissenting opinion), § 3626(e)(2) unequivocally mandates that the stay "shall operate *during*" this specific interval. To allow courts to exercise their equitable discretion to prevent the stay from "operating" during this statutorily prescribed period would be to contradict § 3626(e)(2)'s plain terms. It would mean that the motion to terminate merely *may* operate as a stay, despite the statute's command that it "shall" have such effect. If Congress had intended to accomplish nothing more than to relieve state defendants of the burden of establishing the prerequisites for a stay, the language of § 3626(e)(2) is, at best, an awkward and indirect means to achieve that result.

Viewing the automatic stay provision in the context of § 3626 as a whole further confirms that Congress intended to prohibit federal courts from exercising their equitable authority to suspend operation of the automatic stay. The specific appeal provision contained in § 3626(e) states that "[a]ny order staying, suspending, delaying, or barring the operation of the automatic stay" of § 3626(e)(2) "shall be appealable" pursuant to 28 U. S. C. § 1292(a)(1). § 3626(e)(4). At first blush, this provision might be read as supporting the view that Congress expressly recognized the possibility that a district court could exercise its equitable discretion to enjoin the stay. The two Courts of Appeals that have construed § 3626(e)(2) as preserving the federal courts' equitable powers have reached that conclusion based on this reading of § 3626(e)(4). See *Ruiz* v. *Johnson,* 178 F. 3d, at 394; *Hadix* v. *Johnson,* 144 F. 3d, at 938. They reasoned that Congress would not have provided for expedited review of such orders had it not intended that district courts would retain the power to enter the orders in the first place. See *ibid.* In other words, "Congress understood that there would be some cases in which a conscientious district court acting in good faith would perceive that equity required that it suspend"

the § 3626(e)(2) stay, and "Congress therefore permitted the district court to do so, subject to appellate review." *Ruiz* v. *Johnson*, *supra*, at 394.

The critical flaw in this construction, however, is that § 3626(e)(4) only provides for an appeal from an order *preventing* the operation of the automatic stay. § 3626(e)(4) ("Any order staying, suspending, delaying, or barring the operation of the automatic stay" under § 3626(e)(2) "shall be appealable"). If the rationale for the provision were that in some situations equity demands that the automatic stay be suspended, then presumably the *denial* of a motion to enjoin the stay should also be appealable. The one-way nature of the appeal provision only makes sense if the automatic stay is required to operate during a specific time period, such that any attempt by a district court to circumvent the mandatory stay is immediately reviewable.

The Government contends that if Congress' goal were to prevent courts from circumventing the PLRA's plain commands, mandamus would have been a more appropriate remedy than appellate review. But that proposition is doubtful, as mandamus is an extraordinary remedy that is "granted only in the exercise of sound discretion." *Whitehouse* v. *Illinois Central R. Co.*, 349 U. S. 366, 373 (1955). Given that curbing the equitable discretion of district courts was one of the PLRA's principal objectives, it would have been odd for Congress to have left enforcement of § 3626(e)(2) to that very same discretion. Instead, Congress sensibly chose to make available an immediate appeal to resolve situations in which courts mistakenly believe—under the novel scheme created by the PLRA—that they have the authority to enjoin the automatic stay, rather than the extraordinary remedy of mandamus, which requires a showing of a "clear and indisputable" right to the issuance of the writ. See *Mallard* v. *United States Dist. Court for Southern Dist. of Iowa*, 490 U. S. 296, 309 (1989). In any event, § 3626(e) as originally enacted did not provide for interlocutory review. It was

only after some courts refused to enter the automatic stay, and after the Court of Appeals for the Fifth Circuit would not review such a refusal, that Congress amended § 3626(e) to provide for interlocutory review. See *In re Scott*, 163 F. 3d 282, 284 (CA5 1998); *Ruiz* v. *Johnson*, *supra*, at 388; see also 18 U. S. C. § 3626(e)(4) (1994 ed., Supp. IV).

Finally, the Government finds support for its view in § 3626(e)(3). That provision authorizes an extension, for "good cause," of the starting point for the automatic stay, from 30 days after the § 3626(b) motion is filed until 90 days after that motion is filed. The Government explains that, by allowing the court to prevent the entry of the stay for up to 60 days under the relatively generous "good cause" standard, Congress by negative implication has preserved courts' discretion to suspend the stay *after* that time under the more stringent standard for injunctive relief. To be sure, allowing a delay in entry of the stay for 60 days based on a good cause standard does not by itself necessarily imply that any other reason for preventing the operation of the stay—for example, on the basis of traditional equitable principles—is precluded. But § 3626(e)(3) cannot be read in isolation. When §§ 3626(e)(2) and (3) are read together, it is clear that the district court cannot enjoin the operation of the automatic stay. The § 3626(b) motion "shall operate as a stay during" a specific time period. Section 3626(e)(3) only adjusts the starting point for the stay, and it merely permits that starting point to be delayed. Once the 90-day period has passed, the § 3626(b) motion "shall operate as a stay" until the court rules on the § 3626(b) motion. During that time, any attempt to enjoin the stay is irreconcilable with the plain language of the statute.

Thus, although we should not construe a statute to displace courts' traditional equitable authority absent the "clearest command," *Califano* v. *Yamasaki*, 442 U. S., at 705, or an "inescapable inference" to the contrary, *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398 (1946), we are con-

vinced that Congress' intent to remove such discretion is unmistakable in § 3626(e)(2). And while this construction raises constitutional questions, the canon of constitutional doubt permits us to avoid such questions only where the saving construction is not "plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States* v. *Locke*, 471 U. S. 84, 96 (1985) (quoting *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379 (1933)); see also *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212 (1998) (constitutional doubt canon does not apply where the statute is unambiguous); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 841 (1986) (constitutional doubt canon "does not give a court the prerogative to ignore the legislative will"). Like the Court of Appeals, we find that § 3626(e)(2) is unambiguous, and accordingly, we cannot adopt JUSTICE BREYER's "more flexible interpretation" of the statute. *Post*, at 355. Any construction that preserved courts' equitable discretion to enjoin the automatic stay would effectively convert the PLRA's mandatory stay into a discretionary one. Because this would be plainly contrary to Congress' intent in enacting the stay provision, we must confront the constitutional issue.

III

The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this "very structure" of the Constitution that exemplifies the concept of separation of powers. *INS* v. *Chadha*, 462 U. S. 919, 946 (1983). While the boundaries between the three branches are not "'hermetically' sealed," see *id.*, at 951, the Constitution prohibits one branch from encroaching on the central prerogatives of another, see *Loving* v. *United States*, 517 U. S. 748, 757 (1996); *Buckley* v.

Valeo, 424 U. S. 1, 121–122 (1976) *(per curiam)*. The powers of the Judicial Branch are set forth in Article III, § 1, which states that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," and provides that these federal courts shall be staffed by judges who hold office during good behavior, and whose compensation shall not be diminished during tenure in office. As we explained in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S., at 218–219, Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy."

Respondent prisoners contend that § 3626(e)(2) encroaches on the central prerogatives of the Judiciary and thereby violates the separation of powers doctrine. It does this, the prisoners assert, by legislatively suspending a final judgment of an Article III court in violation of *Plaut* and *Hayburn's Case*, 2 Dall. 409 (1792). According to the prisoners, the remedial order governing living conditions at the Pendleton Correctional Facility is a final judgment of an Article III court, and § 3626(e)(2) constitutes an impermissible usurpation of judicial power because it commands the district court to suspend prospective relief under that order, albeit temporarily. An analysis of the principles underlying *Hayburn's Case* and *Plaut*, as well as an examination of § 3626(e)(2)'s interaction with the other provisions of § 3626, makes clear that § 3626(e)(2) does not offend these separation of powers principles.

Hayburn's Case arose out of a 1792 statute that authorized pensions for veterans of the Revolutionary War. See Act of Mar. 23, 1792, ch. 11, 1 Stat. 243. The statute provided that the circuit courts were to review the applications and determine the appropriate amount of the pension, but that the Secretary of War had the discretion either to adopt or reject the courts' findings. *Hayburn's Case*, *supra*, at 408–410.

Although this Court did not reach the constitutional issue in *Hayburn's Case*, the statements of five Justices, acting as circuit judges, were reported, and we have since recognized that the case "stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut*, *supra*, at 218; see also *Morrison* v. *Olson*, 487 U. S. 654, 677, n. 15 (1988). As we recognized in *Plaut*, such an effort by a coequal branch to "annul a final judgment" is "'an assumption of Judicial power' and therefore forbidden." 514 U. S., at 224 (quoting *Bates* v. *Kimball*, 2 Chipman 77 (Vt. 1824)).

Unlike the situation in *Hayburn's Case*, § 3626(e)(2) does not involve the direct review of a judicial decision by officials of the Legislative or Executive Branches. Nonetheless, the prisoners suggest that § 3626(e)(2) falls within *Hayburn's* prohibition against an indirect legislative "suspension" or reopening of a final judgment, such as that addressed in *Plaut*. See *Plaut*, *supra*, at 226 (quoting *Hayburn's Case*, *supra*, at 413 (letter of Iredell, J., and Sitgreaves, D. J.) ("'[N]o decision of any court of the United States can, under any circumstances, . . . be liable to a revision, or even suspension, by the [l]egislature itself, in whom no judicial power of any kind appears to be vested'")). In *Plaut*, we held that a federal statute that required federal courts to reopen final judgments that had been entered before the statute's enactment was unconstitutional on separation of powers grounds. 514 U. S., at 211. The plaintiffs had brought a civil securities fraud action seeking money damages. *Id.*, at 213. While that action was pending, we ruled in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350 (1991), that such suits must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation. In light of this intervening decision, the *Plaut* plaintiffs' suit was untimely, and the District Court accordingly dismissed the action as time barred. *Plaut*, *supra*, at 214. After the judgment dismissing the

case had become final, Congress enacted a statute providing for the reinstatement of those actions, including the *Plaut* plaintiffs', that had been dismissed under *Lampf* but that would have been timely under the previously applicable statute of limitations. 514 U. S., at 215.

We concluded that this retroactive command that federal courts reopen final judgments exceeded Congress' authority. *Id.*, at 218–219. The decision of an inferior court within the Article III hierarchy is not the final word of the department (unless the time for appeal has expired), and "[i]t is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must 'decide according to existing laws.'" *Id.*, at 227 (quoting *United States* v. *Schooner Peggy*, 1 Cranch 103, 109 (1801)). But once a judicial decision achieves finality, it "becomes the last word of the judicial department." 514 U. S., at 227. And because Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy," *id.*, at 218–219, the "judicial Power is one to render dispositive judgments," and Congress cannot retroactively command Article III courts to reopen final judgments, *id.*, at 219 (quoting Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 926 (1990) (internal quotation marks omitted)).

Plaut, however, was careful to distinguish the situation before the Court in that case—legislation that attempted to reopen the dismissal of a suit seeking money damages—from legislation that "altered the prospective effect of injunctions entered by Article III courts." 514 U. S., at 232. We emphasized that "nothing in our holding today calls . . . into question" Congress' authority to alter the prospective effect of previously entered injunctions. *Ibid.* Prospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law. Cf. *Land-*

graf v. *USI Film Products*, 511 U. S. 244, 273 (1994) ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive"). This conclusion follows from our decisions in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518 (1852) *(Wheeling Bridge I)*, and *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421 (1856) *(Wheeling Bridge II)*.

In *Wheeling Bridge I*, we held that a bridge across the Ohio River, because it was too low, unlawfully "obstruct[ed] the navigation of the Ohio," and ordered that the bridge be raised or permanently removed. 13 How., at 578. Shortly thereafter, Congress enacted legislation declaring the bridge to be a "lawful structur[e]," establishing the bridge as a "'post-roa[d] for the passage of the mails of the United States,'" and declaring that the Wheeling and Belmont Bridge Company was authorized to maintain the bridge at its then-current site and elevation. *Wheeling Bridge II*, *supra*, at 429. After the bridge was destroyed in a storm, Pennsylvania sued to enjoin the bridge's reconstruction, arguing that the statute legalizing the bridge was unconstitutional because it effectively annulled the Court's decision in *Wheeling Bridge I*. We rejected that argument, concluding that the decree in *Wheeling Bridge I* provided for ongoing relief by "directing the abatement of the obstruction" which enjoined the defendants' from any continuance or reconstruction of the obstruction. Because the intervening statute altered the underlying law such that the bridge was no longer an unlawful obstruction, we held that it was "quite plain the decree of the court cannot be enforced." *Wheeling Bridge II*, *supra*, at 431–432. The Court explained that had *Wheeling Bridge I* awarded money damages in an action at law, then that judgment would be final, and Congress' later action could not have affected plaintiff's right to those damages. See 18 How., at 431. But because the decree entered in *Wheeling Bridge I* provided for prospec-

tive relief—a continuing injunction against the continuation or reconstruction of the bridge—the ongoing validity of the injunctive relief depended on "whether or not [the bridge] interferes with the right of navigation." 18 How., at 431. When Congress altered the underlying law such that the bridge was no longer an unlawful obstruction, the injunction against the maintenance of the bridge was not enforceable. See *id.*, at 432.

Applied here, the principles of *Wheeling Bridge II* demonstrate that the automatic stay of § 3626(e)(2) does not unconstitutionally "suspend" or reopen a judgment of an Article III court. Section 3626(e)(2) does not by itself "tell judges when, how, or what to do." 178 F. 3d, at 449 (Easterbrook, J., dissenting from denial of rehearing en banc). Instead, § 3626(e)(2) merely reflects the change implemented by § 3626(b), which does the "heavy lifting" in the statutory scheme by establishing new standards for prospective relief. See *Berwanger* v. *Cottey*, 178 F. 3d 834, 839 (CA7 1999). Section 3626 prohibits the continuation of prospective relief that was "approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means to correct the violation," § 3626(b)(2), or in the absence of "findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of a Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation," § 3626(b)(3). Accordingly, if prospective relief under an existing decree had been granted or approved absent such findings, then that prospective relief must cease, see § 3626(b)(2), unless and until the court makes findings on the record that such relief remains necessary to correct an ongoing violation and is narrowly tailored, see § 3626(b)(3). The PLRA's automatic stay provision assists in the enforce-

ment of §§ 3626(b)(2) and (3) by requiring the court to stay any prospective relief that, due to the change in the underlying standard, is no longer enforceable, *i. e.*, prospective relief that is not supported by the findings specified in §§ 3626(b)(2) and (3).

By establishing new standards for the enforcement of prospective relief in § 3626(b), Congress has altered the relevant underlying law. The PLRA has restricted courts' authority to issue and enforce prospective relief concerning prison conditions, requiring that such relief be supported by findings and precisely tailored to what is needed to remedy the violation of a federal right. See *Benjamin* v. *Jacobson*, 172 F. 3d 144, 163 (CA2 1999) (en banc); *Imprisoned Citizens Union* v. *Ridge*, 169 F. 3d 178, 184–185 (CA3 1999); *Tyler* v. *Murphy*, 135 F. 3d 594, 597 (CA8 1998); *Inmates of Suffolk County Jail* v. *Rouse*, 129 F. 3d 649, 657 (CA1 1997). We note that the constitutionality of § 3626(b) is not challenged here; we assume, without deciding, that the new standards it pronounces are effective. As *Plaut* and *Wheeling Bridge II* instruct, when Congress changes the law underlying a judgment awarding prospective relief, that relief is no longer enforceable to the extent it is inconsistent with the new law. Although the remedial injunction here is a "final judgment" for purposes of appeal, it is not the "last word of the judicial department." *Plaut*, 514 U. S., at 227. The provision of prospective relief is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in the law. See *Rufo* v. *Inmates of Suffolk County Jail*, 502 U. S. 367, 388 (1992). Prospective relief must be "modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law." *Ibid.;* see also *Railway Employees* v. *Wright*, 364 U. S. 642, 646–647 (1961) (a court has the authority to alter the prospective effect of an injunction to reflect a change in circumstances, whether of law or fact, that has occurred since the injunction was

entered); *Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323, 329 (1938) (applying the Norris-LaGuardia Act's prohibition on a district court's entry of injunctive relief in the absence of findings).

The entry of the automatic stay under § 3626(e)(2) helps to implement the change in the law caused by §§ 3626(b)(2) and (3). If the prospective relief under the existing decree is not supported by the findings required under § 3626(b)(2), and the court has not made the findings required by § 3626(b)(3), then prospective relief is no longer enforceable and must be stayed. The entry of the stay does not reopen or "suspend" the previous judgment, nor does it divest the court of authority to decide the merits of the termination motion. Rather, the stay merely reflects the changed legal circumstances—that prospective relief under the existing decree is no longer enforceable, and remains unenforceable unless and until the court makes the findings required by § 3626(b)(3).

For the same reasons, § 3626(e)(2) does not violate the separation of powers principle articulated in *United States* v. *Klein*, 13 Wall. 128 (1872). In that case, Klein, the executor of the estate of a Confederate sympathizer, sought to recover the value of property seized by the United States during the Civil War, which by statute was recoverable if Klein could demonstrate that the decedent had not given aid or comfort to the rebellion. See *id.*, at 131. In *United States* v. *Padelford*, 9 Wall. 531, 542–543 (1870), we held that a Presidential pardon satisfied the burden of proving that no such aid or comfort had been given. While Klein's case was pending, Congress enacted a statute providing that a pardon would instead be taken as proof that the pardoned individual had in fact aided the enemy, and if the claimant offered proof of a pardon the court must dismiss the case for lack of jurisdiction. *Klein*, 13 Wall., at 133–134. We concluded that the statute was unconstitutional because it purported to "pre-

scribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.*, at 146.

Here, the prisoners argue that Congress has similarly prescribed a rule of decision because, for the period of time until the district court makes a final decision on the merits of the motion to terminate prospective relief, § 3626(e)(2) mandates a particular outcome: the termination of prospective relief. As we noted in *Plaut*, however, "[w]hatever the precise scope of *Klein*, . . . later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" 514 U. S., at 218 (quoting *Robertson* v. *Seattle Audubon Soc.*, 503 U. S. 429, 441 (1992)). The prisoners concede this point but contend that, because § 3626(e)(2) does not itself amend the legal standard, *Klein* is still applicable. As we have explained, however, § 3626(e)(2) must be read not in isolation, but in the context of § 3626 as a whole. Section 3626(e)(2) operates in conjunction with the new standards for the continuation of prospective relief; if the new standards of § 3626(b)(2) are not met, then the stay "shall operate" unless and until the court makes the findings required by § 3626(b)(3). Rather than prescribing a rule of decision, § 3626(e)(2) simply imposes the consequences of the court's application of the new legal standard.

Finally, the prisoners assert that, even if § 3626(e)(2) does not fall within the recognized prohibitions of *Hayburn's Case*, *Plaut*, or *Klein*, it still offends the principles of separation of powers because it places a deadline on judicial decisionmaking, thereby interfering with core judicial functions. Congress' imposition of a time limit in § 3626(e)(2), however, does not in itself offend the structural concerns underlying the Constitution's separation of powers. For example, if the PLRA granted courts 10 years to determine whether they could make the required findings, then certainly the PLRA would raise no apprehensions that Congress had encroached on the core function of the Judiciary to decide "cases and controversies properly before them." *United*

States v. *Raines*, 362 U. S. 17, 20 (1960). Respondents' concern with the time limit, then, must be its relative brevity. But whether the time is so short that it deprives litigants of a meaningful opportunity to be heard is a due process question, an issue that is not before us. We leave open, therefore, the question whether this time limit, particularly in a complex case, may implicate due process concerns.

In contrast to due process, which principally serves to protect the personal rights of litigants to a full and fair hearing, separation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the constitutional design. In this action, we have no occasion to decide whether there could be a time constraint on judicial action that was so severe that it implicated these structural separation of powers concerns. The PLRA does not deprive courts of their adjudicatory role, but merely provides a new legal standard for relief and encourages courts to apply that standard promptly.

Through the PLRA, Congress clearly intended to make operation of the automatic stay mandatory, precluding courts from exercising their equitable powers to enjoin the stay. And we conclude that this provision does not violate separation of powers principles. Accordingly, the judgment of the Court of Appeals for the Seventh Circuit is reversed, and the action is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

I agree that 18 U. S. C. § 3626(e)(2) (1994 ed., Supp. IV) is unambiguous and join Parts I and II of the majority opinion. I also agree that applying the automatic stay may raise the due process issue, of whether a plaintiff has a fair chance to preserve an existing judgment that was valid when entered. *Ante* this page. But I believe that applying the statute may

also raise a serious separation-of-powers issue if the time it allows turns out to be inadequate for a court to determine whether the new prerequisite to relief is satisfied in a particular case.[1] I thus do not join Part III of the Court's opinion and on remand would require proceedings consistent with this one. I respectfully dissent from the terms of the Court's disposition.

A prospective remedial order may rest on at least three different legal premises: the underlying right meant to be secured; the rules of procedure for obtaining relief, defining requisites of pleading, notice, and so on; and, in some cases, rules lying between the other two, such as those defining a required level of certainty before some remedy may be ordered, or the permissible scope of relief. At issue here are rules of the last variety.[2]

Congress has the authority to change rules of this sort by imposing new conditions precedent for the continuing enforcement of existing, prospective remedial orders and requiring courts to apply the new rules to those orders. Cf. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 232 (1995). If its legislation gives courts adequate time to determine the applicability of a new rule to an old order and to take the action necessary to apply it or to vacate the order, there seems little basis for claiming that Congress has crossed

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[1] The Court forecloses the possibility of a separation-of-powers challenge based on insufficient time under the Prison Litigation Reform Act of 1995 (PLRA): "In this action, we have no occasion to decide whether there could be a time constraint on judicial action that was so severe that it implicated these structural separation of powers concerns. The PLRA does not deprive courts of their adjudicatory role, but merely provides a new legal standard for relief and encourages courts to apply that standard promptly." *Ante*, at 350.

[2] Other provisions of the PLRA narrow the scope of the underlying entitlements that an order can protect, but some orders may have been issued to secure constitutional rights unaffected by the PLRA. In any event, my concern here is solely with the PLRA's changes to the requisites for relief.

the constitutional line to interfere with the performance of any judicial function. But if determining whether a new rule applies requires time (say, for new factfinding) and if the statute provides insufficient time for a court to make that determination before the statute invalidates an extant remedial order, the application of the statute raises a serious question whether Congress has in practical terms assumed the judicial function. In such a case, the prospective order suddenly turns unenforceable not because a court has made a judgment to terminate it due to changed law or fact, but because no one can tell in the time allowed whether the new rule requires modification of the old order. One way to view this result is to see the Congress as mandating modification of an order that may turn out to be perfectly enforceable under the new rule, depending on judicial factfinding. If the facts are taken this way, the new statute might well be treated as usurping the judicial function of determining the applicability of a general rule in particular factual circumstances.[3] Cf. *United States* v. *Klein*, 13 Wall. 128, 146 (1872).

Whether this constitutional issue arises on the facts of this action, however, is something we cannot yet tell, for the

[3] The constitutional question inherent in these possible circumstances does not seem to be squarely addressed by any of our cases. Congress did not engage in discretionary review of a particular judicial judgment, cf. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 218, 226 (1995) (characterizing *Hayburn's Case*, 2 Dall. 409 (1792)), or try to modify a final, nonprospective judgment, cf. 514 U. S., at 218–219. Nor would a stay result from the judicial application of a change in the underlying law, cf. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 431 (1856); *Plaut*, *supra*, at 218 (characterizing *United States* v. *Klein*, 13 Wall. 128 (1872)). Instead, if the time is insufficient for a court to make a judicial determination about the applicability of the new rules, the stay would result from the inability of the Judicial Branch to exercise the judicial power of determining whether the new rules applied at all. Cf. *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is").

District Court did not address the sufficiency of the time provided by the statute to make the findings required by § 3626(b)(3) in this particular action.[4] Absent that determination, I would not decide the separation-of-powers question, but simply remand for further proceedings. If the District Court determined both that it lacked adequate time to make the requisite findings in the period before the automatic stay would become effective, and that applying the stay would violate the separation of powers, the question would then be properly presented.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

The Prison Litigation Reform Act of 1995 (PLRA) says that "any party or intervener" may move to terminate any "prospective relief" previously granted by the court, 18 U. S. C. § 3626(b)(1) (1994 ed., Supp. IV), and that the court shall terminate (or modify) that relief unless it is "necessary to correct a current and ongoing violation of [a] Federal right, extends no further than necessary to correct the violation . . . [and is] the least intrusive means" to do so. 18 U. S. C. § 3626(b)(3).

We here consider a related procedural provision of the PLRA. It says that "[a]ny motion to modify or terminate prospective relief . . . shall operate as a stay" of that prospective relief "during the period" beginning (no later than) the 90th day after the filing of the motion and ending when the motion is decided. § 3626(e)(2). This provision means

[4] Neither did the Court of Appeals. It merely speculated that "[i]t may be . . . that in some cases the courts will not be able to carry out their adjudicative function in a responsible way within the time limits imposed by (e)(2)," *French* v. *Duckworth*, 178 F. 3d 437, 447 (CA7 1999), without deciding whether this action presented such a situation. The court then concluded that "under *Klein* [the Congress] cannot take away the power of the court in a particular case to preserve the status quo while it ponders these weighty questions." *Ibid.*

approximately the following: Suppose that a district court, in 1980, had entered an injunction governing present and future prison conditions. Suppose further that in 1996 a party filed a motion under the PLRA asking the court to terminate (or to modify) the 1980 injunction. That district court would have no more than 90 days to decide whether to grant the motion. After those 90 days, the 1980 injunction would terminate automatically—regaining life only if, when, and to the extent that the judge eventually decided to deny the PLRA motion.

The majority interprets the words "shall operate as a stay" to mean, in terms of my example, that the 1980 injunction must become ineffective after the 90th day, *no matter what*. The Solicitor General, however, believes that the view adopted by the majority interpretation is too rigid and calls into doubt the constitutionality of the provision. He argues that the statute is silent as to whether the district court can modify or suspend the operation of the automatic stay. He would find in that silence sufficient authority for the court to create an exception to the 90-day time limit where circumstances make it necessary to do so. As so read, the statute would neither displace the courts' traditional equitable authority nor raise significant constitutional difficulties. See *Califano* v. *Yamasaki*, 442 U. S. 682, 705 (1979) (only "clearest" congressional "command" displaces courts' traditional equity powers); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988) (the Court will construe a statute to avoid constitutional problems "unless such construction is plainly contrary to the intent of Congress").

I agree with the Solicitor General and believe we should adopt that "'reasonable construction'" of the statute. *Ibid.* (quoting *Hooper* v. *California*, 155 U. S. 648, 657 (1895), stating "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality'").

I

At the outset, one must understand why a more flexible interpretation of the statute might be needed. To do so, one must keep in mind the extreme circumstances that at least some prison litigation originally sought to correct, the complexity of the resulting judicial decrees, and the potential difficulties arising out of the subsequent need to review those decrees in order to make certain they follow Congress' PLRA directives. A hypothetical example based on actual circumstances may help.

In January 1979, a Federal District Court made 81 factual findings describing extremely poor—indeed "barbaric and shocking"—prison conditions in the Commonwealth of Puerto Rico. *Morales Feliciano* v. *Romero Barcelo*, 497 F. Supp. 14, 32 (PR 1979). These conditions included prisons typically operating with twice the number of prisoners they were designed to hold; inmates living in 16 square feet of space (*i. e.*, only 4 feet by 4 feet); inmates without medical care, without psychiatric care, without beds, without mattresses, without hot water, without soap or towels or toothbrushes or underwear; food prepared on a budget of $1.50 per day and "tons of food . . . destroyed because of . . . rats, vermin, worms, and spoilage"; "no working toilets or showers," "urinals [that] flush into the sinks," "plumbing systems . . . in a state of collapse," and a "stench" that was "omnipresent"; "exposed wiring . . . no fire extinguisher, . . . [and] poor ventilation"; "calabozos," or dungeons, "like cages with bars on the top" or with two slits in a steel door opening onto a central corridor, the floors of which were "covered with raw sewage" and which contained prisoners with severe mental illnesses, "caged like wild animals," sometimes for months; areas of a prison where mentally ill inmates were "kept in cells naked, without beds, without mattresses, without any private possessions, and most of them without toilets that work and without drinking water." *Id.*, at 20–23, 26–

27, 29, 32. These conditions had led to epidemics of communicable diseases, untreated mental illness, suicides, and murders. *Id.*, at 32.

The District Court held that these conditions amounted to constitutionally forbidden "cruel and unusual punishment." *Id.*, at 33–36. It entered 30 specific orders designed to produce constitutionally mandated improvement by requiring the prison system to, for example, screen food handlers for communicable diseases, close the "calabozos," move mentally ill patients to hospitals, fix broken plumbing, and provide at least 35 square feet (*i. e.*, 5 feet by 7 feet) of living space to each prisoner. *Id.*, at 39–41.

The very pervasiveness and seriousness of the conditions described in the court's opinion made those conditions difficult to cure quickly. Over the next decade, the District Court entered further orders embodied in 15 published opinions, affecting 21 prison institutions. These orders concerned, *inter alia*, overcrowding, security, disciplinary proceedings, prisoner classification, rehabilitation, parole, and drug addiction treatment. Not surprisingly, the related proceedings involved extensive evidence and argument consuming thousands of pages of transcript. See *Morales Feliciano* v. *Romero Barcelo*, 672 F. Supp. 591, 595 (PR 1986). Their implementation involved the services of two monitors, two assistants, and a Special Master. Along the way, the court documented a degree of "administrative chaos" in the prison system, *Morales Feliciano* v. *Hernandez Colon*, 697 F. Supp. 37, 44 (PR 1988), and entered findings of contempt of court against the Commonwealth, followed by the assessment and collection of more than $74 million in fines. See *Morales Feliciano* v. *Hernandez Colon*, 775 F. Supp. 487, 488, and n. 2 (PR 1991).

Prison conditions subsequently have improved in some respects. *Morales Feliciano* v. *Rossello Gonzalez*, 13 F. Supp. 2d 151, 179 (PR 1998). I express no opinion as to whether, or which of, the earlier orders are still needed. But my

brief summary of the litigation should illustrate the potential difficulties involved in making the determination of continuing necessity required by the PLRA. Where prison litigation is as complex as the litigation I have just described, it may prove difficult for a district court to reach a fair and accurate decision about which orders remain necessary, and are the "least intrusive means" available, to prevent or correct a continuing violation of federal law. The orders, which were needed to resolve serious constitutional problems and may still be needed where compliance has not yet been assured, are complex, interrelated, and applicable to many different institutions. Ninety days might not provide sufficient time to ascertain the views of several different parties, including monitors, to allow them to present evidence, and to permit each to respond to the arguments and evidence of the others.

It is at least possible, then, that the statute, as the majority reads it, would sometimes terminate a complex system of orders entered over a period of years by a court familiar with the local problem—perhaps only to reinstate those orders later, when the termination motion can be decided. Such an automatic termination could leave constitutionally prohibited conditions unremedied, at least temporarily. Alternatively, the threat of termination could lead a district court to abbreviate proceedings that fairness would otherwise demand. At a minimum, the mandatory automatic stay would provide a recipe for uncertainty, as complex judicial orders that have long governed the administration of particular prison systems suddenly turn off, then (perhaps selectively) back on. So read, the statute directly interferes with a court's exercise of its traditional equitable authority, rendering temporarily ineffective pre-existing remedies aimed at correcting past, and perhaps ongoing, violations of the Constitution. That interpretation, as the majority itself concedes, might give rise to serious constitutional problems. *Ante*, at 350.

II

The Solicitor General's more flexible reading of the statute avoids all these problems. He notes that the relevant language says that the motion to modify or terminate prospective relief "shall operate as a stay" after a period of 30 days, extendable for "good cause" to 90 days. 18 U. S. C. § 3626(e)(2); see also Brief for United States 12. The language says nothing, however, about the district court's power to modify or suspend the operation of the "stay." In the Solicitor General's view, the "stay" would determine the legal status quo; but the district court would retain its traditional equitable power to change that status quo once the party seeking the modification or suspension of the operation of the stay demonstrates that the stay "would cause irreparable injury, that the termination motion is likely to be defeated, and that the merits of the motion cannot be resolved before the automatic stay takes effect." *Ibid.* Where this is shown, the "court has discretion to suspend the automatic stay and require prison officials to comply with outstanding court orders until the court resolves the termination motion on the merits," *id.*, at 12–13, subject to immediate appellate review, 18 U. S. C. § 3626(e)(4).

Is this interpretation a "reasonable construction" of the statute? *Edward J. DeBartolo Corp.*, 485 U. S., at 575. I note first that the statutory language is open to the Solicitor General's interpretation. A district court ordinarily can stay the operation of a judicial order (such as a stay or injunction), see *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4, 9–10, and n. 4 (1942), when a party demonstrates the need to do so in accordance with traditional equitable criteria (irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public, see *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931 (1975); *Yakus* v. *United States*, 321 U. S. 414, 440 (1944)). There is no logical inconsistency in saying both (1) a motion (to terminate) "shall operate as a stay," and (2) the court retains the power

to modify or delay the operation of the stay in appropriate circumstances. The statutory language says nothing about this last-mentioned power. It is *silent*. It does not direct the district court to leave the stay in place come what may.

Nor does this more flexible interpretation deprive the procedural provision of meaning. The filing of the motion to terminate prospective relief will still, after a certain period, operate as a stay without further action by the court. Thus, the motion automatically changes the status quo and imposes upon the party wishing to suspend the automatic stay the burden of demonstrating strong, special reasons for doing so. The word "automatic" in the various subsection titles does not prove the contrary, for that word often means self-starting, not unstoppable. See Websters Third New International Dictionary 148 (1993). Indeed, the Bankruptcy Act uses the words "automatic stay" to describe a provision stating that "a petition filed . . . operates as a stay" of certain other judicial proceedings—despite the fact that a later portion of that same provision makes clear that under certain circumstances the bankruptcy court may terminate, annul, or modify the stay. 11 U. S. C. § 362(d); see also 143 Cong. Rec. S12269 (Nov. 9, 1997) (statement of Sen. Abraham) (explaining that § 3626(e)(2) was modeled after the Bankruptcy Act provision). And the Poultry Producers Financial Protection Act of 1987 specifies that a court of appeals decree affirming an order of the Secretary of Agriculture "shall operate as an injunction" restraining the "live poultry dealer" from violating that order, 7 U. S. C. § 228b–3(g); yet it appears that no one has ever suggested that a court of appeals lacks the power to modify that "injunction" where appropriate. Moreover, the change in the legal status quo that the automatic stay would bring about, and the need to demonstrate a special need to lift the stay (according to traditional equitable criteria), mean that the stay would remain in effect in all but highly unusual cases.

In addition, the surrounding procedural provisions are most naturally read as favoring the flexible interpretation. The immediately preceding provision requires the court to rule "promptly" upon the motion to terminate and says that "[m]andamus shall lie to remedy any failure to issue a prompt ruling." 18 U. S. C. § 3626(e)(1). If a motion to terminate takes effect automatically through the "stay" after 30 or 90 days, it is difficult to understand what purpose would be served by providing for mandamus—a procedure that itself (in so complicated a matter) could take several weeks. But if the automatic stay might be modified or lifted in an unusual case, providing for mandamus makes considerable sense. It guarantees that an appellate court will make certain that unusual circumstances do in fact justify any such modification or lifting of the stay. A later provision that provides for immediate appeal of any order "staying, suspending, delaying, or barring the operation of the automatic stay" can be read as providing for similar appellate review for similar reasons. § 3626(e)(4).

Further, the legislative history is neutral, for it is silent on this issue. Yet there is relevant judicial precedent. That precedent does not read statutory silence as denying judges authority to exercise their traditional equitable powers. Rather, it reads statutory silence as authorizing the exercise of those powers. This Court has said, for example, that "[o]ne thing is clear. Where Congress wished to deprive the courts of this historic power, it knew how to use apt words—only once has it done so and in a statute born of the exigencies of war." *Scripps-Howard*, *supra*, at 17. Compare *Lockerty* v. *Phillips*, 319 U. S. 182, 186–187 (1943) (finding that courts were deprived of equity powers where the statute explicitly removed jurisdiction), with *Scripps-Howard*, *supra*, at 8–10 (refusing to read silence as depriving courts of their historic equity power), and *Califano*, 442 U. S., at 705–706 (same). These cases recognize the importance of permitting courts in equity cases to tailor relief, and related

relief procedure, to the exigencies of particular cases and individual circumstances. In doing so, they recognize the fact that in certain circumstances justice requires the flexibility necessary to treat different cases differently—the rationale that underlies equity itself. Cf. *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case").

Finally, the more flexible interpretation is consistent with Congress' purposes as revealed in the statute. Those purposes include the avoidance of new judicial relief that is overly broad or no longer necessary and the reassessment of pre-existing relief to bring it into conformity with these standards. But Congress has simultaneously expressed its intent to maintain relief that is narrowly drawn and necessary to end unconstitutional practices. See 18 U. S. C. §§ 3626(a)(1), (a)(2), (b)(3). The statute, as flexibly interpreted, risks interfering with the first set of objectives only to the extent that the speedy appellate review provided in the statute fails to control district court error. The same interpretation avoids the improper provisional termination of relief that is constitutionally necessary. The risk of an occasional small additional delay seems a comparatively small price to pay (in terms of the statute's entire set of purposes) to avoid the serious constitutional problems that accompany the majority's more rigid interpretation.

The upshot is a statute that, when read in light of its language, structure, purpose, and history, is open to an interpretation that would allow a court to modify or suspend the automatic stay when a party, in accordance with traditional equitable criteria, has demonstrated a need for such an exception. That interpretation reflects this Court's historic reluctance to read a statute as depriving courts of their traditional equitable powers. It also avoids constitutional difficulties that might arise in unusual cases.

I do not argue that this interpretation reflects the most natural reading of the statute's language. Nor do I assert that each individual legislator would have endorsed that reading at the time. But such an interpretation is a reasonable construction of the statute. That reading harmonizes the statute's language with other basic legal principles, including constitutional principles. And, in doing so, it better fits the full set of legislative objectives embodied in the statute than does the more rigid reading that the majority adopts.

For these reasons, I believe that the Solicitor General's more flexible reading is the proper reading of the statute before us. I would consequently vacate the decision of the Court of Appeals and remand this action for further proceedings.

Syllabus

CROSBY, SECRETARY OF ADMINISTRATION AND FINANCE OF MASSACHUSETTS, ET AL. *v.* NATIONAL FOREIGN TRADE COUNCIL

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

No. 99–474. Argued March 22, 2000—Decided June 19, 2000

In 1996, Massachusetts passed a law barring state entities from buying goods or services from companies doing business with Burma. Subsequently, Congress imposed mandatory and conditional sanctions on Burma. Respondent (hereinafter Council), which has several members affected by the state Act, filed suit against petitioner state officials (hereinafter State) in federal court, claiming that the state Act unconstitutionally infringes on the federal foreign affairs power, violates the Foreign Commerce Clause, and is preempted by the federal Act. The District Court permanently enjoined the state Act's enforcement, and the First Circuit affirmed.

Held: The state Act is preempted, and its application unconstitutional, under the Supremacy Clause. Pp. 372–388.

(a) Even without an express preemption provision, state law must yield to a congressional Act if Congress intends to occupy the field, *California* v. *ARC America Corp.*, 490 U. S. 93, 100, or to the extent of any conflict with a federal statute, *Hines* v. *Davidowitz*, 312 U. S. 52, 66–67. This Court will find preemption where it is impossible for a private party to comply with both state and federal law and where the state law is an obstacle to the accomplishment and execution of Congress's full purposes and objectives. What is a sufficient obstacle is determined by examining the federal statute and identifying its purpose and intended effects. Here, the state Act is such an obstacle, for it undermines the intended purpose and natural effect of at least three federal Act provisions. Pp. 372–374.

(b) First, the state Act is an obstacle to the federal Act's delegation of discretion to the President to control economic sanctions against Burma. Although Congress put initial sanctions in place, it authorized the President to terminate the measures upon certifying that Burma has made progress in human rights and democracy, to impose new sanctions upon findings of repression, and, most importantly, to suspend sanctions in the interest of national security. Within the sphere defined by Congress, the statute has given the President as much discretion to exercise economic leverage against Burma, with an eye toward national security,

as law permits. The plenitude of Executive authority controls the preemption issue here. The President has the authority not merely to make a political statement but to achieve a political result, and the fullness of his authority shows the importance in the congressional mind of reaching that result. It is implausible to think that Congress would have gone to such lengths to empower the President had it been willing to compromise his effectiveness by allowing state or local ordinances to blunt the consequences of his actions. Yet this is exactly what the state Act does. Its sanctions are immediate and perpetual, there being no termination provision. This unyielding application undermines the President's authority by leaving him with less economic and diplomatic leverage than the federal Act permits. Pp. 374–377.

(c) Second, the state Act interferes with Congress's intention to limit economic pressure against the Burmese Government to a specific range. The state Act stands in clear contrast to the federal Act. It prohibits some contracts permitted by the federal Act, affects more investment than the federal Act, and reaches foreign and domestic companies while the federal Act confines its reach to United States persons. It thus conflicts with the federal law by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions. That the two Acts have a common end hardly neutralizes the conflicting means, and the fact that some companies may be able to comply with both sets of sanctions does not mean the state Act is not at odds with achievement of the congressional decision about the right calibration of force. Pp. 377–380.

(d) Finally, the state Act is at odds with the President's authority to speak for the United States among the world's nations to develop a comprehensive, multilateral Burma strategy. Congress called for Presidential cooperation with other countries in developing such a strategy, directed the President to encourage a dialogue between the Burmese Government and the democratic opposition, and required him to report to Congress on these efforts. This delegation of power, like that over economic sanctions, invested the President with the maximum authority of the National Government. The state Act undermines the President's capacity for effective diplomacy. In response to its passage, foreign governments have filed formal protests with the National Government and lodged formal complaints against the United States in the World Trade Organization. The Executive has consistently represented that the state Act has complicated its dealing with foreign sovereigns and proven an impediment to accomplishing the objectives assigned it by Congress. In this case, the positions of foreign governments and the Executive are competent and direct evidence of the state Act's frustra-

Syllabus

tion of congressional objectives. *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 512 U. S. 298, distinguished. Pp. 380–386.

(e) The State's remaining argument—that Congress's failure to preempt state and local sanctions demonstrates implicit permission—is unavailing. The existence of a conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict, and a failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption that courts will dependably apply. Pp. 386–388.

181 F. 3d 38, affirmed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 388.

Thomas A. Barnico, Assistant Attorney General of Massachusetts, argued the cause for petitioners. With him on the briefs were *Thomas F. Reilly*, Attorney General, and *James A. Sweeney*, Assistant Attorney General.

Timothy B. Dyk argued the cause for respondent. With him on the brief were *Gregory A. Castanias*, *John B. Kennedy*, and *Michael A. Collora*.

Solicitor General Waxman argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Assistant Attorney General Ogden*, *Deputy Solicitor General Kneedler*, *Barbara McDowell*, *Mark B. Stern*, *Alisa B. Klein*, *Douglas Hallward-Driemeier*, *David R. Andrews*, *Neal S. Wolin*, and *Andrew J. Pincus*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Arkansas et al. by *Heidi Heitkamp*, Attorney General of North Dakota, *Douglas A. Bahr*, Solicitor General, and *Beth Angus Baumstark*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Mark Pryor* of Arkansas, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *Earl I. Anzai* of Hawaii, *Richard P. Ieyoub* of Louisiana, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Mike Hatch* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Philip T. McLaughlin* of New Hampshire, *John J. Farmer, Jr.*, of New Jersey, *Patricia A. Madrid* of New Mexico, *W. A.*

JUSTICE SOUTER delivered the opinion of the Court.

The issue is whether the Burma law of the Commonwealth of Massachusetts, restricting the authority of its agencies to purchase goods or services from companies doing business with Burma,[1] is invalid under the Supremacy Clause of the National Constitution owing to its threat of frustrating federal statutory objectives. We hold that it is.

I

In June 1996, Massachusetts adopted "An Act Regulating State Contracts with Companies Doing Business with or in

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Drew Edmondson of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *John Cornyn* of Texas, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, and *Christine O. Gregoire* of Washington; for the Council of State Governments et al. by *Richard Ruda* and *James I. Crowley;* for Senator Barbara Boxer et al. by *John Echeverria*, *Robert Stumberg*, and *Matthew C. Porterfield;* for the New York City Comptroller et al. by *Sara C. Kay* and *Jane R. Levine;* and for Alliance for Democracy et al. by *Deborah Anker.*

Briefs of *amici curiae* urging affirmance were filed for Representative Douglas Bereuter et al. by *John Vanderstar*, *Charles Clark*, *Eric D. Brown*, and *W. Thomas McCraney III;* for Associated Industries of Massachusetts et al. by *Michael F. Malamut;* for the Chamber of Commerce of the United States et al. by *Daniel M. Price*, *Robin S. Conrad*, *Jan Amundson*, and *Quentin Riegel;* for the European Communities et al. by *Richard L. A. Weiner* and *David G. Leitch;* for the Industry Coalition on Technology Transfer by *Eric L. Hirschhorn* and *Terence Murphy;* for the Washington Legal Foundation by *Daniel J. Popeo* and *R. Shawn Gunnarson;* and for Gerald R. Ford et al. by *Andrew N. Vollmer*, *Carol J. Banta*, *Martin S. Kaufman*, and *Edwin L. Lewis III.*

Kenneth B. Clark filed a brief for the Coalition for Local Sovereignty as *amicus curiae.*

[1] The Court of Appeals noted that the ruling military government of "Burma changed [the country's] name to Myanmar in 1989," but the court then said it would use the name Burma since both parties and *amici curiae,* the state law, and the federal law all do so. *National Foreign Trade Council* v. *Natsios,* 181 F. 3d 38, 45, n. 1 (CA1 1999). We follow suit, noting that our use of this term, like the First Circuit's, is not intended to express any political view. See *ibid.*

Burma (Myanmar)," 1996 Mass. Acts 239, ch. 130 (codified at Mass. Gen. Laws §§ 7:22G–7:22M, 40 F½ (1997). The statute generally bars state entities from buying goods or services from any person (defined to include a business organization) identified on a "restricted purchase list" of those doing business with Burma. §§ 7:22H(a), 7:22J. Although the statute has no general provision for waiver or termination of its ban, it does exempt from boycott any entities present in Burma solely to report the news, § 7:22H(e), or to provide international telecommunication goods or services, *ibid.*, or medical supplies, § 7:22I.

" 'Doing business with Burma' " is defined broadly to cover any person

> "(a) having a principal place of business, place of incorporation or its corporate headquarters in Burma (Myanmar) or having any operations, leases, franchises, majority-owned subsidiaries, distribution agreements, or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary, licensee or franchise of such a person;
>
> "(b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement;
>
> "(c) promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is largely controlled by the government of Burma (Myanmar), from Burma (Myanmar);
>
> "(d) providing any goods or services to the government of Burma (Myanmar)." § 7:22G.

There are three exceptions to the ban: (1) if the procurement is essential, and without the restricted bid, there would be no bids or insufficient competition, § 7:22H(b); (2) if the

procurement is of medical supplies, § 7:22I; and (3) if the procurement efforts elicit no "comparable low bid or offer" by a person not doing business with Burma, § 7:22H(d), meaning an offer that is no more than 10 percent greater than the restricted bid, § 7:22G. To enforce the ban, the Act requires petitioner Secretary of Administration and Finance to maintain a "restricted purchase list" of all firms "doing business with Burma,"[2] § 7:22J.

In September 1996, three months after the Massachusetts law was enacted, Congress passed a statute imposing a set of mandatory and conditional sanctions on Burma. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 570, 110 Stat. 3009–166 to 3009–167 (enacted by the Omnibus Consolidated Appropriations Act, 1997, § 101(c), 110 Stat. 3009–121 to 3009–172). The federal Act has five basic parts, three substantive and two procedural.

First, it imposes three sanctions directly on Burma. It bans all aid to the Burmese Government except for humanitarian assistance, counternarcotics efforts, and promotion of human rights and democracy. § 570(a)(1). The statute instructs United States representatives to international financial institutions to vote against loans or other assistance to or for Burma, § 570(a)(2), and it provides that no entry visa shall be issued to any Burmese Government official unless required by treaty or to staff the Burmese mission to the United Nations, § 570(a)(3). These restrictions are to remain in effect "[u]ntil such time as the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government." § 570(a).

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[2] According to the District Court, companies may challenge their inclusion on the list by submitting an affidavit stating that they do no business with Burma. *National Foreign Trade Council* v. *Baker*, 26 F. Supp. 2d 287, 289 (Mass. 1998). The Massachusetts Executive Office's Operational Services Division makes a final determination. *Ibid.*

Second, the federal Act authorizes the President to impose further sanctions subject to certain conditions. He may prohibit "United States persons" from "new investment" in Burma, and shall do so if he determines and certifies to Congress that the Burmese Government has physically harmed, rearrested, or exiled Daw Aung San Suu Kyi (the opposition leader selected to receive the Nobel Peace Prize), or has committed "large-scale repression of or violence against the Democratic opposition." § 570(b). "New investment" is defined as entry into a contract that would favor the "economical development of resources located in Burma," or would provide ownership interests in or benefits from such development, § 570(f)(2), but the term specifically excludes (and thus excludes from any Presidential prohibition) "entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology," *ibid.*

Third, the statute directs the President to work to develop "a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." § 570(c). He is instructed to cooperate with members of the Association of Southeast Asian Nations (ASEAN) and with other countries having major trade and investment interests in Burma to devise such an approach, and to pursue the additional objective of fostering dialogue between the ruling State Law and Order Restoration Council (SLORC) and democratic opposition groups. *Ibid.*

As for the procedural provisions of the federal statute, the fourth section requires the President to report periodically to certain congressional committee chairmen on the progress toward democratization and better living conditions in Burma as well as on the development of the required strategy. § 570(d). And the fifth part of the federal Act authorizes the President "to waive, temporarily or permanently, any sanction [under the federal Act] . . . if he determines and certifies to Congress that the application of such sanction

would be contrary to the national security interests of the United States." § 570(e).

On May 20, 1997, the President issued the Burma Executive Order, Exec. Order No. 13047, 3 CFR 202 (1997 Comp.). He certified for purposes of § 570(b) that the Government of Burma had "committed large-scale repression of the democratic opposition in Burma" and found that the Burmese Government's actions and policies constituted "an unusual and extraordinary threat to the national security and foreign policy of the United States," a threat characterized as a national emergency. The President then prohibited new investment in Burma "by United States persons," Exec. Order No. 13047, § 1, any approval or facilitation by a United States person of such new investment by foreign persons, § 2(a), and any transaction meant to evade or avoid the ban, § 2(b). The order generally incorporated the exceptions and exemptions addressed in the statute. §§ 3, 4. Finally, the President delegated to the Secretary of State the tasks of working with ASEAN and other countries to develop a strategy for democracy, human rights, and the quality of life in Burma, and of making the required congressional reports.[3] § 5.

II

Respondent National Foreign Trade Council (Council) is a nonprofit corporation representing companies engaged in foreign commerce; 34 of its members were on the Massachusetts restricted purchase list in 1998. *National Foreign Trade Council* v. *Natsios*, 181 F. 3d 38, 48 (CA1 1999). Three withdrew from Burma after the passage of the state Act, and one member had its bid for a procurement contract increased by 10 percent under the provision of the state law

[3] The President also delegated authority to implement the policy to the Secretary of the Treasury, in consultation with the Secretary of State. § 6. On May 21, 1998, the Secretary of the Treasury issued federal regulations implementing the President's Executive Order. See 31 CFR pt. 537 (1999) (Burmese Sanctions Regulations).

allowing acceptance of a low bid from a listed bidder only if the next-to-lowest bid is more than 10 percent higher. *Ibid.*

In April 1998, the Council filed suit in the United States District Court for the District of Massachusetts, seeking declaratory and injunctive relief against the petitioner state officials charged with administering and enforcing the state Act (whom we will refer to simply as the State).[4] The Council argued that the state law unconstitutionally infringed on the federal foreign affairs power, violated the Foreign Commerce Clause, and was preempted by the federal Act. After detailed stipulations, briefing, and argument, the District Court permanently enjoined enforcement of the state Act, holding that it "unconstitutionally impinge[d] on the federal government's exclusive authority to regulate foreign affairs." *National Foreign Trade Council* v. *Baker*, 26 F. Supp. 2d 287, 291 (Mass. 1998).

The United States Court of Appeals for the First Circuit affirmed on three independent grounds. 181 F. 3d, at 45. It found the state Act unconstitutionally interfered with the foreign affairs power of the National Government under *Zschernig* v. *Miller*, 389 U. S. 429 (1968), see 181 F. 3d, at 52–55; violated the dormant Foreign Commerce Clause, U. S. Const., Art. I, § 8, cl. 3, see 181 F. 3d, at 61–71; and was preempted by the congressional Burma Act, see *id.*, at 71–77.

The State's petition for certiorari challenged the decision on all three grounds and asserted interests said to be shared by other state and local governments with similar measures.[5] Though opposing certiorari, the Council acknowledged the

[4] One of the state offices changed incumbents twice during litigation before reaching this Court, see *National Foreign Trade Council* v. *Natsios*, 181 F. 3d 38, 48, n. 4 (CA1 1999), and once more after we granted certiorari.

[5] "At least nineteen municipal governments have enacted analogous laws restricting purchases from companies that do business in Burma." *Id.*, at 47; Pet. for Cert. 13 (citing N. Y. C. Admin. Code § 6–115 (1999); Los Angeles Admin. Code, Art. 12, § 10.38 *et seq.* (1999); Philadelphia Code § 17–104(b) (1999); Vermont H. J. Res. 157 (1998); 1999 Vt. Laws No. 13).

significance of the issues and the need to settle the constitutionality of such laws and regulations. Brief in Opposition 18–19. We granted certiorari to resolve these important questions, 528 U. S. 1018 (1999), and now affirm.

III

A fundamental principle of the Constitution is that Congress has the power to preempt state law. Art. VI, cl. 2; *Gibbons* v. *Ogden*, 9 Wheat. 1, 211 (1824); *Savage* v. *Jones*, 225 U. S. 501, 533 (1912); *California* v. *ARC America Corp.*, 490 U. S. 93, 101 (1989). Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances. When Congress intends federal law to "occupy the field," state law in that area is preempted. *Id.*, at 100; cf. *United States* v. *Locke*, 529 U. S. 89, 115 (2000) (citing *Charleston & Western Carolina R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597, 604 (1915)). And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.[6] *Hines* v. *Davidowitz*, 312 U. S. 52, 66–67 (1941); *ARC America Corp.*, *supra*, at 100–101; *Locke*, *supra*, at 109. We will find preemption where it is impossible for a private party to comply with both state and federal law, see, *e. g.*, *Florida Lime & Avocado Growers, Inc.* v.

[6] We recognize, of course, that the categories of preemption are not "rigidly distinct." *English* v. *General Elec. Co.*, 496 U. S. 72, 79, n. 5 (1990). Because a variety of state laws and regulations may conflict with a federal statute, whether because a private party cannot comply with both sets of provisions or because the objectives of the federal statute are frustrated, "field pre-emption may be understood as a species of conflict pre-emption," *id.*, at 79–80, n. 5; see also *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 104, n. 2 (1992) (quoting *English*, *supra*); 505 U. S., at 115–116 (SOUTER, J., dissenting) (noting similarity between "purpose-conflict pre-emption" and preemption of a field, and citing L. Tribe, American Constitutional Law 486 (2d ed. 1988)); 1 L. Tribe, American Constitutional Law 1177 (3d ed. 2000) (noting that "*field*" preemption may fall into any of the categories of express, implied, or conflict preemption).

Paul, 373 U. S. 132, 142–143 (1963), and where "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, *supra*, at 67. What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects:

> "For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power." *Savage*, *supra*, at 533, quoted in *Hines*, *supra*, at 67, n. 20.

Applying this standard, we see the state Burma law as an obstacle to the accomplishment of Congress's full objectives under the federal Act.[7] We find that the state law undermines the intended purpose and "natural effect" of at least three provisions of the federal Act, that is, its delegation of effective discretion to the President to control economic

[7] The State concedes, as it must, that in addressing the subject of the federal Act, Congress has the power to preempt the state statute. See Reply Brief for Petitioners 2; Tr. of Oral Arg. 5–6.

We add that we have already rejected the argument that a State's "statutory scheme . . . escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power." *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U. S. 282, 287 (1986). In *Gould*, we found that a Wisconsin statute debarring repeat violators of the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*, from contracting with the State was preempted because the state statute's additional enforcement mechanism conflicted with the federal Act. 475 U. S., at 288–289. The fact that the State "ha[d] chosen to use its spending power rather than its police power" did not reduce the potential for conflict with the federal statute. *Ibid.*

sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy toward Burma.[8]

A

First, Congress clearly intended the federal Act to provide the President with flexible and effective authority over economic sanctions against Burma. Although Congress immediately put in place a set of initial sanctions (prohibiting bilateral aid, § 570(a)(1), support for international financial assistance, § 570(a)(2), and entry by Burmese officials into the United States, § 570(a)(3)), it authorized the President to terminate any and all of those measures upon determining and certifying that there had been progress in human rights and democracy in Burma. § 570(a). It invested the President with the further power to ban new investment by United States persons, dependent only on specific Presidential findings of repression in Burma. § 570(b). And, most significantly, Congress empowered the President "to waive, temporarily or permanently, any sanction [under the federal Act] . . . if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States." § 570(e).

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[8] We leave for another day a consideration in this context of a presumption against preemption. See *United States* v. *Locke*, 529 U. S. 89, 108 (2000). Assuming, *arguendo*, that some presumption against preemption is appropriate, we conclude, based on our analysis below, that the state Act presents a sufficient obstacle to the full accomplishment of Congress's objectives under the federal Act to find it preempted. See *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941).

Because our conclusion that the state Act conflicts with federal law is sufficient to affirm the judgment below, we decline to speak to field preemption as a separate issue, see n. 6, *supra*, or to pass on the First Circuit's rulings addressing the foreign affairs power or the dormant Foreign Commerce Clause. See *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (concurring opinion).

This express investiture of the President with statutory authority to act for the United States in imposing sanctions with respect to the Government of Burma, augmented by the flexibility [9] to respond to change by suspending sanctions in the interest of national security, recalls Justice Jackson's observation in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952): "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." See also *id.*, at 635–636, n. 2 (noting that the President's power in the area of foreign relations is least restricted by Congress and citing *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936)). Within the sphere defined by Congress, then, the statute has placed the President in a position with as much discretion to exercise economic leverage against Burma, with an eye toward national security, as our law will

[9] Statements by the sponsors of the federal Act underscore the statute's clarity in providing the President with flexibility in implementing its Burma sanctions policy. See 142 Cong. Rec. 19212 (1996) (statement of principal sponsor Sen. Cohen) (emphasizing importance of providing "the administration flexibility in reacting to changes, both positive and negative, with respect to the behavior of the [Burmese regime]); *id.*, at 19213; *id.*, at 19221 (statement of cosponsor Sen. McCain) (describing the federal Act as "giv[ing] the President, who, whether Democrat or Republican, is charged with conducting our Nation's foreign policy, some flexibility"); *id.*, at 19220 (statement of cosponsor Sen. Feinstein) ("We need to be able to have the flexibility to remove sanctions and provide support for Burma if it reaches a transition stage that is moving toward the restoration of democracy, which all of us support"). These sponsors chose a pliant policy with the explicit support of the Executive. See, *e. g.*, *id.*, at 19219 (letter from Barbara Larkin, Assistant Secretary, Legislative Affairs, U. S. Department of State to Sen. Cohen) (admitted by unanimous consent) ("We believe the current and conditional sanctions which your language proposes are consistent with Administration policy. As we have stated on several occasions in the past, we need to maintain our flexibility to respond to events in Burma and to consult with Congress on appropriate responses to ongoing and future development there").

admit. And it is just this plenitude of Executive authority that we think controls the issue of preemption here. The President has been given this authority not merely to make a political statement but to achieve a political result, and the fullness of his authority shows the importance in the congressional mind of reaching that result. It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.[10]

And that is just what the Massachusetts Burma law would do in imposing a different, state system of economic pressure against the Burmese political regime. As will be seen, the state statute penalizes some private action that the federal Act (as administered by the President) may allow, and pulls levers of influence that the federal Act does not reach. But the point here is that the state sanctions are immediate,[11] see 1996 Mass. Acts 239, ch. 130, § 3 (restricting all contracts after law's effective date); Mass. Gen. Laws § 7:22K (1997)

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[10] The State makes arguments that could be read to suggest that Congress's objective of Presidential flexibility was limited to discretion solely over the sanctions in the federal Act, and that Congress implicitly left control over state sanctions to the State. Brief for Petitioners 19–24. We reject this cramped view of Congress's intent as against the weight of the evidence. Congress made no explicit statement of such limited objectives. More importantly, the federal Act itself strongly indicates the opposite. For example, under the federal Act, Congress explicitly identified protecting "national security interests" as a ground on which the President could suspend federal sanctions. § 570(e), 110 Stat. 3009–167. We find it unlikely that Congress intended both to enable the President to protect national security by giving him the flexibility to suspend or terminate federal sanctions and simultaneously to allow Massachusetts to act at odds with the President's judgment of what national security requires.

[11] These provisions strongly resemble the immediate sanctions on investment that appeared in the proposed section of H. R. 3540 that Congress rejected in favor of the federal Act. See H. R. 3540, 104th Cong., 2d Sess., § 569(1) (1996).

(authorizing regulations for timely and effective implementation), and perpetual, there being no termination provision, see, *e. g.*, § 7:22J (restricted companies list to be updated at least every three months). This unyielding application undermines the President's intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy when he may choose to take the discretionary action open to him, whether he believes that the national interest requires sanctions to be lifted, or believes that the promise of lifting sanctions would move the Burmese regime in the democratic direction. Quite simply, if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence. In *Dames & Moore* v. *Regan*, 453 U. S. 654 (1981), we used the metaphor of the bargaining chip to describe the President's control of funds valuable to a hostile country, *id.*, at 673; here, the state Act reduces the value of the chips created by the federal statute.[12] It thus "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U. S., at 67.

B

Congress manifestly intended to limit economic pressure against the Burmese Government to a specific range. The federal Act confines its reach to United States persons, § 570(b), imposes limited immediate sanctions, § 570(a), places only a conditional ban on a carefully defined area of "new investment," § 570(f)(2), and pointedly exempts contracts to sell or purchase goods, services, or technology, § 570(f)(2). These detailed provisions show that Congress's calibrated

[12] The sponsors of the federal Act obviously anticipated this analysis. See, *e. g.*, 142 Cong. Rec., at 19220 (statement of Sen. Feinstein) ("We may be able to have the effect of nudging the SLORC toward an increased dialog with the democratic opposition. That is why we also allow the President to lift sanctions").

Burma policy is a deliberate effort "to steer a middle path," *id.*, at 73.[13]

The State has set a different course, and its statute conflicts with federal law at a number of points by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions. While the state Act differs from the federal in relying entirely on indirect economic leverage through third parties with Burmese connections, it otherwise stands in clear contrast to the congressional scheme in the scope of subject matter addressed. It restricts all contracts between the State and companies doing business in Burma, § 7:22H(a), except when purchasing medical supplies and other essentials (or when short of comparable bids), § 7:22I. It is specific in targeting contracts to pro-

[13] The fact that Congress repeatedly considered and rejected targeting a broader range of conduct lends additional support to our view. Most importantly, the federal Act, as passed, replaced the original proposed section of H. R. 3540, which barred "any investment in Burma" by a United States national without exception or limitation. See H. R. 3540, *supra*, § 569(1). Congress also rejected a competing amendment, S. 1511, 104th Cong., 1st Sess. (Dec. 29, 1995), which similarly provided that "United States nationals shall not make any investment in Burma," § 4(b)(1), and would have permitted the President to impose conditional sanctions on the importation of "articles which are produced, manufactured, grown, or extracted in Burma," § 4(c)(1), and would have barred all travel by United States nationals to Burma, § 4(c)(2). Congress had rejected an earlier amendment that would have prohibited all United States investment in Burma, subject to the President's power to lift sanctions. S. 1092, 104th Cong., 1st Sess. (July 28, 1995).

Statements of the sponsors of the federal Act also lend weight to the conclusions that the limits were deliberate. See, *e. g.*, 142 Cong. Rec., at 19279 (statement of Sen. Breaux) (characterizing the federal Act as "strik-[ing] a balance between unilateral sanctions against Burma and unfettered United States investment in that country"). The scope of the exemptions was discussed, see *ibid.* (statements of Sens. Nickles and Cohen), and broader sanctions were rejected, see *id.*, at 19212 (statement of Sen. Cohen); *id.*, at 19280 (statement of Sen. Murkowski) ("Instead of the current draconian sanctions proposed in the legislation before us, we should adopt an approach that effectively secures our national interests").

vide financial services, § 7:22G(b), and general goods and services, § 7:22G(d), to the Government of Burma, and thus prohibits contracts between the State and United States persons for goods, services, or technology, even though those transactions are explicitly exempted from the ambit of new investment prohibition when the President exercises his discretionary authority to impose sanctions under the federal Act. § 570(f)(2).

As with the subject of business meant to be affected, so with the class of companies doing it: the state Act's generality stands at odds with the federal discreteness. The Massachusetts law directly and indirectly imposes costs on all companies that do any business in Burma, § 7:22G, save for those reporting news or providing international telecommunications goods or services, or medical supplies, §§ 7:22H(e), 7:22I. It sanctions companies promoting the importation of natural resources controlled by the Government of Burma, or having any operations or affiliates in Burma. § 7:22G. The state Act thus penalizes companies with pre-existing affiliates or investments, all of which lie beyond the reach of the federal Act's restrictions on "new investment" in Burmese economic development. §§ 570(b), 570(f)(2). The state Act, moreover, imposes restrictions on foreign companies as well as domestic, whereas the federal Act limits its reach to United States persons.

The conflicts are not rendered irrelevant by the State's argument that there is no real conflict between the statutes because they share the same goals and because some companies may comply with both sets of restrictions. See Brief for Petitioners 21–22. The fact of a common end hardly neutralizes conflicting means,[14] see *Gade* v. *National Solid*

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[14] The State's reliance on *CTS Corp.* v. *Dynamics Corp. of America*, 481 U. S. 69, 82–83 (1987), for the proposition that "[w]here the state law furthers the purpose of the federal law, the Court should not find conflict" is misplaced. See Brief for Petitioners 21–22. In *CTS Corp.*, we found that an Indiana state securities law "further[ed] the federal policy of investor

Wastes Management Assn., 505 U. S. 88, 103 (1992), and the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ. See *Hines*, 312 U. S., at 61 ("The basic subject of the state and federal laws is identical"); *id.*, at 67 (finding conflict preemption). "'[C]onflict is imminent'" when "'two separate remedies are brought to bear on the same activity,'" *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U. S. 282, 286 (1986) (quoting *Garner* v. *Teamsters*, 346 U. S. 485, 498–499 (1953)). Sanctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force.

C

Finally, the state Act is at odds with the President's intended authority to speak for the United States among the world's nations in developing a "comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." § 570(c). Congress called for Presidential cooperation with members of ASEAN and other countries in developing such a strategy, *ibid.*, directed the President to encourage a dialogue between the Government of Burma and the democratic opposition, *ibid.*,[15] and required him to report to the Congress on the progress of his diplomatic efforts, § 570(d). As with Con-

protection," 481 U. S., at 83, but we also examined whether the state law conflicted with federal law "[i]n implementing its goal," *ibid.* Identity of ends does not end our analysis of preemption. See *Gould*, 475 U. S., at 286.

[15] The record supports the conclusion that Congress considered the development of a multilateral sanctions strategy to be a central objective of the federal Act. See, *e. g.*, 142 Cong. Rec., at 19212 (remarks of Sen. Cohen) ("[T]o be effective, American policy in Burma has to be coordinated with our Asian friends and allies"); *id.*, at 19219 (remarks of Sen. Feinstein) ("Only a multilateral approach is likely to be successful").

gress's explicit delegation to the President of power over economic sanctions, Congress's express command to the President to take the initiative for the United States among the international community invested him with the maximum authority of the National Government, cf. *Youngstown Sheet & Tube Co.*, 343 U. S., at 635, in harmony with the President's own constitutional powers, U. S. Const., Art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties" and "shall appoint Ambassadors, other public Ministers and Consuls"); § 3 ("[The President] shall receive Ambassadors and other public Ministers"). This clear mandate and invocation of exclusively national power belies any suggestion that Congress intended the President's effective voice to be obscured by state or local action.

Again, the state Act undermines the President's capacity, in this instance for effective diplomacy. It is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate discussions; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments. We need not get into any general consideration of limits of state action affecting foreign affairs to realize that the President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics.[16] When such

[16] Such concerns have been raised by the President's representatives in the Executive Branch. See Testimony of Under Secretary of State Eizenstat before the Trade Subcommittee of the House Ways and Means Committee (Oct. 23, 1997) (hereinafter Eizenstat testimony), App. 116 ("[U]nless sanctions measures are well conceived and coordinated, so that the United States is speaking with one voice and consistent with our international obligations, such uncoordinated responses can put the US on the political defensive and shift attention away from the problem to the issue of sanctions themselves"). We have expressed similar concerns in our cases on foreign commerce and foreign relations. See, *e. g.*, *Japan Line*,

exceptions do qualify his capacity to present a coherent position on behalf of the national economy, he is weakened, of course, not only in dealing with the Burmese regime, but in working together with other nations in hopes of reaching common policy and "comprehensive" strategy.[17] Cf. *Dames & Moore*, 453 U. S., at 673–674.

While the threat to the President's power to speak and bargain effectively with other nations seems clear enough, the record is replete with evidence to answer any skeptics. First, in response to the passage of the state Act, a number of this country's allies and trading partners filed formal protests with the National Government, see 181 F. 3d, at 47 (noting protests from Japan, the European Union (EU), and ASEAN), including an official *Note Verbale* from the EU to the Department of State protesting the state Act.[18] EU officials have warned that the state Act "could have a damaging effect on bilateral EU–US relations." Letter of Hugo

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Ltd. v. *County of Los Angeles*, 441 U. S. 434, 449 (1979); *Chy Lung* v. *Freeman*, 92 U. S. 275, 279 (1876); cf. The Federalist No. 80, pp. 535–536 (J. Cooke ed. 1961) (A. Hamilton) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The union will undoubtedly be answerable to foreign powers for the conduct of its members").

[17] The record reflects that sponsors of the federal Act were well aware of this concern and provided flexibility to the President over sanctions for that very reason. See, *e. g.*, 142 Cong. Rec., at 19214 (statement of Sen. Thomas) ("Although I will readily admit that our present relationship with Burma is not especially deep, the imposition of mandatory economic sanctions would certainly downgrade what little relationship we have. Moreover, it would affect our relations with many of our allies in Asia as we try to corral them into following our lead"); *id.*, at 19219 (statement of Sen. Feinstein) ("It is absolutely essential that any pressure we seek to put on the Government of Burma be coordinated with the nations of ASEAN and our European and Asian allies. If we act unilaterally, we are more likely to have the opposite effect—alienating many of these allies, while having no real impact on the ground").

[18] In *amicus* briefs here and in the courts below, the EU has consistently taken the position that the state Act has created "an issue of serious concern in EU–U. S. relations." Brief for European Communities et al. as *Amici Curiae* 6.

Paemen, Ambassador, European Union, Delegation of the European Commission, to William F. Weld, Governor, State of Massachusetts, Jan. 23, 1997, App. 75.

Second, the EU and Japan have gone a step further in lodging formal complaints against the United States in the World Trade Organization (WTO), claiming that the state Act violates certain provisions of the Agreement on Government Procurement,[19] H. R. Doc. No. 103–316, p. 1719 (1994), and the consequence has been to embroil the National Government for some time now in international dispute proceedings under the auspices of the WTO. In their brief before this Court, EU officials point to the WTO dispute as threatening relations with the United States, Brief for European Communities et al. as *Amici Curiae* 7, and n. 7, and note that the state Act has become the topic of "intensive discussions" with officials of the United States at the highest levels, those discussions including exchanges at the twice yearly EU–U. S. Summit.[20]

Third, the Executive has consistently represented that the state Act has complicated its dealings with foreign sovereigns and proven an impediment to accomplishing objectives assigned it by Congress. Assistant Secretary of State Larson, for example, has directly addressed the mandate of the

[19] Although the WTO dispute proceedings were suspended at the request of Japan and the EU in light of the District Court's ruling below, Letter of Ole Lundby, Chairman of the Panel, to Ambassadors from the European Union, Japan, and the United States (Feb. 10, 1999), and have since automatically lapsed, Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 International Legal Materials 1125, 1234 (1994), neither of those parties is barred from reinstating WTO procedures to challenge the state Act in the future. In fact, the EU, as *amicus* before us, specifically represents that it intends to begin new WTO proceedings should the current injunction on the law be lifted. Brief for European Communities et al. as *Amici Curiae* 7. We express no opinion on the merits of these proceedings.

[20] Senior Level Group Report to the U. S.–EU Summit in Washington 3 (Dec. 17, 1999), http://www.eurunion.org/partner/summit/Summit9912/SLGRept.html.

federal Burma law in saying that the imposition of unilateral state sanctions under the state Act "complicate[s] efforts to build coalitions with our allies" to promote democracy and human rights in Burma. A. Larson, State and Local Sanctions: Remarks to the Council of State Governments 2 (Dec. 8, 1998). "[T]he EU's opposition to the Massachusetts law has meant that US government high level discussions with EU officials often have focused not on what to do about Burma, but on what to do about the Massachusetts Burma law." *Id.*, at 3.[21] This point has been consistently echoed in the State Department:

> "While the [Massachusetts sanctions on Burma] were adopted in pursuit of a noble goal, the restoration of democracy in Burma, these measures also risk shifting the focus of the debate with our European Allies away from the best way to bring pressure against the State Law and Order Restoration Council (SLORC) to a potential WTO dispute over its consistency with our international obligations. Let me be clear. We are working with Massachusetts in the WTO dispute settlement process. But we must be honest in saying that the threatened WTO case risks diverting United States' and Europe's attention from focusing where it should be—on Burma." Eizenstat testimony, App. 115.[22]

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[21] Assistant Secretary Larson also declared that the state law "has hindered our ability to speak with one voice on the grave human rights situation in Burma, become a significant irritant in our relations with the EU and impeded our efforts to build a strong multilateral coalition on Burma where we, Massachusetts and the EU share a common goal." Assistant Secretary of State Alan P. Larson, State and Local Sanctions: Remarks to the Council of State Governments 3 (Dec. 8, 1998).

[22] The United States, in its brief as *amicus curiae*, continues to advance this position before us. See Brief for United States as *Amicus Curiae* 8–9, and n. 7, 34–35. This conclusion has been consistently presented by senior United States officials. See also Testimony of Deputy Assistant Secretary of State David Marchick before the California State Assembly, Oct. 28, 1997, App. 137; Testimony of Deputy Assistant Secretary of State

This evidence in combination is more than sufficient to show that the state Act stands as an obstacle in addressing the congressional obligation to devise a comprehensive, multilateral strategy.

Our discussion in *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 512 U. S. 298, 327–329 (1994), of the limited weight of evidence of formal diplomatic protests, risk of foreign retaliation, and statements by the Executive does not undercut the point. In *Barclays*, we had the question of the preemptive effect of federal tax law on state tax law with discriminatory extraterritorial effects. We found the reactions of foreign powers and the opinions of the Executive irrelevant in fathoming congressional intent because Congress had taken specific actions rejecting the positions both of foreign governments, *id.*, at 324–328, and the Executive, *id.*, at 328–329. Here, however, Congress has done nothing to render such evidence beside the point. In consequence, statements of foreign powers necessarily involved in the President's efforts to comply with the federal Act, indications of concrete disputes with those powers, and opinions of senior National Government officials are competent and direct evidence of the frustration of congressional objectives by the state Act.[23] Although we do not unquestioningly defer to the legal judgments expressed in Executive Branch statements when determining a federal Act's preemptive charac-

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David Marchick before the Maryland House of Delegates Committee on Commerce and Government Matters, Mar. 25, 1998, *id.*, at 166 (same).

[23] We find support for this conclusion in the statements of the congressional sponsors of the federal Act, who indicated their opinion that inflexible unilateral action would be likely to cause difficulties in our relations with our allies and in crafting an effective policy toward Burma. See n. 17, *supra*. Moreover, the facts that the Executive specifically called for flexibility prior to the passage of the federal Act, and that the Congress rejected less flexible alternatives and adopted the current law in response to the Executive's communications, bolster the relevance of the Executive's opinion with regard to its ability to accomplish Congress's goals. See n. 9, *supra*.

ter, *ibid.*, we have never questioned their competence to show the practical difficulty of pursuing a congressional goal requiring multinational agreement. We have, after all, not only recognized the limits of our own capacity to "determin[e] precisely when foreign nations will be offended by particular acts," *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 194 (1983), but consistently acknowledged that the "nuances" of "the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court," *id.*, at 196; *Barclays*, *supra*, at 327. In this case, repeated representations by the Executive Branch supported by formal diplomatic protests and concrete disputes are more than sufficient to demonstrate that the state Act stands in the way of Congress's diplomatic objectives.[24]

IV

The State's remaining argument is unavailing. It contends that the failure of Congress to preempt the state Act

[24] The State appears to argue that we should ignore the evidence of the WTO dispute because under the federal law implementing the General Agreement on Tariffs and Trade (GATT), Congress foreclosed suits by private persons and foreign governments challenging a state law on the basis of GATT in federal or state courts, allowing only the National Government to raise such a challenge. See Uruguay Round Agreements Act (URAA), § 102(c)(1), 108 Stat. 4818, 19 U. S. C. §§ 3512(b)(2)(A), 3512(c)(1); see also "Statement of Administrative Action" (SAA), reprinted in H. R. Doc. No. 103–216, pp. 656, 675–677 (1994). To consider such evidence, in its view, would effectively violate the ban by allowing private parties and foreign nations to challenge state procurement laws in domestic courts. But the terms of § 102 of the URAA and of the SAA simply do not support this argument. They refer to challenges to state law based on inconsistency with any of the "Uruguay Round Agreements." The challenge here is based on the federal Burma law. We reject the State's argument that the National Government's decisions to bar such WTO suits and to decline to bring its own suit against the Massachusetts Burma law evince its approval. These actions simply do not speak to the preemptive effect of the federal sanctions against Burma.

demonstrates implicit permission. The State points out that Congress has repeatedly declined to enact express preemption provisions aimed at state and local sanctions, and it calls our attention to the large number of such measures passed against South Africa in the 1980's, which various authorities cited have thought were not preempted.[25] The State stresses that Congress was aware of the state Act in 1996, but did not preempt it explicitly when it adopted its own Burma statute.[26] The State would have us conclude that Congress's continuing failure to enact express preemption implies approval, particularly in light of occasional instances of express preemption of state sanctions in the past.[27]

The argument is unconvincing on more than one level. A failure to provide for preemption expressly may reflect noth-

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[25] See, *e. g.*, *Board of Trustees* v. *Mayor and City Council of Baltimore*, 317 Md. 72, 79–98, 562 A. 2d 720, 744–749 (1989) (holding local divestment ordinance not preempted by Comprehensive Anti-Apartheid Act of 1986 (CAAA)), cert. denied *sub nom. Lubman* v. *Mayor and City Council of Baltimore*, 493 U. S 1093 (1990); Constitutionality of South African Divestment Statutes Enacted by State and Local Goverments, 10 Op. Off. Legal Counsel 49, 64–66, 1986 WL 213238 (state and local divestment and selective purchasing laws not preempted by pre-CAAA federal law); H. R. Res. Nos. 99–548, 99–549 (1986) (denying preemptive intent of CAAA); 132 Cong. Rec. 23119–23129 (1986) (House debate on resolutions); *id.*, at 23292 (Sen. Kennedy, quoting testimony of Laurence H. Tribe). *Amicus* Members of Congress in support of the State also note that when Congress revoked its federal sanctions in response to the democratic transition in that country, it refused to preempt the state and local measures, merely "urg[ing]" both state and local governments and private boycott participants to rescind their sanctions. Brief for Senator Boxer et al. as *Amici Curiae* 9, citing South African Democratic Transition Support Act of 1993, § 4(c)(1), 107 Stat. 1503.

[26] The State also finds significant the fact that Congress did not preempt state and local sanctions in a recent sanctions reform bill, even though its sponsor seemed to be aware of such measures. See H. R. Rep. No. 105–2708 (1997); 143 Cong. Rec. E2080 (Oct. 23, 1997) (Rep. Hamilton).

[27] See Export Administration Act of 1979, 50 U. S. C. App. § 2407(c) (1988 ed.) (Anti-Arab boycott of Israel provisions expressly "preempt any law, rule, or regulation").

ing more than the settled character of implied preemption doctrine that courts will dependably apply, and in any event, the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict, *Hines*, 312 U. S., at 67. The State's inference of congressional intent is unwarranted here, therefore, simply because the silence of Congress is ambiguous. Since we never ruled on whether state and local sanctions against South Africa in the 1980's were preempted or otherwise invalid, arguable parallels between the two sets of federal and state Acts do not tell us much about the validity of the latter.

V

Because the state Act's provisions conflict with Congress's specific delegation to the President of flexible discretion, with limitation of sanctions to a limited scope of actions and actors, and with direction to develop a comprehensive, multilateral strategy under the federal Act, it is preempted, and its application is unconstitutional, under the Supremacy Clause.

The judgment of the Court of Appeals for the First Circuit is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

It is perfectly obvious on the face of this statute that Congress, with the concurrence of the President, intended to "provid[e] the President with flexibility in implementing its Burma sanctions policy." *Ante*, at 375, n. 9. I therefore see no point in devoting a footnote to the interesting (albeit unsurprising) proposition that "[s]tatements by the sponsors of the federal Act" show that they shared this intent, *ibid.*, and that a statement in a letter from a State Department officer shows that flexibility had "the explicit support of the

Executive," *ante*, at 375, n. 9. This excursus is especially pointless since the immediately succeeding footnote must rely upon the statute itself (devoid of any support in statements by "sponsors" or the "Executive") to refute the quite telling argument that the statements were addressed only to flexibility in administering the sanctions of the *federal* Act, and said nothing at all about state sanctions. See *ante*, at 376, n. 10.

It is perfectly obvious on the face of the statute that Congress expected the President to use his discretionary authority over sanctions to "move the Burmese regime in the democratic direction," *ante*, at 377. I therefore see no point in devoting a footnote to the interesting (albeit unsurprising) proposition that "[t]he sponsors of the federal Act" shared this expectation, *ante*, at 377, n. 12.

It is perfectly obvious on the face of the statute that Congress's Burma policy was a "calibrated" one, which "limit[ed] economic pressure against the Burmese Government to a specific range," *ante*, at 377. I therefore see no point in devoting a footnote to the interesting (albeit unsurprising) proposition that bills imposing greater sanctions were introduced but not adopted, *ante*, at 378, n. 13, and to the (even less surprising) proposition that the sponsors of the legislation made clear that its "limits were deliberate," *ibid.* And I would feel this way even if I shared the Court's naïve assumption that the failure of a bill to make it out of committee, or to be adopted when reported to the floor, is the same as a congressional "reject[ion]" of what the bill contained, *ibid.* Curiously, the Court later recognizes, in rejecting the argument that Congress's failure to enact express pre-emption implies approval of the state Act, that "the silence of Congress [may be] ambiguous." *Ante*, at 388. Would that the Court had come to this conclusion *before* it relied (several times) upon the implications of Congress's failure to enact legislation, see *ante*, at 376, n. 11, 378, n. 13, 385, n. 23.

It is perfectly obvious on the face of the statute that Congress intended the President to develop a "multilateral strategy" in cooperation with other countries. In fact, the statute says that in so many words, see § 570(c), 110 Stat. 3009–166. I therefore see no point in devoting two footnotes to the interesting (albeit unsurprising) proposition that three Senators *also* favored a multilateral approach, *ante,* at 380, n. 15, 382, n. 17.

It is perfectly obvious from the record, as the Court discusses, *ante,* at 382–385, that the inflexibility produced by the Massachusetts statute has in fact caused difficulties with our allies and has in fact impeded a "multilateral strategy." And as the Court later says in another context, "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict," *ante,* at 388. I therefore see no point in devoting a footnote to the interesting (albeit unsurprising) fact that the "congressional sponsors" of the Act and "the Executive" actually *predicted* that inflexibility would have the effect of causing difficulties with our allies and impeding a "multilateral strategy," *ante,* at 385, n. 23.

Of course even if all of the Court's invocations of legislative history were not utterly irrelevant, I would still object to them, since neither the statements of individual Members of Congress (ordinarily addressed to a virtually empty floor),* nor Executive statements and letters addressed to congressional committees, nor the nonenactment of other proposed legislation, is a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us. The *only* reliable indication of *that* intent—the only thing we know for sure can be attributed

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*Debate on the bill that became the present Act seems, in this respect, not to have departed from the ordinary. Cf. 142 Cong. Rec. 19263 (1996) (statement of Sen. McConnell) (noting, in debate regarding which amendment to take up next: "I do not see anyone on the Democratic side in the Chamber").

to *all* of them—is the words of the bill that they voted to make law. In a way, using unreliable legislative history to confirm what the statute plainly says anyway (or what the record plainly shows) is less objectionable since, after all, it has absolutely no effect upon the outcome. But in a way, this utter lack of necessity makes it even worse—calling to mind St. Augustine's enormous remorse at stealing pears when he was not even hungry, and just for the devil of it ("not seeking aught through the shame, but the shame itself!"). The Confessions, Book 2, ¶ 9, in 18 Great Books of the Western World 10–11 (1952) (E. Pusey transl. 1952).

In any case, the portion of the Court's opinion that I consider irrelevant is quite extensive, comprising, in total, about one-tenth of the opinion's size and (since it is in footnote type) even more of the opinion's content. I consider that to be not just wasteful (it was not preordained, after all, that this was to be a 25-page essay) but harmful, since it tells future litigants that, even when a statute is clear on its face, and its effects clear upon the record, statements from the legislative history may help (and presumably harm) the case. If so, they must be researched and discussed by counsel—which makes appellate litigation considerably more time consuming, and hence considerably more expensive, than it need be. This to my mind outweighs the arguable good that may come of such persistent irrelevancy, at least when it is indulged in the margins: that it may encourage readers to ignore our footnotes.

For this reason, I join only the judgment of the Court.

Syllabus

ARIZONA *v.* CALIFORNIA

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 8, Orig. Argued April 25, 2000—Decided June 19, 2000

This litigation began in 1952 when Arizona invoked this Court's original jurisdiction to settle a dispute with California over the extent of each State's right to use water from the Colorado River system. The United States intervened, seeking water rights on behalf of, among others, five Indian reservations, including the Fort Yuma (Quechan) Indian Reservation, the Colorado River Indian Reservation, and the Fort Mojave Indian Reservation. The first round of the litigation culminated in *Arizona* v. *California*, 373 U. S. 546 *(Arizona I)*, in which the Court held that the United States had reserved water rights for the five reservations, *id.*, at 565, 599–601; that those rights must be considered present perfected rights and given priority because they were effective as of the time each reservation was created, *id.*, at 600; and that those rights should be based on the amount of each reservation's practicably irrigable acreage as determined by the Special Master, *ibid.* In its 1964 decree, the Court specified the quantities and priorities of the water entitlements for the parties and the Tribes, *Arizona* v. *California*, 376 U. S. 340, but held that the water rights for the Fort Mojave and Colorado River Reservations would be subject to appropriate adjustment by future agreement or decree in the event the respective reservations' disputed boundaries were finally determined, *id.*, at 345. The Court's 1979 supplemental decree again deferred resolution of reservation boundary disputes and allied water rights claims. *Arizona* v. *California*, 439 U. S. 419, 421 *(per curiam)*. In *Arizona* v. *California*, 460 U. S. 605 *(Arizona II)*, the Court concluded, among other things, that various administrative actions taken by the Secretary of the Interior, including his 1978 order recognizing the entitlement of the Quechan Tribe (Tribe) to the disputed boundary lands of the Fort Yuma Reservation did not constitute final determinations of reservation boundaries for purposes of the 1964 decree. *Id.*, at 636–638. The Court also held in *Arizona II* that certain lands within undisputed reservation boundaries, for which the United States had not sought water rights in *Arizona I*—the so-called "omitted lands"—were not entitled to water under res judicata principles. 460 U. S., at 626. The Court's 1984 supplemental decree again declared that water rights for all five reservations would be subject to appropriate adjustments if the reservations' boundaries were finally determined. *Arizona* v. *California*, 466 U. S.

144, 145. In 1987, the Ninth Circuit dismissed, on grounds of the United States' sovereign immunity, a suit by California state agencies that could have finally determined the reservations' boundaries. This Court affirmed the Ninth Circuit's judgment by an equally divided vote.

The present phase of the litigation concerns claims by the Tribe and the United States on the Tribe's behalf for increased water rights for the Fort Yuma Reservation. These claims rest on the contention that the Fort Yuma Reservation encompasses some 25,000 acres of disputed boundary lands not attributed to that reservation in earlier stages of the litigation. The land in question was purportedly ceded to the United States under an 1893 Agreement with the Tribe. In 1936, the Department of the Interior's Solicitor Margold issued an opinion stating that, under the 1893 Agreement, the Tribe had unconditionally ceded the lands. The Margold Opinion remained the Federal Government's position for 42 years. In 1946, Congress enacted the Indian Claims Commission Act, establishing a tribunal with power to decide tribes' claims against the Government. The Tribe brought before the Commission an action, which has come to be known as Docket No. 320, challenging the 1893 Agreement on two mutually exclusive grounds: (1) that it was void, in which case the United States owed the Tribe damages essentially for trespass, and (2) that it constituted an uncompensated taking of tribal lands. In 1976, the Commission transferred Docket No. 320 to the Court of Claims. In the meantime, the Tribe asked the Interior Department to reconsider the Margold Opinion. Ultimately, in a 1978 Secretarial Order, the Department changed its position and confirmed the Tribe's entitlement to most of the disputed lands. A few months after this Court decided in *Arizona II* that the 1978 Secretarial Order did not constitute a final determination of reservation boundaries, the United States and the Tribe entered into a settlement of Docket No. 320, which the Court of Claims approved and entered as its final judgment. Under the settlement, the United States agreed to pay the Tribe $15 million in full satisfaction of the Tribe's Docket No. 320 claims, and the Tribe agreed that it would not further assert those claims against the Government. In 1989, this Court granted the motion of Arizona, California, and two municipal water districts (State parties) to reopen the 1964 decree to determine whether the Fort Yuma, Colorado River, and Fort Mojave Reservations were entitled to claim additional boundary lands and, if so, additional water rights. The State parties assert here that the Fort Yuma claims of the Tribe and the United States are precluded by *Arizona I* and by the Claims Court consent judgment in Docket No. 320. The Special Master has prepared a report recommending that the Court reject the first ground for preclusion but accept the second. The State parties have filed exceptions to the Special Master's

first recommendation, and the United States and the Tribe have filed exceptions to the second. The Master has also recommended approval of the parties' proposed settlements of claims for additional water for the Fort Mojave and Colorado River Reservations, and has submitted a proposed supplemental decree to effectuate the parties' accords.

Held:

1. In view of the State parties' failure to raise the preclusion argument earlier in the litigation, despite ample opportunity and cause to do so, the claims of the United States and the Tribe to increased water rights for the disputed boundary lands of the Fort Yuma Reservation are not foreclosed by *Arizona I*. According to the State parties, those claims are precluded by the finality rationale this Court employed in dismissing the "omitted lands" claims in *Arizona II*, 460 U. S., at 620–621, 626–627, because the United States could have raised the Fort Yuma Reservation boundary lands claims in *Arizona I*, but deliberately decided not to do so. In rejecting this argument, the Special Master pointed out that the Government did not assert such claims in *Arizona I* because, at that time, it was bound to follow the Margold Opinion, under which the Tribe had no claim to the boundary lands. The Master concluded that the 1978 Secretarial Order, which overruled the Margold Opinion and recognized the Tribe's beneficial ownership of the boundary lands, was a circumstance not known in 1964, one that warranted an exception to the application of res judicata doctrine. In so concluding, the Special Master relied on an improper ground: The 1978 Secretarial Order does not qualify as a previously unknown circumstance that can overcome otherwise applicable preclusion principles. That order did not change the underlying facts in dispute; it simply embodied one party's changed view of the import of unchanged facts. However, the Court agrees with the United States and the Tribe that the State parties' preclusion defense is inadmissible. The State parties did not raise the defense in 1978 in response to the United States' motion for a supplemental decree granting additional water rights for the Fort Yuma Reservation or in 1982 when *Arizona II* was briefed and argued. Unaccountably, the State parties first raised their res judicata plea in 1989, when they initiated the current round of proceedings. While preclusion rules are not strictly applicable in the context of a single ongoing original action, the principles upon which they rest should inform the Court's decision. *Arizona II*, 460 U. S., at 619. Those principles rank res judicata an affirmative defense ordinarily lost if not timely raised. See Fed. Rule Civ. Proc. 8(c). The Court disapproves the notion that a party may wake up and effectively raise a defense years after the first opportunity to raise it so long as the party was (though no fault of anyone

else) in the dark until its late awakening. Nothing in *Arizona II* supports the State parties' assertion that the Court expressly recognized the possibility that future Fort Yuma boundary lands claims might be precluded. 460 U. S., at 638, distinguished. Of large significance, this Court's 1979 and 1984 supplemental decrees anticipated that the disputed boundary issues for all five reservations, including Fort Yuma, would be "finally determined" in some forum, not by preclusion but on the merits. The State parties themselves stipulated to the terms of the 1979 supplemental decree and appear to have litigated the *Arizona II* proceedings on the understanding that the boundary disputes should be resolved on the merits, see, *e. g.*, *id.*, at 634. Finally, the Court rejects the State parties' argument that this Court should now raise the preclusion question *sua sponte.* The special circumstances in which such judicial initiative might be appropriate are not present here. See *United States* v. *Sioux Nation*, 448 U. S. 371, 432 (REHNQUIST, J., dissenting). Pp. 406–413.

2. The claims of the United States and the Tribe to increased water rights for the disputed boundary lands of the Fort Yuma Reservation are not precluded by the consent judgment in Docket No. 320. The Special Master agreed with the State parties' assertion to the contrary. He concluded that, because the settlement extinguished the Tribe's claim to title in the disputed lands, the United States and the Tribe cannot seek additional water rights based on the Tribe's purported beneficial ownership of those lands. Under standard preclusion doctrine, the Master's recommendation cannot be sustained. As between the Tribe and the United States, the settlement indeed had, and was intended to have, claim-preclusive effect. But settlements ordinarily lack issue-preclusive effect. This differentiation is grounded in basic res judicata doctrine. The general rule is that issue preclusion attaches only when an issue is actually litigated and determined by a valid and final judgment. See *United States* v. *International Building Co.*, 345 U. S. 502, 505–506. The State parties assert that common-law principles of issue preclusion do not apply in the special context of Indian land claims. They maintain that the Indian Claims Commission Act created a special regime of statutory preclusion. This Court need not decide whether some consent judgments in that distinctive context might bar a tribe from asserting title even in discrete litigation against third parties, for the 1983 settlement of Docket No. 320 plainly could not qualify as such a judgment. Not only was the issue of ownership of the disputed boundary lands not actually litigated and decided in Docket No. 320, but, most notably, the Tribe proceeded on alternative and mutually exclusive theories of recovery, taking and trespass. The consent judgment embraced all of the Tribe's claims with no election by the Tribe of one

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theory over the other. The Court need not accept the United States' invitation to look behind the consent judgment at presettlement stipulations and memoranda purportedly demonstrating that the judgment was grounded on the parties' shared view, after the 1978 Secretarial Order, that the disputed lands belong to the Tribe. Because the settlement was ambiguous as between mutually exclusive theories of recovery, the consent judgment is too opaque to serve as a foundation for issue preclusion. Pp. 413–418.

3. The Court accepts the Special Master's recommendations and approves the parties' proposed settlements of the disputes respecting additional water for the Fort Mojave and Colorado River Reservations. Pp. 418–419.

Exception of State parties overruled; Exceptions of United States and Quechan Tribe sustained; Special Master's recommendations to approve parties' proposed settlements respecting Fort Mojave and Colorado River Reservations are adopted, and parties are directed to submit any objections they may have to Special Master's proposed supplemental decree; Outstanding water rights claims associated with disputed Fort Yuma Reservation boundary lands remanded.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, SOUTER, and BREYER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR and THOMAS, JJ., joined, *post*, p. 422.

Jeffrey P. Minear argued the cause for the United States. With him on the briefs were *Solicitor General Waxman*, *Assistant Attorney General Schiffer*, and *Deputy Solicitor General Kneedler*.

Mason D. Morisset argued the cause for defendant Quechan Indian Tribe. With him on the briefs was *K. Allison McGaw*.

Jerome C. Muys argued the cause for the State parties. With him on the briefs were *Bill Lockyer*, Attorney General of California, *Richard M. Frank*, Chief Assistant Attorney General, *Mary B. Hackenbracht*, Assistant Attorney General, *Douglas B. Noble*, Deputy Attorney General, *Michael Pearce*, *Steven B. Abbott*, and *Karen L. Tachiki*.*

**John M. Lindskog* filed a brief for the West Bank Homeowners Association as *amicus curiae*.

JUSTICE GINSBURG delivered the opinion of the Court.

In the latest chapter of this long-litigated original-jurisdiction case, the Quechan Tribe (Tribe) and the United States on the Tribe's behalf assert claims for increased rights to water from the Colorado River. These claims are based on the contention that the Fort Yuma (Quechan) Indian Reservation encompasses some 25,000 acres of disputed boundary lands not attributed to that reservation in earlier stages of the litigation. In this decision, we resolve a threshold question regarding these claims to additional water rights: Are the claims precluded by this Court's prior decision in *Arizona* v. *California*, 373 U. S. 546 (1963) *(Arizona I)*, or by a consent judgment entered by the United States Claims Court in 1983? The Special Master has prepared a report recommending that the Court reject the first ground for preclusion but accept the second. We reject both grounds for preclusion and remand the case to the Special Master for consideration of the claims for additional water rights appurtenant to the disputed boundary lands.

I

This litigation began in 1952 when Arizona invoked our original jurisdiction to settle a dispute with California over the extent of each State's right to use water from the Colorado River system. Nevada intervened, seeking a determination of its water rights, and Utah and New Mexico were joined as defendants. The United States intervened and sought water rights on behalf of various federal establishments, including five Indian reservations: the Chemehuevi Indian Reservation, the Cocopah Indian Reservation, the Fort Yuma (Quechan) Indian Reservation, the Colorado River Indian Reservation, and the Fort Mojave Indian Reservation. The Court appointed Simon Rifkind as Special Master.

The first round of the litigation culminated in our opinion in *Arizona I*. We agreed with Special Master Rifkind that

the apportionment of Colorado River water was governed by the Boulder Canyon Project Act of 1928, 43 U. S. C. § 617 *et seq.*, and by contracts entered into by the Secretary of the Interior pursuant to the Act. We further agreed that the United States had reserved water rights for the five reservations under the doctrine of *Winters* v. *United States*, 207 U. S. 564 (1908). See *Arizona I*, 373 U. S., at 565, 599–601. Because the Tribes' water rights were effective as of the time each reservation was created, the rights were considered present perfected rights and given priority under the Act. *Id.*, at 600. We also agreed with the Master that the reservations' water rights should be based on the amount of practicably irrigable acreage on each reservation and sustained his findings as to the relevant acreage for each reservation. *Ibid.* Those findings were incorporated in our decree of March 9, 1964, which specified the quantities and priorities of the water entitlements for the States, the United States, and the Tribes. *Arizona* v. *California*, 376 U. S. 340. The Court rejected as premature, however, Master Rifkind's recommendation to determine the disputed boundaries of the Fort Mojave and Colorado River Indian Reservations; we ordered, instead, that water rights for those two reservations "shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Id.*, at 345.

In 1978, the United States and the State parties jointly moved this Court to enter a supplemental decree identifying present perfected rights to the use of mainstream water in each State and their priority dates. The Tribes then filed motions to intervene, and the United States ultimately joined the Tribes in moving for additional water rights for the five reservations. Again, the Court deferred resolution of reservation boundary disputes and allied water rights claims. The supplemental decree we entered in 1979 set out the water rights and priority dates for the five reservations

under the 1964 decree, but added that the rights for all five reservations (including the Fort Yuma Indian Reservation at issue here) "shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Arizona* v. *California*, 439 U. S. 419, 421 *(per curiam)*. The Court then appointed Senior Circuit Judge Elbert P. Tuttle as Special Master and referred to him the Tribes' motions to intervene and other pending matters.

Master Tuttle issued a report recommending that the Tribes be permitted to intervene, and concluding that various administrative actions taken by the Secretary of the Interior constituted "final determinations" of reservation boundaries for purposes of allocating water rights under the 1964 decree. (Those administrative actions included a 1978 Secretarial Order, discussed in greater detail *infra*, at 404–405, which recognized the Quechan Tribe's entitlement to the disputed boundary lands of the Fort Yuma Reservation.) Master Tuttle also concluded that certain lands within the undisputed reservation boundaries but for which the United States had not sought water rights in *Arizona I*—the so-called "omitted lands"—had in fact been practicably irrigable at the time of *Arizona I* and were thus entitled to water. On these grounds, Master Tuttle recommended that the Court reopen the 1964 decree to award the Tribes additional water rights.

In *Arizona* v. *California*, 460 U. S. 605 (1983) *(Arizona II)*, the Court permitted the Tribes to intervene, but otherwise rejected Master Tuttle's recommendations. The Secretary's determinations did not qualify as "final determinations" of reservation boundaries, we ruled, because the States, agencies, and private water users had not had an opportunity to obtain judicial review of those determinations. *Id.*, at 636–637. In that regard, we noted that California state agencies had initiated an action in the United States District Court for the Southern District of California chal-

lenging the Secretary's decisions, and that the United States had moved to dismiss that action on various grounds, including sovereign immunity. "There will be time enough," the Court stated, "if any of these grounds for dismissal are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court." *Id.*, at 638. The Court also held that the United States was barred from seeking water rights for the lands omitted from presentation in the proceedings leading to *Arizona I;* "principles of res judicata," we said, "advise against reopening the calculation of the amount of practicably irrigable acreage." 460 U. S., at 626. In 1984, in another supplemental decree, the Court again declared that water rights for all five reservations "shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Arizona* v. *California*, 466 U. S. 144, 145.

The District Court litigation proceeded with the participation of eight parties: the United States, the States of Arizona and California, the Metropolitan Water District of Southern California, the Coachella Valley Water District, and the Quechan, Fort Mojave, and Colorado River Indian Tribes. The District Court rejected the United States' sovereign immunity defense; taking up the Fort Mojave Reservation matter first, the court voided the Secretary's determination of that reservation's boundaries. *Metropolitan Water Dist. of S. Cal.* v. *United States*, 628 F. Supp. 1018 (SD Cal. 1986). The Court of Appeals for the Ninth Circuit, however, accepted the United States' plea of sovereign immunity, and on that ground reversed and remanded with instructions to dismiss the entire case. Specifically, the Court of Appeals held that the Quiet Title Act, 28 U. S. C. § 2409a, preserved the United States' sovereign immunity from suits challenging the United States' title "to trust or restricted Indian lands," § 2409a(a), and therefore blocked recourse to the Dis-

trict Court by the States and state agencies. *Metropolitan Water Dist. of S. Cal.* v. *United States*, 830 F. 2d 139 (1987). We granted certiorari and affirmed the Ninth Circuit's judgment by an equally divided Court. *California* v. *United States*, 490 U. S. 920 (1989) *(per curiam)*.

The dismissal of the District Court action dispelled any expectation that a "final determination" of reservation boundaries would occur in that forum. The State parties then moved to reopen the 1964 decree, asking the Court to determine whether the Fort Yuma Indian Reservation and two other reservations were entitled to claim additional boundary lands and, if so, additional water rights. Neither the United States nor the Tribes objected to the reopening of the decree, and the Court granted the motion. *Arizona* v. *California*, 493 U. S. 886 (1989). After the death in 1990 of the third Special Master, Robert McKay, the Court appointed Frank J. McGarr as Special Master. Special Master McGarr has now filed a report and recommendation (McGarr Report), a full understanding of which requires a discussion of issues and events specific to the Fort Yuma Indian Reservation. We now turn to those issues and events.

II

The specific dispute before us has its roots in an 1884 Executive Order signed by President Chester A. Arthur, designating approximately 72 square miles of land along the Colorado River in California as the Fort Yuma Indian Reservation (Reservation) for the benefit of the Quechan Tribe. The Tribe, which had traditionally engaged in farming, offered to cede its rights to a portion of the Reservation to the United States in exchange for allotments of irrigated land to individual Indians. In 1893, the Secretary of the Interior concluded an agreement with the Tribe (1893 Agreement), which Congress ratified in 1894. The 1893 Agreement provided for the Tribe's cession of a 25,000-acre tract of boundary lands on the Reservation. Language in the agreement,

however, could be read to condition the cession on the performance by the United States of certain obligations, including construction within three years of an irrigation canal, allotment of irrigated land to individual Indians, sale of certain lands to raise revenues for canal construction, and opening of certain lands to the public domain.

Doubts about the validity and effect of the 1893 Agreement arose as early as 1935. In that year the construction of the All-American Canal, which prompted the interstate dispute in *Arizona I*, see 373 U. S., at 554–555, also sparked a controversy concerning the Fort Yuma Reservation. When the Department of the Interior's Bureau of Reclamation sought to route the canal through the Reservation, the Department's Indian Office argued that the Bureau had to pay compensation to the Tribe for the right-of-way. The Secretary of the Interior submitted the matter to the Department's Solicitor, Nathan Margold. In 1936, Solicitor Margold issued an opinion (Margold Opinion) stating that, under the 1893 Agreement, the Tribe had unconditionally ceded the lands in question to the United States. 1 Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs 596, 600 (No. M–28198, Jan. 8, 1936). The Margold Opinion remained the position of the Federal Government for 42 years.

In 1946, Congress enacted the Indian Claims Commission Act, 60 Stat. 1049, 25 U. S. C. § 70 *et seq.* (1976 ed.), establishing an Article I tribunal with power to decide claims of Indian tribes against the United States.[1] See generally

[1] The Act conferred exclusive jurisdiction on the Commission to resolve Indian claims solely by the payment of compensation. Section 2 of the Act gave the Commission jurisdiction over, among other things, claims alleging that agreements between a tribe and the United States were vitiated by fraud, duress, or unconscionable consideration, 25 U. S. C. § 70a(3) (1976 ed.), claims arising from the unlawful taking of Indian lands by the United States, § 70a(4), and claims based upon fair and honorable dealings not recognized by law or equity, § 70a(5). The Commission's "[f]inal determinations," § 70r, were subject to review by the Court of

United States v. *Dann*, 470 U. S. 39 (1985). The Tribe filed an action before the Commission in 1951, challenging the validity and effect of the 1893 Agreement. In that action, referred to by the parties as Docket No. 320, the Tribe relied principally on two mutually exclusive grounds for relief. First, the Tribe alleged that the 1893 Agreement was obtained through fraud, coercion, and/or inadequate consideration, rendering it "wholly nugatory." Petition for Loss of Reservation in Docket No. 320 (Ind. Cl. Comm'n), ¶¶ 15–16, reprinted in Brief for United States in Support of Exception, pp. 11a–27a. At the very least, contended the Tribe, the United States had failed to perform the obligations enumerated in the 1893 Agreement, rendering the cession void. *Id.*, at ¶ 31. In either event, the Tribe claimed continuing title to the disputed lands and sought damages essentially for trespass. Alternatively, the Tribe alleged that the 1893 Agreement was contractually valid but constituted an uncompensated taking of tribal lands, an appropriation of lands for unconscionable consideration, and/or a violation of standards of fair and honorable dealing, for which §§ 2(3)–(5) of the Act authorized recovery. *Id.*, at ¶¶ 19, 22, 25. According to this theory of recovery, the 1893 Agreement had indeed vested in the United States unconditional title to the dis-

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Claims, § 70s(b), and, if upheld, were submitted to Congress for payment, § 70u. Section 15 authorized the Attorney General to represent the United States before the Commission and, "with the approval of the Commission, to compromise any claim presented to the Commission." 25 U. S. C. § 70n (1976 ed.). The Act provided that such compromises "shall be submitted by the Commission to the Congress as a part of its report as provided in section 70t of this title in the same manner as final determinations of the Commission, and shall be subject to the provisions of section 70u of this title." *Ibid.* Section 22(a) of the Act provided that "[t]he payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." 25 U. S. C. § 70u(a) (1976 ed.). Pursuant to statute, § 70v, the Commission ceased its operations in 1978 and transferred its remaining cases to the Court of Claims.

puted lands, and the Tribe sought damages as compensation for that taking. During the more than quarter-century of litigation in Docket No. 320, the Tribe vacillated between these two grounds for relief, sometimes emphasizing one and sometimes the other. See *Quechan Tribe of Fort Yuma Reservation* v. *United States*, 26 Ind. Cl. Comm'n 15 (1971), reprinted in Brief for United States in Support of Exception, at 29a–34a.

The Commission conducted a trial on liability, but stayed further proceedings in 1970 because legislation had been proposed in Congress that would have restored the disputed lands to the Tribe. The legislation was not enacted, and the Commission vacated the stay. In 1976, the Commission transferred the matter to the Court of Claims.

In the meantime, the Tribe had asked the Department of the Interior to reconsider its 1936 Margold Opinion regarding the 1893 Agreement. In 1977, Interior Solicitor Scott Austin concluded, in accord with the 1936 opinion, that the 1893 Agreement was valid and that the cession of the disputed lands had been unconditional. Opinion of the Solicitor, No. M–36886 (Jan. 18, 1977), 84 I. D. 1 (1977) (Austin Opinion). It soon became clear both to the Tribe and to interested Members of Congress, however, that the Austin Opinion had provoked controversy within the Department, and, after the election of President Carter, the Department revisited the issue and reversed course. In 1978, without notice to the parties, Solicitor Leo Krulitz issued an opinion concluding that the 1893 Agreement had provided for a conditional cession of the disputed lands, that the conditions had not been met by the United States, and that "[t]itle to the subject property is held by the United States in trust for the Quechan Tribe." Opinion of the Solicitor, No. M–36908 (Jan. 2, 1979), 86 I. D. 3, 22 (1979) (Krulitz Opinion). On December 20, 1978, the Secretary of the Interior issued a Secretarial Order adopting the Krulitz Opinion and confirming the Tribe's entitlement to the disputed lands, with the ex-

press exception of certain lands that the United States had acquired pursuant to Act of Congress or had conveyed to third parties.

The 1978 Secretarial Order caused the United States to change its position both in Docket No. 320, which was still pending in the Claims Court, and in the present litigation. Because the Secretarial Order amounted to an admission that the 1893 Agreement had been ineffective to transfer title and that the Tribe enjoyed beneficial ownership of the disputed boundary lands, the United States no longer opposed the Tribe's claim for trespass in Docket No. 320. In the present litigation, the Secretarial Order both prompted the United States to file a water rights claim for the affected boundary lands and provided the basis for the Tribe's intervention to assert a similar, albeit larger, water rights claim. See *Arizona II*, 460 U. S., at 632–633. Those water rights claims are the subject of the current proceedings.

In August 1983, a few months after this Court decided in *Arizona II* that the 1978 Secretarial Order did not constitute a final determination of reservation boundaries, see *supra*, at 399–400, the United States and the Tribe entered into a settlement of Docket No. 320, which the Court of Claims approved and entered as its final judgment. Under the terms of that settlement, the United States agreed to pay the Tribe $15 million in full satisfaction of "all rights, claims, or demands which plaintiff [*i. e.*, the Tribe] has asserted or could have asserted with respect to the claims in Docket 320." Final Judgment, Docket No. 320 (Aug. 11, 1983). The judgment further provided that "plaintiff shall be barred thereby from asserting any further rights, claims, or demands against the defendant and any future action on the claims encompassed on Docket 320." *Ibid.* The United States and the Tribe also stipulated that the "final judgment is based on a compromise and settlement and shall not be construed as an admission by either party for the purposes of precedent or argument in any other case." *Ibid.* Both

the Tribe and the United States continue to recognize the Tribe's entitlement to the disputed boundary lands.

III

Master McGarr has issued a series of orders culminating in the report and recommendation now before the Court. He has recommended that the Court reject the claims of the United States and the Tribe seeking additional water rights for the Fort Yuma Indian Reservation. The Master rejected the State parties' contention that this Court's *Arizona I* decision precludes the United States and the Tribe from seeking water rights for the disputed boundary lands. He concluded, however, that the United States and the Tribe are precluded from pursuing those claims by operation of the 1983 Claims Court consent judgment. The State parties have filed an exception to the first of these preclusion recommendations, and the United States and the Tribe have filed exceptions to the second. In Part III–A, *infra,* we consider the exception filed by the State parties, and in Part III–B we address the exceptions filed by the United States and the Tribe. The Special Master has also recommended that the Court approve the parties' proposed settlements respecting the Fort Mojave and Colorado River Indian Reservations. No party has filed an exception to those recommendations; we address them in Part III–C, *infra.*

A

The States of Arizona and California, the Coachella Valley Water District, and the Metropolitan Water District of Southern California (State parties) argued before Special Master McGarr, and repeat before this Court, that the water rights claims associated with the disputed boundary lands of the Fort Yuma Reservation are precluded by the finality rationale this Court employed in dismissing the "omitted lands" claims in *Arizona II.* See *supra,* at 399–400. According to the State parties, the United States could have

raised a boundary lands claim for the Fort Yuma Reservation in the *Arizona I* proceedings based on facts known at that time, just as it did for the Fort Mojave and Colorado River Reservations, but deliberately decided not to do so, just as it did with respect to the "omitted lands." In *Arizona II*, this Court rejected the United States' claim for water rights for the "omitted lands," emphasizing that "[c]ertainty of rights is particularly important with respect to water rights in the Western United States" and noting "the strong interest in finality in this case." 460 U. S., at 620. Observing that the 1964 decree determined "the extent of irrigable acreage within the uncontested boundaries of the reservations," *id.*, at 621, n. 12, the Court refused to reconsider issues "fully and fairly litigated 20 years ago," *id.*, at 621. The Court concomitantly held that the Tribes were bound by the United States' representation of them in *Arizona I*. 460 U. S., at 626–627.

The Special Master rejected the State parties' preclusion argument. He brought out first the evident reason why the United States did not assert water rights claims for the Fort Yuma Reservation boundary lands in *Arizona I*. At that point in time, the United States was bound to follow the 1936 Margold Opinion, see *supra*, at 402, which maintained that the Tribe had no claim to those lands. "[I]t is clear," the Master stated, "that the later Secretary of the Interior opinion arbitrarily changing [the Margold] decision was a circumstance not known in 1964, thus constituting an exception to the application of the rule of *res adjudicata*." Special Master McGarr Memorandum Opinion and Order No. 4, pp. 6–7 (Sept. 6, 1991). Characterizing the question as "close," the Master went on to conclude that "the Tribe is not precluded from asserting water rights based on boundary land claims on *[sic]* this proceeding, because although the U. S. on behalf of the Tribe failed to assert such claims in the proceeding leading to the 1964 decree, a later and then unknown circum-

stance bars the application of the doctrine of *res judicata* to this issue." *Id.*, at 7.

While the Special Master correctly recognized the relevance of the Margold Opinion to the litigating stance of the United States, he ultimately relied on an improper ground in rejecting the State parties' preclusion argument. The Department of the Interior's 1978 Secretarial Order recognizing the Tribe's beneficial ownership of the boundary lands, see *supra*, at 404–405, does not qualify as a "later and then unknown circumstance" that can overcome otherwise applicable preclusion principles. The 1978 Order did not change the underlying facts in dispute; it simply embodied one party's changed view of the import of unchanged facts. Moreover, the Tribe can hardly claim to have been surprised by the Government's shift in assessment of the boundary lands ownership question, for the Tribe had been advocating just such a shift for decades.

The United States and the Tribe, however, urge other grounds on which to reject the State parties' argument regarding the preclusive effect of *Arizona I*. The United States and the Tribe maintain that the preclusion rationale the Court applied to the "omitted lands" in *Arizona II* is not equally applicable to the disputed boundary lands,[2] and that, in any event, the State parties have forfeited their preclusion defense. We agree that the State parties' preclusion de-

[2] The United States and the Tribe point to the holding in *Arizona I* that Special Master Rifkind had erred in prematurely considering boundary lands claims relating to the Fort Mojave and Colorado River Reservations, see 373 U. S., at 601; they contend that consideration of the Fort Yuma Reservation boundaries would have been equally premature. They further stress that in *Arizona II* we held the omitted lands claims precluded because we resisted "reopen[ing] an adjudication . . . to reconsider whether initial factual determinations were correctly made," 460 U. S., at 623–624; in contrast, they maintain, the present claims turn on the validity of the 1893 Agreement and the 1978 Secretarial Order, questions of law not addressed in prior proceedings.

fense is inadmissible at this late date, and therefore we do not reach the merits of that plea. The State parties could have raised the defense in 1979 in response to the United States' motion for a supplemental decree granting additional water rights for the Fort Yuma Reservation. The State parties did not do so then, nor did they raise the objection in 1982 when *Arizona II* was briefed and argued.[3] Unaccountably, they raised the preclusion argument for the first time in 1989, when they initiated the current round of proceedings. See Exception and Brief for State Parties 16; Motion of State Parties to Reopen Decree in *Arizona* v. *California*, O. T. 1989, No. 8 Orig., p. 6, n. 2. The State parties had every opportunity, and every incentive, to press their current preclusion argument at earlier stages in the litigation, yet failed to do so.[4]

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[3] Noting that in *Arizona II* we "encouraged the parties to assert their legal claims and defenses in another forum," THE CHIEF JUSTICE concludes that the Court probably would have declined to resolve the preclusion issue at that stage of the case even had the State parties raised it then. *Post*, at 423 (opinion concurring in part and dissenting in part). One can only wonder why this should be so. If this Court had held in *Arizona II* that the United States and the Tribe were precluded from litigating their boundary lands claims, it would have been pointless for the Court to encourage pursuit of those claims "in another forum"; further assertion of the claims in any forum would have been barred. In any event, a party generally forfeits an affirmative defense by failing to raise it even if the relevant proceeding is ultimately resolved on other grounds.

[4] The dissent's observation that "the only 'pleadings' in this case were filed in the 1950's," *post*, at 422, is beside the point. The State parties could have properly raised the preclusion defense as early as February 1979, in their response to the United States' motion for modification of the decree, yet did not do so. See Response of the States of Arizona, California, and Nevada and the Other California Defendants to the Motion of the United States for Modification of Decree, O. T. 1978, No. 8 Orig. Alternatively, it was open to the State parties to seek leave to file a supplemental pleading "setting forth . . . occurrences or events which have happened since the date of the pleading sought to be amended." Fed. Rule Civ. Proc. 15(d). In such a supplemental pleading, and in compliance with Rule

"[W]hile the technical rules of preclusion are not strictly applicable [in the context of a single ongoing original action], the principles upon which these rules are founded should inform our decision." *Arizona II*, 460 U. S., at 619. Those principles rank res judicata an affirmative defense ordinarily lost if not timely raised. See Fed. Rule Civ. Proc. 8(c). Counsel for the State parties conceded at oral argument that "no preclusion argument was made with respect to boundary lands" in the proceedings leading up to *Arizona II*, and that "after this Court's decision in *Arizona II* and after the Court's later decision in [*Nevada* v. *United States*, 463 U. S. 110 (1983)], the light finally dawned on the State parties that there was a valid preclusion—or *res judicata* argument here with respect to Fort Yuma." Tr. of Oral Arg. 46–47. We disapprove the notion that a party may wake up because a "light finally dawned," years after the first opportunity to raise a defense, and effectively raise it so long as the party was (though no fault of anyone else) in the dark until its late awakening.

The State parties assert that our prior pronouncements in this case have expressly recognized the possibility that future boundary lands claims for the Fort Yuma Reservation might be precluded. If anything, the contrary is true. Nothing in the *Arizona II* decision hints that the Court believed the boundary lands issue might ultimately be held precluded. Rather, the Court expressly found it "*necessary* to decide whether any or all of these boundary disputes have been 'finally determined' within the meaning of Article

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8(c), the preclusion defense could have been raised. No such supplemental pleading was ever presented, and by 1989 a reasonable time to do so had surely expired.

The State parties' tardiness in raising their preclusion defense is hard to account for, while the United States' decision not to assert claims for the disputed boundary lands until 1978 can at least be explained by the continued vitality of the Margold Opinion, see *supra*, at 402. It is puzzling that the dissent should go to such lengths to excuse the former delay while relentlessly condemning the latter.

II(D)(5) . . . ." 460 U. S., at 631 (emphasis added). That *Arizona II* contains no discussion of preclusion with respect to the disputed lands is hardly surprising, given that the State parties neglected to raise that issue until six years later.

The Court did note in *Arizona II* that in the District Court proceedings the United States had asserted defenses based on "lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations," and added that "[t]here will be time enough, if any of *these grounds for dismissal* are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such [lower court] action are *nevertheless* open for litigation in this Court." 460 U. S., at 638 (emphasis added). This passage, however, is most sensibly read to convey that the defenses just mentioned—standing, indispensable parties, sovereign immunity, and the statute of limitations—would not necessarily affect renewed litigation in this Court. The passage contains no acknowledgment, express or implied, of a lurking preclusion issue stemming from our *Arizona I* disposition.

Moreover, and of large significance, the 1979 and 1984 supplemental decrees anticipated that the disputed boundary issues for all five reservations, including the Fort Yuma Reservation, would be "finally determined" in some forum, not by preclusion but on the merits. See 1984 Supplemental Decree, Art. II(D)(5), *Arizona* v. *California*, 466 U. S., at 145 (Water rights for all five reservations "shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined."); 1979 Supplemental Decree, Art. II(D)(5), *Arizona* v. *California*, 439 U. S., at 421 (same).

The State parties themselves stipulated to the terms of the supplemental decree we entered in 1979. They also appear to have litigated the *Arizona II* proceedings on the un-

derstanding that the boundary disputes should be resolved on the merits. See 460 U. S., at 634 ("[The State parties] argued . . . that the boundary controversies were ripe for judicial review, and they urged the Special Master to receive evidence, hear legal arguments, and resolve each of the boundary disputes, but only for the limited purpose of establishing additional Indian water rights, if any."); Report of Special Master Tuttle, O. T. 1981, No. 8 Orig., p. 57 (describing the State parties' contention "that the boundaries [of all five reservations] have not been finally determined and that I should make a de novo determination of the boundaries for recommendation to the Court"). As late as 1988, the State parties asked the Court to appoint a new Special Master and direct him "to conclude his review of the boundary issues as expeditiously as possible and to submit a recommended decision to the Court." Brief for Petitioners in *California* v. *United States*, O. T. 1987, No. 87–1165, p. 49.

Finally, the State parties argue that even if they earlier failed to raise the preclusion defense, this Court should raise it now *sua sponte*. Judicial initiative of this sort might be appropriate in special circumstances. Most notably, "if a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte*, even though the defense has not been raised. This result is fully consistent with the policies underlying res judicata: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste." *United States* v. *Sioux Nation*, 448 U. S. 371, 432 (1980) (REHNQUIST, J., dissenting) (citations omitted). That special circumstance is not present here: While the State parties contend that the Fort Yuma boundary dispute could have been decided in *Arizona I*, this Court plainly has not "previously decided the issue presented." Therefore we do not face the prospect of redoing a matter once decided. Where no judicial resources have been spent on the resolution of a question, trial courts must

be cautious about raising a preclusion bar *sua sponte*, thereby eroding the principle of party presentation so basic to our system of adjudication.

In view of the State parties' failure to raise the preclusion argument earlier in the litigation, despite ample opportunity and cause to do so, we hold that the claims of the United States and the Tribe to increased water rights for the disputed boundary lands of the Fort Yuma Reservation are not foreclosed by our decision in *Arizona I*.

B

The State parties also assert that the instant water rights claims are precluded by the 1983 consent judgment in the Claims Court proceeding, Docket No. 320. Special Master McGarr agreed, noting the consent judgment's declaration that the Tribe would "be barred thereby from asserting any further rights, claims or demands against the defendant and any future action encompassed on docket no. 320." See Special Master McGarr Memorandum Opinion and Order No. 4, at 9–10. On reconsideration, the Special Master provided a fuller account of his recommendation. The settlement, he concluded, had extinguished the Tribe's claim to title in the disputed boundary lands, vesting that title in the United States against all the world: "The only viable basis for a damage or trespass claim [in Docket No. 320] was that the 1893 taking was illegal and that title therefore remained with the Tribe. When the Tribe accepted money in settlement of this claim, it relinquished its claim to title." *Id.*, No. 7, at 5 (May 5, 1992). See also *id.*, No. 13, at 3 (Apr. 13, 1993) ("[T]he relinquishment of all future claims regarding the subject matter of Docket No. 320 in exchange for a sum of money extinguished the Tribe's title in the subject lands . . . ."). Because the settlement extinguished the Tribe's title to the disputed boundary lands, the Master reasoned, the United States and the Tribe cannot now seek addi-

tional water rights based on the Tribe's purported beneficial ownership of those lands.

Under standard preclusion doctrine, the Master's recommendation cannot be sustained. As already noted, the express terms of the consent judgment in Docket No. 320 barred the Tribe and the United States from asserting against each other any claim or defense they raised or could have raised in that action. See *supra*, at 405. As between the parties to Docket No. 320, then, the settlement indeed had, and was intended to have, *claim-preclusive* effect—a matter the United States and the Tribe readily concede. Exception and Brief for United States 36; Exception and Brief for Quechan Indian Tribe 20. But settlements ordinarily occasion no *issue preclusion* (sometimes called collateral estoppel), unless it is clear, as it is not here, that the parties intend their agreement to have such an effect. "In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented. Thus consent judgments ordinarily support claim preclusion but not issue preclusion." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4443, pp. 384–385 (1981). This differentiation is grounded in basic res judicata doctrine. It is the general rule that issue preclusion attaches only "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." Restatement (Second) of Judgments § 27, p. 250 (1982). "In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section [describing issue preclusion's domain] does not apply with respect to any issue in a subsequent action." *Id.*, comment *e*, at 257.

This Court's decision in *United States* v. *International Building Co.*, 345 U. S. 502 (1953), is illustrative. In 1942, the Commissioner of Internal Revenue assessed deficiencies

against a taxpayer for the taxable years 1933, 1938, and 1939, alleging that the taxpayer had claimed an excessive basis for depreciation. *Id.*, at 503. After the taxpayer filed for bankruptcy, however, the Commissioner and the taxpayer filed stipulations in the pending Tax Court proceedings stating that there was no deficiency for the taxable years in question, and the Tax Court entered a formal decision to that effect. *Id.*, at 503–504. In 1948, the Commissioner assessed deficiencies for the years 1943, 1944, and 1945, and the taxpayer defended on the ground that the earlier Tax Court decision was preclusive on the issue of the correct basis for depreciation. We disagreed, holding that the Tax Court decision, entered pursuant to the parties' stipulations, did not accomplish an "estoppel by judgment," *i. e.*, it had no issue-preclusive effect:

> "We conclude that the decisions entered by the Tax Court for the years 1933, 1938, and 1939 were only a *pro forma* acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed . . . . Perhaps, as the Court of Appeals inferred, the parties did agree on the basis for depreciation. Perhaps the settlement was made for a different reason, for some exigency arising out of the bankruptcy proceeding. As the case reaches us, we are unable to tell whether the agreement of the parties was based on the merits or on some collateral consideration. Certainly the judgments entered are *res judicata* of the tax claims for the years 1933, 1938, and 1939, whether or not the basis of the agreements on which they rest reached the merits . . . . Estoppel by judgment includes matters in a second proceeding which were actually presented and determined in an earlier suit. A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel

> is concerned, than any judgment entered only as a compromise of the parties." *Id.*, at 505–506 (citations omitted).

The State parties, perhaps recognizing the infirmity of their argument as a matter of standard preclusion doctrine, assert that common-law principles of issue preclusion do not apply in the special context of Indian land claims. Instead, they argue, § 22 of the Indian Claims Commission Act created a special regime of "statutory preclusion."[5] According to the State parties, the payment of a Commission judgment for claims to aboriginal or trust lands automatically and universally extinguishes title to the Indian lands upon which the claim is based and creates a statutory bar to further assertion of claims against either the United States or third parties based on the extinguished title. The State parties point to several decisions of the Ninth Circuit in support of this contention. See Reply Brief for State Parties 17 (citing *United States* v. *Pend Oreille Pub. Util. Dist. No. 1*, 926 F. 2d 1502 (CA9 1991)); Reply Brief for State Parties 15 (citing *United States* v. *Dann*, 873 F. 2d 1189 (CA9 1989)); Reply Brief for State Parties 11 (citing *United States* v. *Gemmill*, 535 F. 2d 1145 (CA9 1976)).

We need not decide whether, in the distinctive context of the Indian Claims Commission Act, some consent judgments

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[5] Section 22 provided:

"(a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

"The payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

"(b) A final determination against a claimant made and reported in accordance with this chapter shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy." 25 U. S. C. § 70u (1976 ed.).

might bar a tribe from asserting title even in discrete litigation against third parties, for the 1983 settlement of Docket No. 320 plainly could not qualify as such a judgment. Not only was the issue of ownership of the disputed boundary lands not actually litigated and decided in Docket No. 320, but, most notably, the Tribe proceeded on alternative and mutually exclusive theories of recovery. Had the case proceeded to final judgment upon trial, the Tribe might have won damages for a taking, indicating that title was in the United States. Alternatively, however, the Tribe might have obtained damages for trespass, indicating that title remained in the Tribe. The consent judgment embraced all of the Tribe's claims. There was no election by the Tribe of one theory over the other, nor was any such election required to gain approval for the consent judgment. The Special Master's assumption that the settlement necessarily and universally relinquished the Tribe's claim to title was thus unwarranted. Certainly, if the $15 million payment constituted a discharge of the Tribe's trespass claim, it would make scant sense to say that the acceptance of the payment extinguished the Tribe's title. In contrast, the Ninth Circuit cases cited by the State parties (the correctness of which we do not address) all involved Indian Claims Commission Act petitions in which tribes claimed no continuing title, choosing instead to seek compensation from the United States for the taking of their lands. See, *e. g.*, *Pend Oreille,* 926 F. 2d, at 1507–1508; *Dann,* 873 F. 2d, at 1192, 1194; *Gemmill,* 535 F. 2d, at 1149, and n. 6.

The United States invites us to look behind the consent judgment in Docket No. 320 at presettlement stipulations and memoranda purportedly demonstrating that the judgment was grounded on the parties' shared view, after the 1978 Secretarial Order, that the disputed lands belong to the Tribe. We need not accept the Government's invitation. On the matter of issue preclusion, it suffices to observe that the settlement was ambiguous as between mutually exclu-

sive theories of recovery. Like the Tax Court settlement in *International Building Co.*, then, the consent judgment in the Tribe's Claims Court action is too opaque to serve as a foundation for issue preclusion. Accordingly, we hold that the claims of the United States and the Tribe to increased water rights for the disputed boundary lands of the Fort Yuma Reservation are not precluded by the consent judgment in Docket No. 320.

C

The Special Master has recommended that the Court approve the parties' proposed settlement of the dispute respecting the Fort Mojave Reservation. The claim to additional water for the Fort Mojave Reservation arises out of a dispute over the accuracy of a survey of the so-called Hay and Wood Reserve portion of the Reservation. See *Arizona II*, 460 U. S., at 631–632. The parties agreed to resolve the matter through an accord that (1) specifies the location of the disputed boundary; (2) preserves the claims of the parties regarding title to and jurisdiction over the bed of the last natural course of the Colorado River within the agreed-upon boundary; (3) awards the Tribe the lesser of an additional 3,022 acre-feet of water or enough water to supply the needs of 468 acres; (4) precludes the United States and the Tribe from claiming additional water rights from the Colorado River for lands within the Hay and Wood Reserve; and (5) disclaims any intent to affect any private claims to title to or jurisdiction over any lands. See McGarr Report 8–9 (July 28, 1999). We accept the Master's uncontested recommendation and approve the proposed settlement.

The Master has also recommended that the Court approve the parties' proposed settlement of the dispute respecting the Colorado River Indian Reservation. The claim to additional water for that reservation stems principally from a dispute over whether the reservation boundary is the ambulatory west bank of the Colorado River or a fixed line repre-

senting a past location of the River. See *Arizona II*, 460 U. S., at 631. The parties agreed to resolve the matter through an accord that (1) awards the Tribes the lesser of an additional 2,100 acre-feet of water or enough water to irrigate 315 acres; (2) precludes the United States or the Tribe from seeking additional reserved water rights from the Colorado River for lands in California; (3) embodies the parties' intent not to adjudicate in these proceedings the correct location of the disputed boundary; (4) preserves the competing claims of the parties to title to or jurisdiction over the bed of the Colorado River within the reservation; and (5) provides that the agreement will become effective only if the Master and the Court approve the settlement. See McGarr Report 9–10. The Master expressed concern that the settlement does not resolve the location of the disputed boundary, but recognized that it did achieve the ultimate aim of determining water rights associated with the disputed boundary lands. *Id.*, at 10–12, 13–14. We again accept the Master's recommendation and approve the proposed settlement.[6]

* * *

For the foregoing reasons, we remand the outstanding water rights claims associated with the disputed boundary

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[6] A group called the West Bank Homeowners Association has filed a brief *amicus curiae* objecting to the proposed settlement of water rights claims respecting the Colorado River Indian Reservation. The Association represents some 650 families who lease property from the United States within the current boundaries of the Reservation. The Court and the Special Master have each denied the Association's request to intervene in these proceedings. See *Arizona* v. *California*, 514 U. S. 1081 (1995); Special Master McGarr Memorandum Opinion and Order No. 17 (Mar. 29, 1995). The Master observed that the Association's members do "not own land in the disputed area and [the Association] makes no claim to title or water rights," *id.*, at 2, thus their interests will "not be impeded or impaired by the outcome of this litigation," *id.*, at 6. Accordingly, we do not further consider the Association's objections.

lands of the Fort Yuma Indian Reservation to the Special Master for determination on the merits. Those claims are the only ones that remain to be decided in *Arizona* v. *California;* their resolution will enable the Court to enter a final consolidated decree and bring this case to a close.

With respect to the Fort Mojave and Colorado River Reservations, the Special Master has submitted a proposed supplemental decree to carry the parties' accords into effect. That decree is reproduced as the Appendix to this opinion, *infra* this page and 421–422. The parties are directed to submit to the Clerk of this Court, before August 22, 2000, any objections to the proposed supplemental decree.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

Proposed Supplemental Decree

It is ORDERED, ADJUDGED, AND DECREED:

A. Paragraph (4) of Article II(D) of the Decree in this case entered on March 9, 1964 (376 U. S. 340, 344–345) is hereby amended to read as follows:

> (4) The Colorado River Indian Reservation in annual quantities not to exceed (i) 719,248 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 107,903 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of March 3, 1865, for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873, for lands reserved by the Executive Order of said date; November 16, 1874, for lands reserved by the Executive Order of said date, except as later modified; May 15, 1876, for lands reserved by the Executive Order of said date; November 22, 1915, for lands reserved by the Executive Order of said date.

B. Paragraph (5) of Article II(D) of the Decree in this case entered on March 9, 1964 (376 U. S. 340, 345) and supplemented on April 16, 1984 (466 U. S. 144, 145) is hereby amended to read as follows:

> (5) The Fort Mojave Indian Reservation in annual quantities not to exceed (i) 132,789 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 20,544 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of September 19, 1890, for lands transferred by the Executive Order of said date; February 2, 1911, for lands reserved by the Executive Order of said date.

C. Paragraph (5) of the introductory conditions to the Supplemental Decree in this case entered on January 9, 1979 (439 U. S. 419, 421–423) is hereby amended by adding the following exception at the end of the concluding proviso in the first sentence of that paragraph: "except for the western boundaries of the Fort Mojave and Colorado River Indian Reservations in California."

D. Paragraph II(A)(24) of the Decree of January 9, 1979 (439 U. S. 419, 428) is hereby amended to read as follows:

24)			
Colorado River Indian Reservation	10,745	1,612	Nov. 22, 1873
	40,241	6,037	Nov. 16, 1874
	5,860	879	May 15, 1876

E. Paragraph II(A)(25) of the Decree of January 9, 1979 (439 U. S. 419, 428) is hereby amended to read as follows:

25)			
Fort Mojave Indian Reservation	16,720	2,587	Sept. 18, 1890

F. Except as otherwise provided herein, the Decree entered on March 9, 1964, and the Supplemental Decrees entered on January 9, 1979, and April 16, 1984, shall remain in full force and effect.

G. The Court shall retain jurisdiction herein to order such further proceedings and enter such supplemental decree as may be deemed appropriate.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, concurring in part and dissenting in part.

I believe that the United States' and the Quechan Tribe's claim for additional water rights is barred by the principles of res judicata, and therefore I dissent. The Special Master concluded that an exception to the general preclusion rule applied and that, therefore, the United States' claim was not barred. The Court rejects the Special Master's reasoning but concludes that the State parties' res judicata defense is not properly before the Court. While I agree that the Special Master erred in finding the 1978 order of the Secretary of the Interior a "new fact" justifying an exception to the application of preclusion, I disagree with the Court's refusal to reach the merits of the State parties' defense.

The Court first concludes that the State parties lost the defense because they failed to assert it in a timely manner. While the State parties concede that they did not raise their claim of res judicata until 1989, it does not automatically follow that the defense is lost. Federal Rule of Civil Procedure 8(c) provides that res judicata shall be pleaded as an affirmative defense. But the only "pleadings" in this case were filed in the 1950's, at which time no claim of res judicata could have been made. The motions filed by the State parties in 1977 and 1979 were not in any sense comprehensive pleadings, purporting to set forth all of the claims and defenses of the parties. More importantly, neither Special Master Tuttle nor this Court focused on the merits of the boundary dispute during the proceedings in *Arizona* v. *California*, 460 U. S. 605 (1983) *(Arizona II)*. Rather, the Master only decided whether the Secretary's order was a final boundary determination, and, similarly, this Court simply de-

termined that the Secretary's order was subject to challenge and encouraged the parties to assert their legal claims and defenses in another forum. Consequently, it is likely that the State parties' res judicata claim would not have been resolved in *Arizona II* even if it had been raised.

The State parties did expressly raise the defense of res judicata in their 1989 motion, and neither the United States nor the Tribe objected to its consideration. The Tribe contested the merits of the State parties' res judicata claim and argued that its water rights' claim was not precluded. In so doing, the Tribe asserted that the State parties had not argued res judicata during the *Arizona II* proceedings. But neither the Tribe nor the United States contended, in response to the State parties' motion, that the Court could not decide the res judicata issue because it was not timely raised. We granted the motion, and Special Master McGarr considered the claim on the merits. Under these circumstances, I believe that the State parties did not lose their res judicata defense by failing to assert it in the earlier proceedings.

The Court also concludes that this Court's 1979 and 1984 supplemental decrees "anticipated" that the boundary dispute would be finally resolved in some forum. See *ante*, at 411. To reach this conclusion, the Court reads too much into the simple language of the supplemental decrees and ignores language in our *Arizona II* opinion. The supplemental decrees stated that water rights for the five reservations "shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 1984 Supplemental Decree, Art. II(D)(5), *Arizona* v. *California*, 466 U. S. 144, 145 (1984); 1979 Supplemental Decree, Art. II(D)(5), *Arizona* v. *California*, 439 U. S. 419, 421 (1979) *(per curiam)*. These decrees can best be interpreted as merely providing that the reservation's water quantity can be adjusted *if* the boundary changes, without deciding whether

the boundary relied on in the 1964 decree could be properly challenged, and without indicating that the boundary necessarily would be "finally determined" at some future point. This reading is supported by language in *Arizona II*. In discussing the pending District Court action, we explained: "We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. *There will be time enough, if any of these grounds for dismissal are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court.*" 460 U. S., at 638 (emphasis added; footnote omitted). As is evident from this language, we did not "anticipate" that the dispute would be finally resolved. Instead, we explicitly left open the question whether the dispute could be litigated in this Court.

The Court disregards this language in *Arizona II* because it does not mention a potential preclusion defense. However, the point is not that this Court anticipated the State parties' preclusion defense. Rather, it is that this Court recognized the possibility that the boundary issue would not be judicially resolved at all, and left open the question whether there was some defense precluding this Court's review. What that defense might be was not before the Court.

Now that the question is squarely before us, I would hold that the United States' claim for additional water rights is barred by the principles of res judicata. Res judicata not only bars relitigation of claims previously litigated, but also precludes claims that could have been brought in earlier proceedings. Under the doctrine of res judicata, "when a final judgment has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding 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, 129–130 (1983) (quoting *Cromwell* v. *County of Sac*, 94 U. S. 351, 352 (1877)).

In *Arizona II*, we recognized that the general principles of res judicata apply to our 1964 decree even though the decree expressly provided for modification in appropriate circumstances. In so doing, we noted the importance of the certainty of water rights in the Western United States. "A major purpose of this litigation, from its inception to the present day, has been to provide the necessary assurance to States of the Southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado River system. . . . If there is no surplus of water in the Colorado River, an increase in federal reserved water rights will require a 'gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators.'" 460 U. S., at 620–621 (quoting *United States* v. *New Mexico*, 438 U. S. 696, 699 (1978)). Thus, we concluded that allowing recalculation of the amount of practicably irrigable acreage "runs directly counter to the strong interest in finality in this case." 460 U. S., at 620. We also noted that treating the 1964 calculation as final comported with the clearly expressed intention of the parties and was consistent with our previous treatment of original actions, allowing modifications after a change in the relevant circumstances.

This reasoning is equally applicable to the United States' and the Tribe's claim for additional water for the disputed boundary lands. Even though the exact claim was not actually litigated in *Arizona* v. *California*, 373 U. S. 546 (1963) *(Arizona I)*, the United States could have raised the boundary claim and failed to do so. Indeed, in the proceedings before Special Master Rifkind, the counsel for the United States affirmatively represented that "[t]he testimony . . . as reflected by these maps and by the other testimony will de-

fine the maximum claim which the United States is asserting in this case." Earlier in the proceedings, the Master explicitly warned the United States about the preclusive effect of failing to assert potential claims: "In an action or a decree quieting title, you cut out all claims not asserted. . . . I just want you to be aware of the fact that the mere fact that it has not been asserted does not mean that you may not lose it . . . ." Exception by State Parties to Report of Special Master and Supporting Brief 8–9 (colloquy between counsel for the United States and the Special Master). Thus, under the general principles of res judicata, the United States would clearly be barred from now asserting the claim for additional water rights.

Special Master McGarr concluded that the United States' claim was not precluded because it fell within an exception to the bar of res judicata. Wisely abandoning the Master's reasoning, the United States instead defends the Master's ruling on the ground that these claims "are not precluded, under basic principles of res judicata, because [they] were not decided, and could not have been decided, in the prior proceedings." Reply Brief for United States in Response to Exception of State Parties 21. But this argument fares no better.

The issue before the Master in *Arizona I* was the amount of water from the Colorado River to which the Quechan Tribe was entitled. The Master made an allotment to the reservation based on the evidence then before him as to the amount of irrigable acreage within the reservation boundary, which was undisputed at the time. Only years after that decree was confirmed by this Court in *Arizona I* did the United States assert a larger claim to water for the reservation based on a claim for a larger amount of irrigable acreage—not because of a miscalculation as to the irrigability of acreage already claimed, but because of a claimed extension of the boundaries of the reservation. But, at the time of *Arizona I*, the United States had in its possession all of

the facts that it later asserted in 1979 in *Arizona II*, and it could have litigated the larger claim before Special Master Rifkind.

The United States offers no support for its contention that the boundary dispute could not have been decided in *Arizona I* except for the fact that this Court rejected the Master's resolution of the Fort Mojave Reservation and Colorado River Reservation boundary disputes. However, those boundary disputes are different. While we did not explain in *Arizona I* why we believed it was improper to decide the boundary disputes, California's objection was based on the fact that necessary parties were not participating in the proceedings. Specifically, California argued that it lacked the authority to represent private individuals claiming title to the disputed lands and maintained that "it would be unfair to prejudice any of the parties in future litigation over land titles or political jurisdiction by approving findings on a tangential issue never pleaded by the United States." *Arizona II*, *supra*, at 629. The Fort Yuma Reservation boundary dispute, on the other hand, is solely between the United States and the Quechan Tribe—there are no private parties claiming title to the land. Thus, the United States could have raised this claim in *Arizona I*, and the Master could have decided it.

Because I believe that the State parties' res judicata defense is properly before the Court and that the United States' claim for additional water rights is precluded, I see no need to remand for further proceedings. I agree with the Court that we should approve the proposed settlements of the remaining claims in this case and direct the parties to submit any objections to the proposed supplemental decree.

Syllabus

DICKERSON *v.* UNITED STATES

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

No. 99–5525. Argued April 19, 2000—Decided June 26, 2000

In the wake of *Miranda* v. *Arizona*, 384 U. S. 436, in which the Court held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence, *id.*, at 479, Congress enacted 18 U. S. C. § 3501, which in essence makes the admissibility of such statements turn solely on whether they were made voluntarily. Petitioner, under indictment for bank robbery and related federal crimes, moved to suppress a statement he had made to the Federal Bureau of Investigation, on the ground he had not received "*Miranda* warnings" before being interrogated. The District Court granted his motion, and the Government took an interlocutory appeal. In reversing, the Fourth Circuit acknowledged that petitioner had not received *Miranda* warnings, but held that § 3501 was satisfied because his statement was voluntary. It concluded that *Miranda* was not a constitutional holding, and that, therefore, Congress could by statute have the final say on the admissibility question.

Held: Miranda and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts. Pp. 432–444.

(a) *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress. Given § 3501's express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and its instruction for trial courts to consider the totality of the circumstances surrounding the giving of the confession, this Court agrees with the Fourth Circuit that Congress intended § 3501 to overrule *Miranda*. The law is clear as to whether Congress has constitutional authority to do so. This Court has supervisory authority over the federal courts to prescribe binding rules of evidence and procedure. *Carlisle* v. *United States*, 517 U. S. 416, 426. While Congress has ultimate authority to modify or set aside any such rules that are not constitutionally required, *e. g.*, *Palermo* v. *United States*, 360 U. S. 343, 345–348, it may not supersede this Court's decisions interpreting and applying the Constitution, see, *e. g.*, *City of Boerne* v. *Flores*, 521 U. S. 507, 517–521. That *Miranda* announced a constitutional rule is demonstrated, first and foremost, by the fact that both *Miranda* and two of its companion cases applied its rule to proceedings in state courts, and that the Court has consistently done

so ever since. See, *e. g., Stansbury* v. *California*, 511 U. S. 318 *(per curiam)*. The Court does not hold supervisory power over the state courts, *e. g., Smith* v. *Phillips*, 455 U. S. 209, 221, as to which its authority is limited to enforcing the commands of the Constitution, *e. g., Mu'Min* v. *Virginia*, 500 U. S. 415, 422. The conclusion that *Miranda* is constitutionally based is also supported by the fact that that case is replete with statements indicating that the majority thought it was announcing a constitutional rule, see, *e. g.*, 384 U. S., at 445. Although *Miranda* invited legislative action to protect the constitutional right against coerced self-incrimination, it stated that any legislative alternative must be "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Id.*, at 467.

A contrary conclusion is not required by the fact that the Court has subsequently made exceptions from the *Miranda* rule, see, *e. g., New York* v. *Quarles*, 467 U. S. 649. No constitutional rule is immutable, and the sort of refinements made by such cases are merely a normal part of constitutional law. *Oregon* v. *Elstad*, 470 U. S. 298, 306—in which the Court, in refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases, stated that *Miranda*'s exclusionary rule serves the Fifth Amendment and sweeps more broadly than that Amendment itself—does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth. Finally, although the Court agrees with the court-appointed *amicus curiae* that there are more remedies available for abusive police conduct than there were when *Miranda* was decided—*e. g.*, a suit under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388—it does not agree that such additional measures supplement § 3501's protections sufficiently to create an adequate substitute for the *Miranda* warnings. *Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and assure him that the exercise of that right will be honored, see, *e. g.*, 384 U. S., at 467, while § 3501 explicitly eschews a requirement of preinterrogation warnings in favor of an approach that looks to the administration of such warnings as only one factor in determining the voluntariness of a suspect's confession. Section 3501, therefore, cannot be sustained if *Miranda* is to remain the law. Pp. 432–443.

(b) This Court declines to overrule *Miranda*. Whether or not this Court would agree with *Miranda*'s reasoning and its rule in the first instance, *stare decisis* weighs heavily against overruling it now. Even in constitutional cases, *stare decisis* carries such persuasive force that the Court has always required a departure from precedent to be supported by some special justification. *E. g., United States* v. *Inter-*

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national Business Machines Corp., 517 U. S. 843, 856. There is no such justification here. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture. See *Mitchell* v. *United States*, 526 U. S. 314, 331–332. While the Court has overruled its precedents when subsequent cases have undermined their doctrinal underpinnings, that has not happened to *Miranda*. If anything, subsequent cases have reduced *Miranda*'s impact on legitimate law enforcement while reaffirming the decision's core ruling. The rule's disadvantage is that it may result in a guilty defendant going free. But experience suggests that § 3501's totality-of-the-circumstances test is more difficult than *Miranda* for officers to conform to, and for courts to apply consistently. See, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503, 515. The requirement that *Miranda* warnings be given does not dispense with the voluntariness inquiry, but cases in which a defendant can make a colorable argument that a self-incriminating statement was compelled despite officers' adherence to *Miranda* are rare. Pp. 443–444.

166 F. 3d 667, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 444.

James W. Hundley, by appointment of the Court, 528 U. S. 1072, argued the cause for petitioner. With him on the briefs were *Carter G. Phillips*, *Jeffrey T. Green*, and *Kurt H. Jacobs*.

Solicitor General Waxman argued the cause for the United States. With him on the briefs were *Attorney General Reno*, *Assistant Attorney General Robinson*, *Deputy Solicitor General Dreeben*, *James A. Feldman*, and *Lisa S. Blatt*.

Paul G. Cassell, by invitation of the Court, 528 U. S. 1045, argued the cause as *amicus curiae* urging affirmance. With him on the brief were *Daniel J. Popeo* and *Paul D. Kamenar*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union by *Jonathan L. Abram*, *Audrey J. Anderson*, *Steven R. Shapiro*, *Vivian Berger*, *Susan N. Herman*, and *Stephen Schulhofer;*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), we held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in

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for the House Democratic Leadership by *Charles Tiefer* and *Jonathan W. Cuneo;* for the National Association of Criminal Defense Lawyers et al. by *Paul M. Smith*, *Deanne E. Maynard*, *Lisa B. Kemler*, and *John T. Philipsborn;* for the National Legal Aid and Defender Association by *Charles D. Weisselberg* and *Michelle Falkoff;* for the Rutherford Institute by *James Joseph Lynch, Jr.*, and *John W. Whitehead;* for Griffin B. Bell by *Robert S. Litt*, *John A. Freedman*, and *Daniel C. Richman;* and for Benjamin R. Civiletti by *Mr. Civiletti*, *pro se*, *Kenneth C. Bass III*, and *John F. Cooney.*

Briefs of *amici curiae* urging affirmance were filed for the State of South Carolina et al. by *Charles M. Condon*, Attorney General of South Carolina, *Treva Ashworth*, Deputy Attorney General, *Kenneth P. Woodington*, Senior Assistant Attorney General, and *Travey Colton Green*, Assistant Attorney General; for the Maricopa County Attorney's Office by *Theodore B. Olson*, *Douglas R. Cox*, and *Miguel A. Estrada;* for Arizona Voices for Victims et al. by *Douglas Beloof;* for the Bipartisan Legal Advisory Group of the United States House of Representatives by *Geraldine R. Gennet*, *Kerry W. Kircher*, and *Michael L. Stern;* for the Center for the Community Interest et al. by *Daniel P. Collins*, *Kristin Linsley Myles*, and *Kelly M. Klaus;* for the Center for the Original Intent of the Constitution by *Michael P. Farris;* for Citizens for Law and Order et al. by *Theodore M. Cooperstein;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*, *Charles L. Hobson*, and *Edwin Meese III;* for the Federal Bureau of Investigation Agents Association by *Robert F. Hoyt;* for the Fraternal Order of Police by *Patrick F. Philbin* and *Thomas T. Rutherford;* for the National Association of Police Organizations et al. by *Stephen R. McSpadden*, *Robert J. Cynkar*, and *Margaret A. Ryan;* for the National District Attorneys Association et al. by *Lynne Abraham*, *Ronald Eisenberg*, *Jeffrey C. Sullivan*, *John M. Tyson, Jr.*, *Grover Trask*, *Christine A. Cooke*, *John B. Dangler*, and *Richard E. Trodden;* for Former Attorneys General of the United States William P. Barr and Edwin Meese III by *Andrew G. McBride;* for Senator Orrin G. Hatch et al. by *Senator Hatch*, *pro se;* and for Manning & Marder, Kass, Ellrod, Ramirez by *Davis J. Wilson.*

Wayne W. Schmidt, *James P. Manak*, and *Bernard J. Farber* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae.*

evidence. In the wake of that decision, Congress enacted 18 U. S. C. § 3501, which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.

Petitioner Dickerson was indicted for bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence, all in violation of the applicable provisions of Title 18 of the United States Code. Before trial, Dickerson moved to suppress a statement he had made at a Federal Bureau of Investigation field office, on the grounds that he had not received "*Miranda* warnings" before being interrogated. The District Court granted his motion to suppress, and the Government took an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit. That court, by a divided vote, reversed the District Court's suppression order. It agreed with the District Court's conclusion that petitioner had not received *Miranda* warnings before making his statement. But it went on to hold that § 3501, which in effect makes the admissibility of statements such as Dickerson's turn solely on whether they were made voluntarily, was satisfied in this case. It then concluded that our decision in *Miranda* was not a constitutional holding, and that, therefore, Congress could by statute have the final say on the question of admissibility. 166 F. 3d 667 (1999).

Because of the importance of the questions raised by the Court of Appeals' decision, we granted certiorari, 528 U. S. 1045 (1999), and now reverse.

We begin with a brief historical account of the law governing the admission of confessions. Prior to *Miranda*, we

evaluated the admissibility of a suspect's confession under a voluntariness test. The roots of this test developed in the common law, as the courts of England and then the United States recognized that coerced confessions are inherently untrustworthy. See, *e. g.*, *King* v. *Rudd*, 1 Leach 115, 117–118, 122–123, 168 Eng. Rep. 160, 161, 164 (K. B. 1783) (Lord Mansfield, C. J.) (stating that the English courts excluded confessions obtained by threats and promises); *King* v. *Warickshall*, 1 Leach 262, 263–264, 168 Eng. Rep. 234, 235 (K. B. 1783) ("A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it; and therefore it is rejected"); *King* v. *Parratt*, 4 Car. & P. 570, 172 Eng. Rep. 829 (N. P. 1831); *Queen* v. *Garner*, 1 Den. 329, 169 Eng. Rep. 267 (Ct. Crim. App. 1848); *Queen* v. *Baldry*, 2 Den. 430, 169 Eng. Rep. 568 (Ct. Crim. App. 1852); *Hopt* v. *Territory of Utah*, 110 U. S. 574 (1884); *Pierce* v. *United States*, 160 U. S. 355, 357 (1896). Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment. See, *e. g.*, *Bram* v. *United States*, 168 U. S. 532, 542 (1897) (stating that the voluntariness test "is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself' "); *Brown* v. *Mississippi*, 297 U. S. 278 (1936) (reversing a criminal conviction under the Due Process Clause because it was based on a confession obtained by physical coercion).

While *Bram* was decided before *Brown* and its progeny, for the middle third of the 20th century our cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process. We applied the

due process voluntariness test in "some 30 different cases decided during the era that intervened between *Brown* and *Escobedo* v. *Illinois*, 378 U. S. 478 [(1964)]." *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 223 (1973). See, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Chambers* v. *Florida*, 309 U. S. 227 (1940). Those cases refined the test into an inquiry that examines "whether a defendant's will was overborne" by the circumstances surrounding the giving of a confession. *Schneckloth*, 412 U. S., at 226. The due process test takes into consideration "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Ibid.* See also *Haynes*, *supra*, at 513; *Gallegos* v. *Colorado*, 370 U. S. 49, 55 (1962); *Reck* v. *Pate*, 367 U. S. 433, 440 (1961) ("[A]ll the circumstances attendant upon the confession must be taken into account"); *Malinski* v. *New York*, 324 U. S. 401, 404 (1945) ("If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant"). The determination "depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing." *Stein* v. *New York*, 346 U. S. 156, 185 (1953).

We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily. But our decisions in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), and *Miranda* changed the focus of much of the inquiry in determining the admissibility of suspects' incriminating statements. In *Malloy*, we held that the Fifth Amendment's Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the States. 378 U. S., at 6–11. We decided *Miranda* on the heels of *Malloy*.

In *Miranda*, we noted that the advent of modern custodial police interrogation brought with it an increased con-

cern about confessions obtained by coercion.[1] 384 U. S., at 445–458. Because custodial police interrogation, by its very nature, isolates and pressures the individual, we stated that "[e]ven without employing brutality, the 'third degree' or [other] specific stratagems, . . . custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Id.*, at 455. We concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be "accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself." *Id.*, at 439. Accordingly, we laid down "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.*, at 442. Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings. These warnings (which have come to be known colloquially as "*Miranda* rights") are: a suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.*, at 479.

Two years after *Miranda* was decided, Congress enacted § 3501. That section provides, in relevant part:

> "(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial

[1] While our cases have long interpreted the Due Process and Self-Incrimination Clauses to require that a suspect be accorded a fair trial free from coerced testimony, our application of those Clauses to the context of custodial police interrogation is relatively recent because the routine practice of such interrogation is itself a relatively new development. See, *e. g.*, *Miranda*, 384 U. S., at 445–458.

> judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> "(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> "The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."

Given § 3501's express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and the instruction for trial courts to consider a nonexclusive list of factors relevant to the circumstances of a confession, we agree with the Court of Appeals that Congress intended by its enactment to overrule *Miranda*. See also *Davis* v. *United States*, 512 U. S. 452, 464 (1994) (SCALIA, J., concurring) (stating that, prior to *Miranda*,

"voluntariness *vel non* was the touchstone of admissibility of confessions"). Because of the obvious conflict between our decision in *Miranda* and § 3501, we must address whether Congress has constitutional authority to thus supersede *Miranda*. If Congress has such authority, § 3501's totality-of-the-circumstances approach must prevail over *Miranda*'s requirement of warnings; if not, that section must yield to *Miranda*'s more specific requirements.

The law in this area is clear. This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals. *Carlisle* v. *United States*, 517 U. S. 416, 426 (1996). However, the power to judicially create and enforce nonconstitutional "rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." *Palermo* v. *United States*, 360 U. S. 343, 353, n. 11 (1959) (citing *Funk* v. *United States*, 290 U. S. 371, 382 (1933), and *Gordon* v. *United States*, 344 U. S. 414, 418 (1953)). Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution. *Palermo*, *supra*, at 345–348; *Carlisle*, *supra*, at 426; *Vance* v. *Terrazas*, 444 U. S. 252, 265 (1980).

But Congress may not legislatively supersede our decisions interpreting and applying the Constitution. See, *e. g.*, *City of Boerne* v. *Flores*, 521 U. S. 507, 517–521 (1997). This case therefore turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction. Recognizing this point, the Court of Appeals surveyed *Miranda* and its progeny to determine the constitutional status of the *Miranda* decision. 166 F. 3d, at 687–692. Relying on the fact that we have created several exceptions to *Miranda*'s warnings requirement and that we have repeatedly referred to the *Miranda* warnings as "prophylactic," *New York* v. *Quarles*, 467 U. S. 649, 653

(1984), and "not themselves rights protected by the Constitution," *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974),[2] the Court of Appeals concluded that the protections announced in *Miranda* are not constitutionally required. 166 F. 3d, at 687–690.

We disagree with the Court of Appeals' conclusion, although we concede that there is language in some of our opinions that supports the view taken by that court. But first and foremost of the factors on the other side—that *Miranda* is a constitutional decision—is that both *Miranda* and two of its companion cases applied the rule to proceedings in state courts—to wit, Arizona, California, and New York. See 384 U. S., at 491–494, 497–499. Since that time, we have consistently applied *Miranda*'s rule to prosecutions arising in state courts. See, *e. g.*, *Stansbury* v. *California*, 511 U. S. 318 (1994) *(per curiam)*; *Minnick* v. *Mississippi*, 498 U. S. 146 (1990); *Arizona* v. *Roberson*, 486 U. S. 675 (1988); *Edwards* v. *Arizona*, 451 U. S. 477, 481–482 (1981). It is beyond dispute that we do not hold a supervisory power over the courts of the several States. *Smith* v. *Phillips*, 455 U. S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension"); *Cicenia* v. *Lagay*, 357 U. S. 504, 508–509 (1958). With respect to proceedings in state courts, our "authority is limited to enforcing the commands of the United States Constitution." *Mu'Min* v. *Virginia*, 500 U. S. 415, 422 (1991). See also *Harris* v. *Rivera*, 454 U. S. 339, 344–345 (1981) *(per curiam)* (stating that "[f]ederal judges . . . may not require the ob-

[2] See also *Davis* v. *United States*, 512 U. S. 452, 457–458 (1994); *Withrow* v. *Williams*, 507 U. S. 680, 690–691 (1993) ("*Miranda*'s safeguards are not constitutional in character"); *Duckworth* v. *Eagan*, 492 U. S. 195, 203 (1989); *Connecticut* v. *Barrett*, 479 U. S. 523, 528 (1987) ("[T]he *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights"); *Oregon* v. *Elstad*, 470 U. S. 298, 306 (1985); *Edwards* v. *Arizona*, 451 U. S. 477, 492 (1981) (Powell, J., concurring in result).

servance of any special procedures" in state courts "except when necessary to assure compliance with the dictates of the Federal Constitution").[3]

The *Miranda* opinion itself begins by stating that the Court granted certiorari "to explore some facets of the problems . . . of applying the privilege against self-incrimination to in-custody interrogation, *and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.*" 384 U. S., at 441–442 (emphasis added). In fact, the majority opinion is replete with statements indicating that the majority thought it was announcing a constitutional rule.[4] Indeed, the Court's ultimate conclusion was that the

[3] Our conclusion regarding *Miranda*'s constitutional basis is further buttressed by the fact that we have allowed prisoners to bring alleged *Miranda* violations before the federal courts in habeas corpus proceedings. See *Thompson* v. *Keohane*, 516 U. S. 99 (1995); *Withrow*, *supra*, at 690–695. Habeas corpus proceedings are available only for claims that a person "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254(a). Since the *Miranda* rule is clearly not based on federal laws or treaties, our decision allowing habeas review for *Miranda* claims obviously assumes that *Miranda* is of constitutional origin.

[4] See 384 U. S., at 445 ("The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody"), 457 (stating that the *Miranda* Court was concerned with "adequate safeguards to protect precious Fifth Amendment rights"), 458 (examining the "history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation"), 476 ("The requirement of warnings and waiver of rights is . . . fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation"), 479 ("The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself"), 481, n. 52 (stating that the Court dealt with "constitutional standards in relation to statements made"), 490 ("[T]he issues presented are of constitutional dimensions and must be determined by the courts"), 489 (stating that the *Miranda* Court was dealing "with rights grounded in a specific requirement of the Fifth Amendment of the Constitution").

unwarned confessions obtained in the four cases before the Court in *Miranda* "were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege."[5] *Id.*, at 491.

Additional support for our conclusion that *Miranda* is constitutionally based is found in the *Miranda* Court's invitation for legislative action to protect the constitutional right against coerced self-incrimination. After discussing the "compelling pressures" inherent in custodial police interrogation, the *Miranda* Court concluded that, "[i]n order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.*, at 467. However, the Court emphasized that it could not foresee "the potential alternatives for protecting the privilege which might be devised by Congress or the States," and it accordingly opined that the Constitution would not preclude legislative solutions that differed from the prescribed *Miranda* warnings but which were "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it."[6] *Ibid.*

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[5] Many of our subsequent cases have also referred to *Miranda*'s constitutional underpinnings. See, *e. g.*, *Withrow*, *supra*, at 691 ("'Prophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards a 'fundamental trial right'"); *Illinois* v. *Perkins*, 496 U. S. 292, 296 (1990) (describing *Miranda*'s warning requirement as resting on "the Fifth Amendment privilege against self-incrimination"); *Butler* v. *McKellar*, 494 U. S. 407, 411 (1990) ("[T]he Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation"); *Michigan* v. *Jackson*, 475 U. S. 625, 629 (1986) ("The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations"); *Moran* v. *Burbine*, 475 U. S. 412, 427 (1986) (referring to *Miranda* as "our interpretation of the Federal Constitution"); *Edwards*, *supra*, at 481–482.

[6] The Court of Appeals relied in part on our statement that the *Miranda* decision in no way "creates a 'constitutional straightjacket.'" See 166 F. 3d 667, 672 (CA4 1999) (quoting *Miranda*, 384 U. S., at 467). However, a

The Court of Appeals also relied on the fact that we have, after our *Miranda* decision, made exceptions from its rule in cases such as *New York* v. *Quarles*, 467 U. S. 649 (1984), and *Harris* v. *New York*, 401 U. S. 222 (1971). See 166 F. 3d, at 672, 689–691. But we have also broadened the application of the *Miranda* doctrine in cases such as *Doyle* v. *Ohio*, 426 U. S. 610 (1976), and *Arizona* v. *Roberson*, 486 U. S. 675 (1988). These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision.

The Court of Appeals also noted that in *Oregon* v. *Elstad*, 470 U. S. 298 (1985), we stated that "'[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself.'" 166 F. 3d, at 690 (quoting *Elstad*, *supra*, at 306). Our decision in that case—refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases—does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.

As an alternative argument for sustaining the Court of Appeals' decision, the court-invited *amicus curiae*[7] contends that the section complies with the requirement that a legislative alternative to *Miranda* be equally as effective in preventing coerced confessions. See Brief for Paul G. Cassell

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review of our opinion in *Miranda* clarifies that this disclaimer was intended to indicate that the Constitution does not require police to administer the particular *Miranda* warnings, not that the Constitution does not require a procedure that is effective in securing Fifth Amendment rights.

[7] Because no party to the underlying litigation argued in favor of § 3501's constitutionality in this Court, we invited Professor Paul Cassell to assist our deliberations by arguing in support of the judgment below.

as *Amicus Curiae* 28–39. We agree with the *amicus*' contention that there are more remedies available for abusive police conduct than there were at the time *Miranda* was decided, see, *e. g.*, *Wilkins* v. *May*, 872 F. 2d 190, 194 (CA7 1989) (applying *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), to hold that a suspect may bring a federal cause of action under the Due Process Clause for police misconduct during custodial interrogation). But we do not agree that these additional measures supplement § 3501's protections sufficiently to meet the constitutional minimum. *Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored. See, *e. g.*, 384 U. S., at 467. As discussed above, § 3501 explicitly eschews a requirement of preinterrogation warnings in favor of an approach that looks to the administration of such warnings as only one factor in determining the voluntariness of a suspect's confession. The additional remedies cited by *amicus* do not, in our view, render them, together with § 3501, an adequate substitute for the warnings required by *Miranda*.

The dissent argues that it is judicial overreaching for this Court to hold § 3501 unconstitutional unless we hold that the *Miranda* warnings are required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements. *Post*, at 453–454, 465 (opinion of SCALIA, J.). But we need not go further than *Miranda* to decide this case. In *Miranda*, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, 384 U. S, at 457, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt. The Court therefore concluded that something more than the totality test was necessary. See *ibid.;* see also *id.*, at 467, 490–491. As discussed above, § 3501 reinstates the totality test as

sufficient. Section 3501 therefore cannot be sustained if *Miranda* is to remain the law.

Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now. See, *e. g.*, *Rhode Island* v. *Innis*, 446 U. S. 291, 304 (1980) (Burger, C. J., concurring in judgment) ("The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date"). While "'*stare decisis* is not an inexorable command,'" *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997) (quoting *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991)), particularly when we are interpreting the Constitution, *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997), "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 856 (1996) (quoting *Payne*, *supra*, at 842 (SOUTER, J., concurring), in turn quoting *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984)).

We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture. See *Mitchell* v. *United States*, 526 U. S. 314, 331–332 (1999) (SCALIA, J., dissenting) (stating that the fact that a rule has found "'wide acceptance in the legal culture'" is "adequate reason not to overrule" it). While we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings, see, *e. g.*, *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989), we do not believe that this has happened to the *Miranda* decision. If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned

statements may not be used as evidence in the prosecution's case in chief.

The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his "rights," may nonetheless be excluded and a guilty defendant go free as a result. But experience suggests that the totality-of-the-circumstances test which § 3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner. See, *e. g.*, *Haynes* v. *Washington*, 373 U. S., at 515 ("The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw"). The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry. But as we said in *Berkemer* v. *McCarty*, 468 U. S. 420 (1984), "[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Id.*, at 433, n. 20.

In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively. Following the rule of *stare decisis*, we decline to overrule *Miranda* ourselves.[8] The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

Those to whom judicial decisions are an unconnected series of judgments that produce either favored or disfa-

[8] Various other contentions and suggestions have been pressed by the numerous *amici*, but because of the procedural posture of this case we do not think it appropriate to consider them. See *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 60, n. 2 (1981); *Bell* v. *Wolfish*, 441 U. S. 520, 531–532, n. 13 (1979); *Knetsch* v. *United States*, 364 U. S. 361, 370 (1960).

vored results will doubtless greet today's decision as a paragon of moderation, since it declines to overrule *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Those who understand the judicial process will appreciate that today's decision is not a reaffirmation of *Miranda*, but a radical revision of the most significant element of *Miranda* (as of all cases): the rationale that gives it a permanent place in our jurisprudence.

Marbury v. *Madison*, 1 Cranch 137 (1803), held that an Act of Congress will not be enforced by the courts if what it prescribes violates the Constitution of the United States. That was the basis on which *Miranda* was decided. One will search today's opinion in vain, however, for a statement (surely simple enough to make) that what 18 U. S. C. § 3501 prescribes—the use at trial of a voluntary confession, even when a *Miranda* warning or its equivalent has failed to be given—violates the Constitution. The reason the statement does not appear is not only (and perhaps not so much) that it would be absurd, inasmuch as § 3501 excludes from trial precisely what the Constitution excludes from trial, viz., compelled confessions; but also that Justices whose votes are needed to compose today's majority are on record as believing that a violation of *Miranda* is *not* a violation of the Constitution. See *Davis* v. *United States*, 512 U. S. 452, 457–458 (1994) (opinion of the Court, in which KENNEDY, J., joined); *Duckworth* v. *Eagan*, 492 U. S. 195, 203 (1989) (opinion of the Court, in which KENNEDY, J., joined); *Oregon* v. *Elstad*, 470 U. S. 298 (1985) (opinion of the Court by O'CONNOR, J.); *New York* v. *Quarles*, 467 U. S. 649 (1984) (opinion of the Court by REHNQUIST, J.). And so, to justify today's agreed-upon result, the Court must adopt a significant *new*, if not entirely comprehensible, principle of constitutional law. As the Court chooses to describe that principle, statutes of Congress can be disregarded, not only when what they prescribe violates the Constitution, but when what they prescribe contradicts a decision of this Court that "announced a constitutional rule," *ante*, at 437. As I shall discuss in some

detail, the only thing that can possibly mean in the context of this case is that this Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful "prophylactic" restrictions upon Congress and the States. That is an immense and frightening anti-democratic power, and it does not exist.

It takes only a small step to bring today's opinion out of the realm of power-judging and into the mainstream of legal reasoning: The Court need only go beyond its carefully couched iterations that "*Miranda* is a constitutional decision," *ante,* at 438, that "*Miranda* is constitutionally based," *ante,* at 440, that *Miranda* has "constitutional underpinnings," *ante,* at 440, n. 5, and come out and say quite clearly: "We reaffirm today that custodial interrogation that is not preceded by *Miranda* warnings or their equivalent violates the Constitution of the United States." It cannot say that, because a majority of the Court does not believe it. The Court therefore acts in plain violation of the Constitution when it denies effect to this Act of Congress.

I

Early in this Nation's history, this Court established the sound proposition that constitutional government in a system of separated powers requires judges to regard as inoperative any legislative Act, even of Congress itself, that is "repugnant to the Constitution."

> "So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case." *Marbury, supra,* at 178.

The power we recognized in *Marbury* will thus permit us, indeed require us, to "disregar[d]" § 3501, a duly enacted

statute governing the admissibility of evidence in the federal courts, only if it "be in opposition to the constitution"—here, assertedly, the dictates of the Fifth Amendment.

It was once possible to characterize the so-called *Miranda* rule as resting (however implausibly) upon the proposition that what the statute here before us permits—the admission at trial of un-*Mirandized* confessions—violates the Constitution. That is the fairest reading of the *Miranda* case itself. The Court began by announcing that the Fifth Amendment privilege against self-incrimination applied in the context of extrajudicial custodial interrogation, see 384 U. S., at 460–467—itself a doubtful proposition as a matter both of history and precedent, see *id.*, at 510–511 (Harlan, J., dissenting) (characterizing the Court's conclusion that the Fifth Amendment privilege, rather than the Due Process Clause, governed station house confessions as a "*trompe l'oeil*"). Having extended the privilege into the confines of the station house, the Court liberally sprinkled throughout its sprawling 60-page opinion suggestions that, because of the compulsion inherent in custodial interrogation, the privilege was violated by any statement thus obtained that did not conform to the rules set forth in *Miranda,* or some functional equivalent. See *id.*, at 458 ("Unless adequate protective devices are employed to dispel the compulsion *inherent* in custodial surroundings, *no* statement obtained from the defendant can truly be the product of his free choice" (emphases added)); *id.*, at 461 ("An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak"); *id.*, at 467 ("We have concluded that without proper safeguards the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely"); *id.*, at 457, n. 26 (noting

the "absurdity of denying that a confession obtained under these circumstances is compelled").

The dissenters, for their part, also understood *Miranda*'s holding to be based on the "premise . . . that pressure on the suspect must be eliminated though it be only the subtle influence of the atmosphere and surroundings." *Id.*, at 512 (Harlan, J., dissenting). See also *id.*, at 535 (White, J., dissenting) ("[I]t has never been suggested, until today, that such questioning was so coercive and accused persons so lacking in hardihood that the very first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will"). And at least one case decided shortly after *Miranda* explicitly confirmed the view. See *Orozco* v. *Texas*, 394 U. S. 324, 326 (1969) ("[T]he use of these admissions obtained in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda*").

So understood, *Miranda* was objectionable for innumerable reasons, not least the fact that cases spanning more than 70 years had rejected its core premise that, absent the warnings and an effective waiver of the right to remain silent and of the (thitherto unknown) right to have an attorney present, a statement obtained pursuant to custodial interrogation was necessarily the product of compulsion. See *Crooker* v. *California*, 357 U. S. 433 (1958) (confession not involuntary despite denial of access to counsel); *Cicenia* v. *Lagay*, 357 U. S. 504 (1958) (same); *Powers* v. *United States*, 223 U. S. 303 (1912) (lack of warnings and counsel did not render statement before United States Commissioner involuntary); *Wilson* v. *United States*, 162 U. S. 613 (1896) (same). Moreover, history and precedent aside, the decision in *Miranda*, if read as an explication of what the Constitution *requires*, is preposterous. There is, for example, simply no basis in reason for concluding that a response to the very first question asked, by a suspect who already *knows* all of the rights de-

scribed in the *Miranda* warning, is anything other than a volitional act. See *Miranda, supra,* at 533–534 (White, J., dissenting). And even if one assumes that the elimination of compulsion absolutely requires informing even the most knowledgeable suspect of his right to remain silent, it cannot conceivably require the right to have *counsel* present. There is a world of difference, which the Court recognized under the traditional voluntariness test but ignored in *Miranda,* between compelling a suspect to incriminate himself and preventing him from foolishly doing so of his own accord. Only the latter (which is *not* required by the Constitution) could explain the Court's inclusion of a right to counsel and the requirement that it, too, be knowingly and intelligently waived. Counsel's presence is not required to tell the suspect that he *need* not speak; the interrogators can do that. The only good reason for having counsel there is that he can be counted on to advise the suspect that he *should* not speak. See *Watts* v. *Indiana*, 338 U. S. 49, 59 (1949) (Jackson, J., concurring in result in part and dissenting in part) ("[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances").

Preventing foolish (rather than compelled) confessions is likewise the only conceivable basis for the rules (suggested in *Miranda,* see 384 U. S., at 444–445, 473–474), that courts must exclude any confession elicited by questioning conducted, without interruption, after the suspect has indicated a desire to stand on his right to remain silent, see *Michigan* v. *Mosley,* 423 U. S. 96, 105–106 (1975), or initiated by police after the suspect has expressed a desire to have counsel present, see *Edwards* v. *Arizona,* 451 U. S. 477, 484–485 (1981). Nonthreatening attempts to persuade the suspect to reconsider that initial decision are not, without more, enough to render a change of heart the product of anything other than the suspect's free will. Thus, what is most remarkable about the *Miranda* decision—and what

made it unacceptable as a matter of straightforward constitutional interpretation in the *Marbury* tradition—is its palpable hostility toward the act of confession *per se*, rather than toward what the Constitution abhors, *compelled* confession. See *United States* v. *Washington*, 431 U. S. 181, 187 (1977) ("[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable"). The Constitution is not, unlike the *Miranda* majority, offended by a criminal's commendable qualm of conscience or fortunate fit of stupidity. Cf. *Minnick* v. *Mississippi*, 498 U. S. 146, 166–167 (1990) (SCALIA, J., dissenting).

For these reasons, and others more than adequately developed in the *Miranda* dissents and in the subsequent works of the decision's many critics, any conclusion that a violation of the *Miranda* rules *necessarily* amounts to a violation of the privilege against compelled self-incrimination can claim no support in history, precedent, or common sense, and as a result would at least presumptively be worth reconsidering even at this late date. But that is unnecessary, since the Court has (thankfully) long since abandoned the notion that failure to comply with *Miranda*'s rules is itself a violation of the Constitution.

II

As the Court today acknowledges, since *Miranda* we have explicitly, and repeatedly, interpreted that decision as having announced, not the circumstances in which custodial interrogation runs afoul of the Fifth or Fourteenth Amendment, but rather only "prophylactic" rules that go beyond the right against compelled self-incrimination. Of course the seeds of this "prophylactic" interpretation of *Miranda* were present in the decision itself. See *Miranda*, 384 U. S., at 439 (discussing the "necessity for procedures which assure that the [suspect] is accorded his privilege"); *id.*, at 447 ("[u]nless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assur-

ance that practices of this nature will be eradicated"); *id.*, at 457 ("[i]n these cases, we might not find the defendants' statements to have been involuntary in traditional terms"); *ibid.* (noting "concern for adequate safeguards to protect precious Fifth Amendment rights" and the "potentiality for compulsion" in Ernesto Miranda's interrogation). In subsequent cases, the seeds have sprouted and borne fruit: The Court has squarely concluded that it is possible—indeed not uncommon—for the police to violate *Miranda* without also violating the Constitution.

Michigan v. *Tucker*, 417 U. S. 433 (1974), an opinion for the Court written by then-JUSTICE REHNQUIST, rejected the true-to-*Marbury*, failure-to-warn-as-constitutional-violation interpretation of *Miranda*. It held that exclusion of the "fruits" of a *Miranda* violation—the statement of a witness whose identity the defendant had revealed while in custody—was not required. The opinion explained that the question whether the "police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination" was a "separate question" from "whether it instead violated only the prophylactic rules developed to protect that right." 417 U. S., at 439. The "procedural safeguards" adopted in *Miranda*, the Court said, "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected," and to "provide practical reinforcement for the right," 417 U. S., at 444. Comparing the particular facts of the custodial interrogation with the "historical circumstances underlying the privilege," *ibid.*, the Court concluded, unequivocally, that the defendant's statement could not be termed "involuntary as that term has been defined in the decisions of this Court," *id.*, at 445, and thus that there had been no constitutional violation, notwithstanding the clear violation of the "procedural rules later established in *Miranda*," *ibid.* Lest there be any confusion on the point, the Court reiterated that the "police conduct at

issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." *Id.*, at 446. It is clear from our cases, of course, that if the statement in *Tucker had* been obtained in violation of the Fifth Amendment, the statement and its fruits would have been excluded. See *Nix* v. *Williams*, 467 U. S. 431, 442 (1984).

The next year, in *Oregon* v. *Hass*, 420 U. S. 714 (1975), the Court held that a defendant's statement taken in violation of *Miranda* that was nonetheless *voluntary* could be used at trial for impeachment purposes. This holding turned upon the recognition that violation of *Miranda* is not unconstitutional compulsion, since statements obtained in actual violation of the privilege against compelled self-incrimination, "as opposed to . . . taken in violation of *Miranda*," quite simply "may not be put to any testimonial use whatever against [the defendant] in a criminal trial," including as impeachment evidence. *New Jersey* v. *Portash*, 440 U. S. 450, 459 (1979). See also *Mincey* v. *Arizona*, 437 U. S. 385, 397–398 (1978) (holding that while statements obtained in violation of *Miranda* may be used for impeachment if otherwise trustworthy, the Constitution prohibits "*any* criminal trial use against a defendant of his *involuntary* statement").

Nearly a decade later, in *New York* v. *Quarles*, 467 U. S. 649 (1984), the Court relied upon the fact that "[t]he prophylactic *Miranda* warnings . . . are 'not themselves rights protected by the Constitution,'" *id.*, at 654 (quoting *Tucker*, *supra*, at 444), to create a "public safety" exception. In that case, police apprehended, after a chase in a grocery store, a rape suspect known to be carrying a gun. After handcuffing and searching him (and finding no gun)—but before reading him his *Miranda* warnings—the police demanded to know where the gun was. The defendant nodded in the direction of some empty cartons and responded that "the gun is over there." The Court held that both the unwarned

statement—"the gun is over there"—and the recovered weapon were admissible in the prosecution's case in chief under a "public safety exception" to the "prophylactic rules enunciated in *Miranda*." 467 U. S., at 653. It explicitly acknowledged that if the *Miranda* warnings were an imperative of the Fifth Amendment itself, such an exigency exception would be impossible, since the Fifth Amendment's bar on compelled self-incrimination is absolute, and its "'strictures, unlike the Fourth's are not removed by showing reasonableness,'" 467 U. S., at 653, n. 3. (For the latter reason, the Court found it necessary to note that respondent did not "claim that [his] statements were actually compelled by police conduct which overcame his will to resist," *id.*, at 654.)

The next year, the Court again declined to apply the "fruit of the poisonous tree" doctrine to a *Miranda* violation, this time allowing the admission of a suspect's properly warned statement even though it had been preceded (and, arguably, induced) by an earlier inculpatory statement taken in violation of *Miranda*. *Oregon* v. *Elstad*, 470 U. S. 298 (1985). As in *Tucker*, the Court distinguished the case from those holding that a confession obtained as a result of an unconstitutional search is inadmissible, on the ground that the violation of *Miranda* does not involve an "actual infringement of the suspect's constitutional rights," 470 U. S., at 308. *Miranda*, the Court explained, "sweeps more broadly than the Fifth Amendment itself," and "*Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm." 470 U. S., at 306–307. "[E]rrors [that] are made by law enforcement officers in administering the prophylactic *Miranda* procedures . . . should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself." *Id.*, at 308–309.

In light of these cases, and our statements to the same effect in others, see, *e. g.*, *Davis* v. *United States*, 512 U. S., at 457–458; *Withrow* v. *Williams*, 507 U. S. 680, 690–691 (1993);

Eagan, 492 U. S., at 203, it is simply no longer possible for the Court to conclude, even if it wanted to, that a violation of *Miranda*'s rules is a violation of the Constitution. But as I explained at the outset, that is what is required before the Court may disregard a law of Congress governing the admissibility of evidence in federal court. The Court today insists that the *decision* in *Miranda* is a "constitutional" one, *ante*, at 432, 438; that it has "constitutional underpinnings," *ante*, at 440, n. 5; a "constitutional basis" and a "constitutional origin," *ante*, at 439, n. 3; that it was "constitutionally based," *ante*, at 440; and that it announced a "constitutional rule," *ante*, at 437, 439, 441, 444. It is fine to play these word games; but what makes a decision "constitutional" in the only sense relevant here—in the sense that renders it impervious to supersession by congressional legislation such as § 3501—is the determination that the Constitution *requires* the result that the decision announces and the statute ignores. By disregarding congressional action that concededly does not violate the Constitution, the Court flagrantly offends fundamental principles of separation of powers, and arrogates to itself prerogatives reserved to the representatives of the people.

The Court seeks to avoid this conclusion in two ways: First, by misdescribing these post-*Miranda* cases as mere dicta. The Court concedes only "that there is language in some of our opinions that supports the view" that *Miranda*'s protections are not "constitutionally required." *Ante*, at 438. It is not a matter of *language;* it is a matter of *holdings.* The proposition that failure to comply with *Miranda*'s rules does not establish a constitutional violation was central to the *holdings* of *Tucker*, *Hass*, *Quarles*, and *Elstad.*

The second way the Court seeks to avoid the impact of these cases is simply to disclaim responsibility for reasoned decisionmaking. It says:

> "These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable. No court laying down a gen-

> eral rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision." *Ante,* at 441.

The issue, however, is not whether court rules are "mutable"; they assuredly are. It is not whether, in the light of "various circumstances," they can be "modifi[ed]"; they assuredly can. The issue is whether, *as mutated and modified,* they must *make sense.* The requirement that they do so is the only thing that prevents this Court from being some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy. And if confessions procured in violation of *Miranda* are confessions "compelled" in violation of the Constitution, the post-*Miranda* decisions I have discussed do not make sense. The only reasoned basis for their outcome was that a violation of *Miranda* is *not* a violation of the Constitution. If, for example, as the Court acknowledges was the holding of *Elstad,* "the traditional 'fruits' doctrine developed in Fourth Amendment cases" (that the fruits of evidence obtained unconstitutionally must be excluded from trial) does *not* apply to the fruits of *Miranda* violations, *ante,* at 441; and if the reason for the difference is *not* that *Miranda* violations are not constitutional violations (which is plainly and flatly what *Elstad* said); then the Court must come up with some *other* explanation for the difference. (That will take quite a bit of doing, by the way, since it is *not* clear on the face of the Fourth Amendment that evidence obtained in violation of that guarantee must be excluded from trial, whereas it *is* clear on the face of the Fifth Amendment that unconstitutionally compelled confessions cannot be used.) To say simply that "unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment," *ante,* at 441, is true but supremely unhelpful.

Finally, the Court asserts that *Miranda* must be a "constitutional decision" announcing a "constitutional rule," and thus immune to congressional modification, because we have since its inception applied it to the States. If this argument is meant as an invocation of *stare decisis*, it fails because, though it is true that our cases applying *Miranda* against the States must be reconsidered if *Miranda* is not required by the Constitution, it is likewise true that our cases (discussed above) based on the principle that *Miranda* is *not* required by the Constitution will have to be reconsidered if it *is*. So the *stare decisis* argument is a wash. If, on the other hand, the argument is meant as an appeal to logic rather than *stare decisis*, it is a classic example of begging the question: Congress's attempt to set aside *Miranda*, since it represents an assertion that violation of *Miranda* is not a violation of the Constitution, *also* represents an assertion that the Court has no power to impose *Miranda* on the States. To answer this assertion—not by showing why violation of *Miranda is* a violation of the Constitution—but by asserting that *Miranda does* apply against the States, is to assume precisely the point at issue. In my view, our continued application of the *Miranda* code to the States despite our consistent statements that running afoul of its dictates does not necessarily—or even usually—result in an actual constitutional violation, represents not the source of *Miranda*'s salvation but rather evidence of its ultimate illegitimacy. See generally J. Grano, Confessions, Truth, and the Law 173–198 (1993); Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 Nw. U. L. Rev. 100 (1985). As JUSTICE STEVENS has elsewhere explained: "This Court's power to require state courts to exclude probative self-incriminatory statements rests entirely on the premise that the use of such evidence violates the Federal Constitution. . . . If the Court does not accept that premise, it must regard the holding in the *Miranda* case itself, as well as all of the federal jurisprudence that has

evolved from that decision, as nothing more than an illegitimate exercise of raw judicial power." *Elstad*, 470 U. S., at 370 (dissenting opinion). Quite so.

III

There was available to the Court a means of reconciling the established proposition that a violation of *Miranda* does not itself offend the Fifth Amendment with the Court's assertion of a right to ignore the present statute. That means of reconciliation was argued strenuously by both petitioner and the United States, who were evidently more concerned than the Court is with maintaining the coherence of our jurisprudence. It is not mentioned in the Court's opinion because, I assume, a majority of the Justices intent on reversing believes that incoherence is the lesser evil. They may be right.

Petitioner and the United States contend that there is nothing at all exceptional, much less unconstitutional, about the Court's adopting prophylactic rules to buttress constitutional rights, and enforcing them against Congress and the States. Indeed, the United States argues that "[p]rophylactic rules are now and have been for many years a feature of this Court's constitutional adjudication." Brief for United States 47. That statement is not wholly inaccurate, if by "many years" one means since the mid-1960's. However, in their zeal to validate what is in my view a lawless practice, the United States and petitioner greatly overstate the frequency with which we have engaged in it. For instance, petitioner cites several cases in which the Court quite simply exercised its traditional judicial power to define the scope of constitutional protections and, relatedly, the circumstances in which they are violated. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 436–437 (1982) (holding that a permanent physical occupation constitutes a *per se* taking); *Maine* v. *Moulton*, 474 U. S. 159, 176 (1985) (holding that the Sixth Amendment right to the assist-

ance of counsel is *actually* "violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent").

Similarly unsupportive of the supposed practice is *Bruton* v. *United States*, 391 U. S. 123 (1968), where we concluded that the Confrontation Clause of the Sixth Amendment forbids the admission of a nontestifying codefendant's facially incriminating confession in a joint trial, even where the jury has been given a limiting instruction. That decision was based, not upon the theory that this was desirable protection "beyond" what the Confrontation Clause technically required; but rather upon the self-evident proposition that the inability to cross-examine an available witness whose damaging out-of-court testimony is introduced violates the Confrontation Clause, combined with the conclusion that in these circumstances a mere jury instruction can never be relied upon to prevent the testimony from being damaging, see *Richardson* v. *Marsh*, 481 U. S. 200, 207–208 (1987).

The United States also relies on our cases involving the question whether a State's procedure for appointed counsel's withdrawal of representation on appeal satisfies the State's constitutional obligation to "'affor[d] adequate and effective appellate review to indigent defendants.'" *Smith* v. *Robbins*, 528 U. S. 259, 276 (2000) (quoting *Griffin* v. *Illinois*, 351 U. S. 12, 20 (1956)). In *Anders* v. *California*, 386 U. S. 738 (1967), we concluded that California's procedure governing withdrawal fell short of the constitutional minimum, and we outlined a procedure that *would* meet that standard. But as we made clear earlier this Term in *Smith*, which upheld a procedure *different* from the one *Anders* suggested, the benchmark of constitutionality is the constitutional requirement of adequate representation, and not some excrescence upon that requirement decreed, for safety's sake, by this Court.

In a footnote, the United States directs our attention to certain overprotective First Amendment rules that we have adopted to ensure "breathing space" for expression. See *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340, 342 (1974) (recognizing that in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), we "extended a measure of strategic protection to defamatory falsehood" of public officials); *Freedman* v. *Maryland*, 380 U. S. 51, 58 (1965) (setting forth "procedural safeguards designed to obviate the dangers of a censorship system" with respect to motion picture obscenity). In these cases, and others involving the First Amendment, the Court has acknowledged that in order to guarantee that protected speech is not "chilled" and thus forgone, it is in some instances necessary to incorporate in our substantive rules a "measure of strategic protection." But that is because the Court has viewed the importation of "chill" as *itself* a violation of the First Amendment—not because the Court thought it could go beyond what the First Amendment *demanded* in order to provide some prophylaxis.

Petitioner and the United States are right on target, however, in characterizing the Court's actions in a case decided within a few years of *Miranda*, *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). There, the Court concluded that due process would be offended were a judge vindictively to resentence with added severity a defendant who had successfully appealed his original conviction. Rather than simply announce that vindictive sentencing violates the Due Process Clause, the Court went on to hold that "[i]n order to assure the absence of such a [vindictive] motivation, . . . the reasons for [imposing the increased sentence] must affirmatively appear" and must "be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.*, at 726. The Court later explicitly acknowledged *Pearce*'s prophylactic character, see *Michigan* v. *Payne*, 412 U. S. 47, 53 (1973). It is true, therefore, that the

case exhibits the same fundamental flaw as does *Miranda* when deprived (as it has been) of its original (implausible) pretension to announcement of what the Constitution itself required. That is, although the Due Process Clause may well prohibit punishment based on judicial vindictiveness, the Constitution by no means vests in the courts "any general power to prescribe particular devices 'in order to assure the absence of such a motivation,'" 395 U. S., at 741 (Black, J., dissenting). Justice Black surely had the right idea when he derided the Court's requirement as "pure legislation if there ever was legislation," *ibid.*, although in truth *Pearce*'s rule pales as a legislative achievement when compared to the detailed code promulgated in *Miranda*.[1]

The foregoing demonstrates that, petitioner's and the United States' suggestions to the contrary notwithstanding, what the Court did in *Miranda* (assuming, as later cases hold, that *Miranda* went beyond what the Constitution actually requires) is in fact extraordinary. That the Court has, on rare and recent occasion, repeated the mistake does not transform error into truth, but illustrates the potential for future mischief that the error entails. Where the Constitution has wished to lodge in one of the branches of the Federal Government some limited power to supplement its guarantees, it has said so. See Amdt. 14, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"). The power with which the Court would endow itself under a "prophylactic" justification for *Miranda* goes far beyond what it has permitted Congress to do under authority of that text. Whereas we have in-

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[1] As for *Michigan* v. *Jackson*, 475 U. S. 625 (1986), upon which petitioner and the United States also rely, in that case we extended to the Sixth Amendment, postindictment, context the *Miranda*-based prophylactic rule of *Edwards* v. *Arizona*, 451 U. S. 477 (1981), that the police cannot initiate interrogation after counsel has been requested. I think it less a separate instance of claimed judicial power to impose constitutional prophylaxis than a direct, logic-driven consequence of *Miranda* itself.

sisted that congressional action under § 5 of the Fourteenth Amendment must be "congruent" with, and "proportional" to, a *constitutional violation*, see *City of Boerne* v. *Flores*, 521 U. S. 507, 520 (1997), the *Miranda* nontextual power to embellish confers authority to prescribe preventive measures against not only constitutionally prohibited compelled confessions, but also (as discussed earlier) foolhardy ones.

I applaud, therefore, the refusal of the Justices in the majority to enunciate this boundless doctrine of judicial empowerment as a means of rendering today's decision rational. In nonetheless joining the Court's judgment, however, they overlook two truisms: that actions speak louder than silence, and that (in judge-made law at least) logic will out. Since there is in fact no other principle that can reconcile today's judgment with the post-*Miranda* cases that the Court refuses to abandon, what today's decision will stand for, whether the Justices can bring themselves to say it or not, is the power of the Supreme Court to write a prophylactic, extraconstitutional Constitution, binding on Congress and the States.

IV

Thus, while I agree with the Court that § 3501 cannot be upheld without also concluding that *Miranda* represents an illegitimate exercise of our authority to review state-court judgments, I do not share the Court's hesitation in reaching that conclusion. For while the Court is also correct that the doctrine of *stare decisis* demands some "special justification" for a departure from longstanding precedent—even precedent of the constitutional variety—that criterion is more than met here. To repeat JUSTICE STEVENS' cogent observation, it is "[o]bviou[s]" that "the Court's power to reverse Miranda's conviction rested *entirely* on the determination that a violation of the Federal Constitution had occurred." *Elstad*, 470 U. S., at 367, n. 9 (dissenting opinion) (emphasis added). Despite the Court's Orwellian assertion to the contrary, it is undeniable that later cases (discussed

above) have "undermined [*Miranda*'s] doctrinal underpinnings," *ante,* at 443, denying constitutional violation and thus stripping the holding of its only constitutionally legitimate support. *Miranda*'s critics and supporters alike have long made this point. See Office of Legal Policy, U. S. Dept. of Justice, Report to Attorney General on Law of Pre-Trial Interrogation 97 (Feb. 12, 1986) ("The current Court has repudiated the premises on which *Miranda* was based, but has drawn back from recognizing the full implications of its decisions"); *id.*, at 78 ("*Michigan* v. *Tucker* accordingly repudiated the doctrinal basis of the *Miranda* decision"); Sonenshein, *Miranda* and the Burger Court: Trends and Countertrends, 13 Loyola U. Chi. L. J. 405, 407–408 (1982) ("Although the Burger Court has not overruled *Miranda,* the Court has consistently undermined the rationales, assumptions, and values which gave *Miranda* life"); *id.*, at 425–426 ("Seemingly, the Court [in *Michigan* v. *Tucker*] utterly destroyed both *Miranda*'s rationale and its holding"); Stone, The Miranda Doctrine in the Burger Court, 1977 S. Ct. Rev. 99, 118 ("Mr. Justice Rehnquist's conclusion that there is a violation of the Self-Incrimination Clause only if a confession is involuntary . . . is an outright rejection of the core premises of *Miranda*").

The Court cites *Patterson* v. *McLean Credit Union,* 491 U. S. 164, 173 (1989), as accurately reflecting our standard for overruling, see *ante,* at 443—which I am pleased to accept, even though *Patterson* was speaking of overruling statutory cases and the standard for constitutional decisions is somewhat more lenient. What is set forth there reads as though it was written precisely with the current status of *Miranda* in mind:

> "In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such changes have

> removed or weakened the conceptual underpinnings from the prior decision, . . . or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, . . . the Court has not hesitated to overrule an earlier decision." 491 U. S., at 173.

Neither am I persuaded by the argument for retaining *Miranda* that touts its supposed workability as compared with the totality-of-the-circumstances test it purported to replace. *Miranda*'s proponents cite *ad nauseam* the fact that the Court was called upon to make difficult and subtle distinctions in applying the "voluntariness" test in some 30-odd due process "coerced confessions" cases in the 30 years between *Brown* v. *Mississippi*, 297 U. S. 278 (1936), and *Miranda*. It is not immediately apparent, however, that the judicial burden has been eased by the "bright-line" rules adopted in *Miranda*. In fact, in the 34 years since *Miranda* was decided, this Court has been called upon to decide nearly *60* cases involving a host of *Miranda* issues, most of them predicted with remarkable prescience by Justice White in his *Miranda* dissent. 384 U. S., at 545.

Moreover, it is not clear why the Court thinks that the "totality-of-the-circumstances test . . . is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Ante*, at 444. Indeed, I find myself persuaded by JUSTICE O'CONNOR's rejection of this same argument in her opinion in *Williams*, 507 U. S., at 711–712 (O'CONNOR, J., joined by REHNQUIST, C. J., concurring in part and dissenting in part):

> "*Miranda*, for all its alleged brightness, is not without its difficulties; and voluntariness is not without its strengths. . . .
>
> ". . . *Miranda* creates as many close questions as it resolves. The task of determining whether a defendant is in 'custody' has proved to be 'a slippery one.' And the supposedly 'bright' lines that separate interrogation

> from spontaneous declaration, the exercise of a right from waiver, and the adequate warning from the inadequate, likewise have turned out to be rather dim and ill defined. . . .
>
> "The totality-of-the-circumstances approach, on the other hand, permits each fact to be taken into account without resort to formal and dispositive labels. By dispensing with the difficulty of producing a yes-or-no answer to questions that are often better answered in shades and degrees, *the voluntariness inquiry often can make judicial decisionmaking easier rather than more onerous.*" (Emphasis added; citations omitted.)

But even were I to agree that the old totality-of-the-circumstances test was more cumbersome, it is simply not true that *Miranda* has banished it from the law and replaced it with a new test. Under the current regime, which the Court today retains in its entirety, courts are frequently called upon to undertake *both* inquiries. That is because, as explained earlier, voluntariness remains the *constitutional* standard, and as such continues to govern the admissibility for impeachment purposes of statements taken in violation of *Miranda*, the admissibility of the "fruits" of such statements, and the admissibility of statements challenged as unconstitutionally obtained *despite* the interrogator's compliance with *Miranda*, see, *e. g.*, *Colorado* v. *Connelly*, 479 U. S. 157 (1986).

Finally, I am not convinced by petitioner's argument that *Miranda* should be preserved because the decision occupies a special place in the "public's consciousness." Brief for Petitioner 44. As far as I am aware, the public is not under the illusion that we are infallible. I see little harm in admitting that we made a mistake in taking away from the people the ability to decide for themselves what protections (beyond those required by the Constitution) are reasonably affordable in the criminal investigatory process. And I see much to be gained by reaffirming for the people the wonderful reality

that they govern themselves—which means that "[t]he powers not delegated to the United States by the Constitution" that the people adopted, "nor prohibited . . . to the States" by that Constitution, "are reserved to the States respectively, or to the people," U. S. Const., Amdt. 10.[2]

* * *

Today's judgment converts *Miranda* from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance. In imposing its Court-made code upon the States, the original opinion at least *asserted* that it was demanded by the Constitution. Today's decision does not pretend that it is—and yet *still* asserts the right to impose it against the will of the people's representatives in Congress. Far from believing that *stare decisis* compels this result, I believe we cannot allow to remain on the books even a celebrated decision—*especially* a celebrated decision—that has come to stand for the proposition that the Supreme Court has power to impose extraconstitutional constraints upon Congress and the States. This is not the system that was established by the Framers, or that would be established by any sane supporter of government by the people.

I dissent from today's decision, and, until § 3501 is repealed, will continue to apply it in all cases where there has been a sustainable finding that the defendant's confession was voluntary.

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[2] The Court cites my dissenting opinion in *Mitchell* v. *United States*, 526 U. S. 314, 331–332 (1999), for the proposition that "the fact that a rule has found 'wide acceptance in the legal culture' is 'adequate reason not to overrule' it." *Ante*, at 443. But the legal culture is not the same as the "public's consciousness"; and unlike the rule at issue in *Mitchell* (prohibiting comment on a defendant's refusal to testify), *Miranda* has been continually criticized by lawyers, law enforcement officials, and scholars since its pronouncement (not to mention by Congress, as § 3501 shows). In *Mitchell*, moreover, the constitutional underpinnings of the earlier rule had not been demolished by subsequent cases.

Syllabus

APPRENDI *v.* NEW JERSEY

CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

No. 99–478. Argued March 28, 2000—Decided June 26, 2000

Petitioner Apprendi fired several shots into the home of an African-American family and made a statement—which he later retracted—that he did not want the family in his neighborhood because of their race. He was charged under New Jersey law with, *inter alia*, second-degree possession of a firearm for an unlawful purpose, which carries a prison term of 5 to 10 years. The count did not refer to the State's hate crime statute, which provides for an enhanced sentence if a trial judge finds, by a preponderance of the evidence, that the defendant committed the crime with a purpose to intimidate a person or group because of, *inter alia*, race. After Apprendi pleaded guilty, the prosecutor filed a motion to enhance the sentence. The court found by a preponderance of the evidence that the shooting was racially motivated and sentenced Apprendi to a 12-year term on the firearms count. In upholding the sentence, the appeals court rejected Apprendi's claim that the Due Process Clause requires that a bias finding be proved to a jury beyond a reasonable doubt. The State Supreme Court affirmed.

Held: The Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. Pp. 474–497.

(a) The answer to the narrow constitutional question presented—whether Apprendi's sentence was permissible, given that it exceeds the 10-year maximum for the offense charged—was foreshadowed by the holding in *Jones* v. *United States*, 526 U. S. 227, that, with regard to federal law, the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees require that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. The Fourteenth Amendment commands the same answer when a state statute is involved. Pp. 474–476.

(b) The Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *E. g.*, *In re Winship*, 397 U. S. 358, 364. The historical foundation for these principles extends down centuries into the common law. While

judges in this country have long exercised discretion in sentencing, such discretion is bound by the range of sentencing options prescribed by the legislature. See, *e. g.*, *United States* v. *Tucker*, 404 U. S. 443, 447. The historic inseparability of verdict and judgment and the consistent limitation on judges' discretion highlight the novelty of a scheme that removes the jury from the determination of a fact that exposes the defendant to a penalty exceeding the maximum he could receive if punished according to the facts reflected in the jury verdict alone. Pp. 476–485.

(c) *McMillan* v. *Pennsylvania*, 477 U. S. 79, was the first case in which the Court used "sentencing factor" to refer to a fact that was not found by the jury but could affect the sentence imposed by the judge. In finding that the scheme at issue there did not run afoul of *Winship*'s strictures, this Court did not budge from the position that (1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense, 477 U. S., at 85–88, and (2) a state scheme that keeps from the jury facts exposing defendants to greater or additional punishment may raise serious constitutional concerns, *id.*, at 88. *Almendarez-Torres* v. *United States*, 523 U. S. 224—in which the Court upheld a federal law allowing a judge to impose an enhanced sentence based on prior convictions not alleged in the indictment—represents at best an exceptional departure from the historic practice. Pp. 485–490.

(d) In light of the constitutional rule expressed here, New Jersey's practice cannot stand. It allows a jury to convict a defendant of a second-degree offense on its finding beyond a reasonable doubt and then allows a judge to impose punishment identical to that New Jersey provides for first-degree crimes on his finding, by a preponderance of the evidence, that the defendant's purpose was to intimidate his victim based on the victim's particular characteristic. The State's argument that the biased purpose finding is not an "element" of a distinct hate crime offense but a "sentencing factor" of motive is nothing more than a disagreement with the rule applied in this case. Beyond this, the argument cannot succeed on its own terms. It does not matter how the required finding is labeled, but whether it exposes the defendant to a greater punishment than that authorized by the jury's verdict, as does the sentencing "enhancement" here. The degree of culpability the legislature associates with factually distinct conduct has significant implications both for a defendant's liberty and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment. That the State placed the enhancer within the criminal code's sentencing provisions does not mean that it is not an essential element of the offense. Pp. 491–497.

159 N. J. 7, 731 A. 2d 485, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 498. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined as to Parts I and II, *post*, p. 499. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY and BREYER, JJ., joined, *post*, p. 523. BREYER, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 555.

Joseph D. O'Neill argued the cause for petitioner. With him on the briefs were *Charles I. Coant*, *Richard G. Singer*, and *Jeffrey T. Green.*

Lisa Sarnoff Gochman, Deputy Attorney General of New Jersey, argued the cause for respondent. With her on the brief was *John J. Farmer, Jr.*, Attorney General.

Edward C. DuMont argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Robinson*, *Deputy Solicitor General Dreeben*, and *Nina Goodman.**

JUSTICE STEVENS delivered the opinion of the Court.

A New Jersey statute classifies the possession of a firearm for an unlawful purpose as a "second-degree" offense. N. J. Stat. Ann. § 2C:39–4(a) (West 1995). Such an offense is punishable by imprisonment for "between five years and 10 years." § 2C:43–6(a)(2). A separate statute, described by that State's Supreme Court as a "hate crime" law, provides for an "extended term" of imprisonment if the trial judge finds, by a preponderance of the evidence, that "[t]he de-

*Briefs of *amici curiae* urging reversal were filed for the National Association of Criminal Defense Lawyers et al. by *Steven B. Duke*, *Kyle O'Dowd*, *Lisa B. Kemler*, and *Peter Goldberger;* and for the Rutherford Institute by *John W. Whitehead* and *Steven H. Aden.*

Briefs of *amici curiae* urging affirmance were filed for the Anti-Defamation League by *David M. Raim*, *Steven M. Freeman*, and *Michael Lieberman;* and for the Brudnick Center on Violence and Conflict et al. by *Brian H. Levin.*

fendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." N. J. Stat. Ann. §2C:44–3(e) (West Supp. 1999–2000). The extended term authorized by the hate crime law for second-degree offenses is imprisonment for "between 10 and 20 years." §2C:43–7(a)(3).

The question presented is whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt.

I

At 2:04 a.m. on December 22, 1994, petitioner Charles C. Apprendi, Jr., fired several .22-caliber bullets into the home of an African-American family that had recently moved into a previously all-white neighborhood in Vineland, New Jersey. Apprendi was promptly arrested and, at 3:05 a.m., admitted that he was the shooter. After further questioning, at 6:04 a.m., he made a statement—which he later retracted—that even though he did not know the occupants of the house personally, "because they are black in color he does not want them in the neighborhood." 159 N. J. 7, 10, 731 A. 2d 485, 486 (1999).

A New Jersey grand jury returned a 23-count indictment charging Apprendi with four first-degree, eight second-degree, six third-degree, and five fourth-degree offenses. The charges alleged shootings on four different dates, as well as the unlawful possession of various weapons. None of the counts referred to the hate crime statute, and none alleged that Apprendi acted with a racially biased purpose.

The parties entered into a plea agreement, pursuant to which Apprendi pleaded guilty to two counts (3 and 18) of second-degree possession of a firearm for an unlawful pur-

pose, N. J. Stat. Ann. § 2C:39–4a (West 1995), and one count (22) of the third-degree offense of unlawful possession of an antipersonnel bomb, § 2C:39–3a; the prosecutor dismissed the other 20 counts. Under state law, a second-degree offense carries a penalty range of 5 to 10 years, § 2C:43–6(a)(2); a third-degree offense carries a penalty range of between 3 and 5 years, § 2C:43–6(a)(3). As part of the plea agreement, however, the State reserved the right to request the court to impose a higher "enhanced" sentence on count 18 (which was based on the December 22 shooting) on the ground that that offense was committed with a biased purpose, as described in § 2C:44–3(e). Apprendi, correspondingly, reserved the right to challenge the hate crime sentence enhancement on the ground that it violates the United States Constitution.

At the plea hearing, the trial judge heard sufficient evidence to establish Apprendi's guilt on counts 3, 18, and 22; the judge then confirmed that Apprendi understood the maximum sentences that could be imposed on those counts. Because the plea agreement provided that the sentence on the sole third-degree offense (count 22) would run concurrently with the other sentences, the potential sentences on the two second-degree counts were critical. If the judge found no basis for the biased purpose enhancement, the maximum consecutive sentences on those counts would amount to 20 years in aggregate; if, however, the judge enhanced the sentence on count 18, the maximum on that count alone would be 20 years and the maximum for the two counts in aggregate would be 30 years, with a 15-year period of parole ineligibility.

After the trial judge accepted the three guilty pleas, the prosecutor filed a formal motion for an extended term. The trial judge thereafter held an evidentiary hearing on the issue of Apprendi's "purpose" for the shooting on December 22. Apprendi adduced evidence from a psychologist and from seven character witnesses who testified that he did not

have a reputation for racial bias. He also took the stand himself, explaining that the incident was an unintended consequence of overindulgence in alcohol, denying that he was in any way biased against African-Americans, and denying that his statement to the police had been accurately described. The judge, however, found the police officer's testimony credible, and concluded that the evidence supported a finding "that the crime was motivated by racial bias." App. to Pet. for Cert. 143a. Having found "by a preponderance of the evidence" that Apprendi's actions were taken "with a purpose to intimidate" as provided by the statute, *id.*, at 138a, 139a, 144a, the trial judge held that the hate crime enhancement applied. Rejecting Apprendi's constitutional challenge to the statute, the judge sentenced him to a 12-year term of imprisonment on count 18, and to shorter concurrent sentences on the other two counts.

Apprendi appealed, arguing, *inter alia*, that the Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt, *In re Winship*, 397 U. S. 358 (1970). Over dissent, the Appellate Division of the Superior Court of New Jersey upheld the enhanced sentence. 304 N. J. Super. 147, 698 A. 2d 1265 (1997). Relying on our decision in *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), the appeals court found that the state legislature decided to make the hate crime enhancement a "sentencing factor," rather than an element of an underlying offense—and that decision was within the State's established power to define the elements of its crimes. The hate crime statute did not create a presumption of guilt, the court determined, and did not appear "'tailored to permit the . . . finding to be a tail which wags the dog of the substantive offense.'" 304 N. J. Super., at 154, 698 A. 2d, at 1269 (quoting *McMillan*, 477 U. S., at 88). Characterizing the required finding as one of "motive," the court described it as a traditional "sentencing factor," one not considered an "essen-

tial element" of any crime unless the legislature so provides. 304 N. J. Super., at 158, 698 A. 2d, at 1270. While recognizing that the hate crime law did expose defendants to "'greater and additional punishment,'" *id.*, at 156, 698 A. 2d, at 1269 (citing *McMillan*, 477 U. S., at 88), the court held that that "one factor standing alone" was not sufficient to render the statute unconstitutional, 304 N. J. Super., at 156, 698 A. 2d, at 1269.

A divided New Jersey Supreme Court affirmed. 159 N. J. 7, 731 A. 2d 485 (1999). The court began by explaining that while due process only requires the State to prove the "elements" of an offense beyond a reasonable doubt, the mere fact that a state legislature has placed a criminal component "within the sentencing provisions" of the criminal code "does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." *Id.*, at 20, 731 A. 2d, at 492. "Were that the case," the court continued, "the Legislature could just as easily allow judges, not juries, to determine if a kidnapping victim has been released unharmed." *Ibid.* (citing state precedent requiring such a finding to be submitted to a jury and proved beyond a reasonable doubt). Neither could the constitutional question be settled simply by defining the hate crime statute's "purpose to intimidate" as "motive" and thereby excluding the provision from any traditional conception of an "element" of a crime. Even if one could characterize the language this way—and the court doubted that such a characterization was accurate—proof of motive did not ordinarily "increase the penal consequences to an actor." *Ibid.* Such "[l]abels," the court concluded, would not yield an answer to Apprendi's constitutional question. *Ibid.*

While noting that we had just last year expressed serious doubt concerning the constitutionality of allowing penalty-enhancing findings to be determined by a judge by a preponderance of the evidence, *Jones* v. *United States*, 526 U. S.

227 (1999), the court concluded that those doubts were not essential to our holding. Turning then, as the appeals court had, to *McMillan*, as well as to *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), the court undertook a multifactor inquiry and then held that the hate crime provision was valid. In the majority's view, the statute did not allow impermissible burden shifting, and did not "create a separate offense calling for a separate penalty." 159 N. J., at 24, 731 A. 2d, at 494. Rather, "the Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor." *Ibid.*, 731 A. 2d, at 494–495. As had the appeals court, the majority recognized that the state statute was unlike that in *McMillan* inasmuch as it increased the maximum penalty to which a defendant could be subject. But it was not clear that this difference alone would "change the constitutional calculus," especially where, as here, "there is rarely any doubt whether the defendants committed the crimes with the purpose of intimidating the victim on the basis of race or ethnicity." 159 N. J., at 24–25, 731 A. 2d, at 495. Moreover, in light of concerns "idiosyncratic" to hate crime statutes drawn carefully to avoid "punishing thought itself," the enhancement served as an appropriate balance between those concerns and the State's compelling interest in vindicating the right "to be free of invidious discrimination." *Id.*, at 25–26, 731 A. 2d, at 495.

The dissent rejected this conclusion, believing instead that the case turned on two critical characteristics: (1) "[A] defendant's mental state in committing the subject offense . . . necessarily involves a finding so integral to the charged offense that it must be characterized as an element thereof"; and (2) "the significantly increased sentencing range triggered by . . . the finding of a purpose to intimidate" means that the purpose "must be treated as a material element [that] must be found by a jury beyond a reasonable doubt."

Id., at 30, 731 A. 2d, at 498. In the dissent's view, the facts increasing sentences in both *Almendarez-Torres* (recidivism) and *Jones* (serious bodily injury) were quite distinct from New Jersey's required finding of purpose here; the latter finding turns directly on the conduct of the defendant during the crime and defines a level of culpability necessary to form the hate crime offense. While acknowledging "analytical tensions" in this Court's post-*Winship* jurisprudence, the dissenters concluded that "there can be little doubt that the sentencing factor applied to this defendant—the purpose to intimidate a victim because of race—must fairly be regarded as an element of the crime requiring inclusion in the indictment and proof beyond a reasonable doubt." 159 N. J., at 51, 731 A. 2d, at 512.

We granted certiorari, 528 U. S. 1018 (1999), and now reverse.

II

It is appropriate to begin by explaining why certain aspects of the case are not relevant to the narrow issue that we must resolve. First, the State has argued that even without the trial judge's finding of racial bias, the judge could have imposed consecutive sentences on counts 3 and 18 that would have produced the 12-year term of imprisonment that Apprendi received; Apprendi's actual sentence was thus within the range authorized by statute for the three offenses to which he pleaded guilty. Brief for Respondent 4. The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count. The finding is legally significant because it increased—indeed, it doubled—the maximum range within which the judge could exercise his discretion, converting what otherwise was a maximum 10-year sentence on that count into a minimum sentence. The sentences on counts 3 and 22 have no more relevance to our disposition than the dismissal of the remaining 18 counts.

Second, although the constitutionality of basing an enhanced sentence on racial bias was argued in the New Jersey courts, that issue was not raised here.[1] The substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is. The strength of the state interests that are served by the hate crime legislation has no more bearing on this procedural question than the strength of the interests served by other provisions of the criminal code.

Third, we reject the suggestion by the State Supreme Court that "there is rarely any doubt" concerning the existence of the biased purpose that will support an enhanced sentence, 159 N. J., at 25, 731 A. 2d, at 495. In this very case, that issue was the subject of the full evidentiary hearing we described. We assume that both the purpose of the offender, and even the known identity of the victim, will sometimes be hotly disputed, and that the outcome may well depend in some cases on the standard of proof and the identity of the factfinder.

Fourth, because there is no ambiguity in New Jersey's statutory scheme, this case does not raise any question concerning the State's power to manipulate the prosecutor's burden of proof by, for example, relying on a presumption rather than evidence to establish an element of an offense, cf. *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975); *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), or by placing the affirmative defense label on "at least some elements" of traditional crimes, *Patterson* v. *New York*, 432 U. S. 197, 210 (1977). The prosecutor did not invoke any presumption to buttress the evidence of racial bias and did not claim that Apprendi had the burden of disproving an improper motive. The question whether Apprendi had a constitutional right to

[1] We have previously rejected a First Amendment challenge to an enhanced sentence based on a jury finding that the defendant had intentionally selected his victim because of the victim's race. *Wisconsin* v. *Mitchell*, 508 U. S. 476, 480 (1993).

have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.

Our answer to that question was foreshadowed by our opinion in *Jones* v. *United States*, 526 U. S. 227 (1999), construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.*, at 243, n. 6. The Fourteenth Amendment commands the same answer in this case involving a state statute.

III

In his 1881 lecture on the criminal law, Oliver Wendell Holmes, Jr., observed: "The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed."[2] New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentence enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an im-

[2] O. Holmes, The Common Law 40 (M. Howe ed. 1963).

partial jury," Amdt. 6.[3] Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States* v. *Gaudin*, 515 U. S. 506, 510 (1995); see also *Sullivan* v. *Louisiana*, 508 U. S. 275, 278 (1993); *Winship*, 397 U. S., at 364 ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

As we have, unanimously, explained, *Gaudin*, 515 U. S., at 510–511, the historical foundation for our recognition of these principles extends down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540–541 (4th ed. 1873), trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (hereinafter Blackstone) (emphasis added). See also *Duncan* v. *Louisiana*, 391 U. S. 145, 151–154 (1968).

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[3] Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. He relies entirely on the fact that the "due process of law" that the Fourteenth Amendment requires the States to provide to persons accused of crime encompasses the right to a trial by jury, *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and the right to have every element of the offense proved beyond a reasonable doubt, *In re Winship*, 397 U. S. 358 (1970). That Amendment has not, however, been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury" that was implicated in our recent decision in *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998). We thus do not address the indictment question separately today.

Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt. "The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.' C. McCormick, Evidence § 321, pp. 681–682 (1954); see also 9 J. Wigmore, Evidence § 2497 (3d ed. 1940)." *Winship,* 397 U. S., at 361. We went on to explain that the reliance on the "reasonable doubt" standard among common-law jurisdictions "'reflect[s] a profound judgment about the way in which law should be enforced and justice administered.'" *Id.,* at 361–362 (quoting *Duncan,* 391 U. S., at 155).

Any possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court[4] as it existed during the years surrounding our Nation's founding. As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing "all the facts and circumstances which constitute the offence, . . . stated with such certainty and precision, that the defendant . . . may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly . . . and *that there may be no doubt as to the judgment which should be given,* if the defendant be convicted." J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862) (emphasis added). The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime. See 4 Black-

[4] "[A]fter trial and conviction are past," the defendant is submitted to "judgment" by the court, 4 Blackstone 368—the stage approximating in modern terms the imposition of sentence.

stone 369–370 (after verdict, and barring a defect in the indictment, pardon, or benefit of clergy, "the court *must pronounce that judgment, which the law hath annexed to the crime*" (emphasis added)).

Thus, with respect to the criminal law of felonious conduct, "the English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence (unless he thought in the circumstances that the sentence was so inappropriate that he should invoke the pardon process to commute it)." Langbein, The English Criminal Trial Jury on the Eve of the French Revolution, in The Trial Jury in England, France, Germany 1700–1900, pp. 36–37 (A. Schioppa ed. 1987).[5] As Blackstone, among many others, has made clear,[6] "[t]he judg-

[5] As we suggested in *Jones* v. *United States*, 526 U. S. 227 (1999), juries devised extralegal ways of avoiding a guilty verdict, at least of the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct of the particular defendant. *Id.*, at 245 ("This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part. 4 Blackstone 238–239").

[6] As the principal dissent would chide us for this single citation to Blackstone's third volume, rather than his fourth, *post*, at 525–526 (opinion of O'Connor, J.), we suggest that Blackstone himself directs us to it for these purposes. See 4 Blackstone 343 ("The antiquity and excellence of this [jury] trial, for the settling of civil property, has before been explained at large"). See 3 *id.*, at 379 ("Upon these accounts the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And, if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases!"); 4 *id.*, at 343 ("And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property");

ment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law." 3 Blackstone 396 (emphasis deleted).[7]

This practice at common law held true when indictments were issued pursuant to statute. Just as the circumstances of the crime and the intent of the defendant at the time of commission were often essential elements to be alleged in the indictment, so too were the circumstances mandating a particular punishment. "Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. [2 M. Hale, Pleas of the Crown *170]." Archbold, Pleading and Evidence in Criminal Cases, at 51. If, then, "upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the

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4 *id.*, at 344 ("What was said of juries in general, and the trial thereby, in *civil* cases, will greatly shorten our present remarks, with regard to the trial of *criminal* suits; indictments, informations, and appeals").

[7] The common law of punishment for misdemeanors—those "smaller faults, and omissions of less consequence," 4 *id.*, at 5—was, as we noted in *Jones*, 526 U. S., at 244, substantially more dependent upon judicial discretion. Subject to the limitations that the punishment not "touch life or limb," that it be proportionate to the offense, and, by the 17th century, that it not be "cruel or unusual," judges most commonly imposed discretionary "sentences" of fines or whippings upon misdemeanants. J. Baker, Introduction to English Legal History 584 (3d ed. 1990). Actual sentences of imprisonment for such offenses, however, were rare at common law until the late 18th century, *ibid.*, for "the idea of prison as a punishment would have seemed an absurd expense," Baker, Criminal Courts and Procedure at Common Law 1550–1800, in Crime in England 1550–1800, p. 43 (J. Cockburn ed. 1977).

defendant shall be convicted of the common-law felony only." *Id.*, at 188.[8]

We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case. See, *e. g.*, *Williams* v. *New York*, 337 U. S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed *within limits fixed by law*" (emphasis added)). As in *Williams*, our periodic recognition of judges' broad discretion in sentencing—since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range, Note, The Admissibility of Character Evidence in Determining Sentence, 9 U. Chi. L. Rev. 715 (1942)—has been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature. See, *e. g.*, *United States* v. *Tucker*, 404 U. S. 443, 447 (1972) (agreeing that "[t]he Government is also on solid ground in asserting that a

[8] To the extent the principal dissent appears to take issue with our reliance on Archbold (among others) as an authoritative source on the common law of the relevant period, *post*, at 525, 526, we simply note that Archbold has been cited by numerous opinions of this Court for that very purpose, his Criminal Pleading treatise being generally viewed as "an essential reference book for every criminal lawyer working in the Crown Court." Biographical Dictionary of the Common Law 13 (A. Simpson ed. 1984); see also Holdsworth, The Literature of the Common Law, in 13 A History of English Law 464–465 (A. Goodhart & H. Hanbury eds. 1952).

sentence imposed by a federal district judge, *if within statutory limits*, is generally not subject to review" (emphasis added)); *Williams*, 337 U. S., at 246, 247 (explaining that, in contrast to the guilt stage of trial, the judge's task in sentencing is to determine, "within fixed statutory or constitutional limits[,] the type and extent of punishment after the issue of guilt" has been resolved).[9]

The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from

[9] See also 1 J. Bishop, Criminal Law §§ 933–934(1) (9th ed. 1923) ("With us legislation ordinarily fixes the penalties for the common law offences equally with the statutory ones. . . . Under the common-law procedure, the court determines in each case what *within the limits of the law* shall be the punishment,—the question being one of discretion" (emphasis added)); *id.*, § 948 ("[I]f the law has given the court a discretion as to the punishment, it will look in pronouncing sentence into any evidence proper to influence a judicious magistrate to make it heavier or lighter, yet not to exceed the limits fixed for what of crime is within the allegation and the verdict. Or this sort of evidence may be placed before the jury at the trial, if it has the power to assess the punishment. But in such a case the aggravating matter must not be of a crime separate from the one charged in the indictment,—a rule not applicable where a delinquent offence under an habitual criminal act is involved" (footnotes omitted)).

The principal dissent's discussion of *Williams*, *post*, at 545–546, 547, fails to acknowledge the significance of the Court's caveat that judges' discretion is constrained by the "limits fixed by law." Nothing in *Williams* implies that a judge may impose a more severe sentence than the maximum authorized by the facts found by the jury. Indeed, the commentators cited in the dissent recognize precisely this same limitation. See *post*, at 544–545 (quoting K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1998) ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion . . . , permitting the sentencing judge to impose any term of imprisonment and any fine *up to the statutory maximum*" (emphasis added)); Lynch, Towards A Model Penal Code, Second (Federal?), 2 Buffalo Crim. L. Rev. 297, 320 (1998) (noting that judges in discretionary sentencing took account of facts relevant to a particular offense "within the spectrum of conduct covered by the statute of conviction")).

the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.[10]

We do not suggest that trial practices cannot change in the course of centuries and still remain true to the principles that emerged from the Framers' fears "that the jury right could be lost not only by gross denial, but by erosion." *Jones*, 526 U. S., at 247–248.[11] But practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reason-

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[10] In support of its novel view that this Court has "long recognized" that not all facts affecting punishment need go to the jury, *post*, at 524, the principal dissent cites three cases decided within the past quarter century; and each of these is plainly distinguishable. Rather than offer any historical account of its own that would support the notion of a "sentencing factor" legally increasing punishment beyond the statutory maximum—and JUSTICE THOMAS' concurring opinion in this case makes clear that such an exercise would be futile—the dissent proceeds by mischaracterizing our account. The evidence we describe that punishment was, by law, tied to the offense (enabling the defendant to discern, barring pardon or clergy, his punishment from the face of the indictment), and the evidence that American judges have exercised sentencing discretion within a legally prescribed range (enabling the defendant to discern from the statute of indictment what maximum punishment conviction under that statute could bring), point to a single, consistent conclusion: The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition "elements" of a separate legal offense.

[11] As we stated in *Jones:* "One contributor to the ratification debates, for example, commenting on the jury trial guarantee in Art. III, § 2, echoed Blackstone in warning of the need 'to guard with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY.' A [New Hampshire] Farmer, No. 3, June 6, 1788, quoted in The Complete Bill of Rights 477 (N. Cogan ed. 1997)." 526 U. S., at 248.

able doubt. As we made clear in *Winship,* the "reasonable doubt" requirement "has [a] vital role in our criminal procedure for cogent reasons." 397 U. S., at 363. Prosecution subjects the criminal defendant both to "the possibility that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction." *Ibid.* We thus require this, among other, procedural protections in order to "provid[e] concrete substance for the presumption of innocence," and to reduce the risk of imposing such deprivations erroneously. *Ibid.* If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.

Since *Winship,* we have made clear beyond peradventure that *Winship*'s due process and associated jury protections extend, to some degree, "to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." *Almendarez-Torres,* 523 U. S., at 251 (SCALIA, J., dissenting). This was a primary lesson of *Mullaney* v. *Wilbur,* 421 U. S. 684 (1975), in which we invalidated a Maine statute that presumed that a defendant who acted with an intent to kill possessed the "malice aforethought" necessary to constitute the State's murder offense (and therefore, was subject to that crime's associated punishment of life imprisonment). The statute placed the burden on the defendant of proving, in rebutting the statutory presumption, that he acted with a lesser degree of culpability, such as in the heat of passion, to win a reduction in the offense from murder to manslaughter (and thus a reduction of the maximum punishment of 20 years).

The State had posited in *Mullaney* that requiring a defendant to prove heat-of-passion intent to overcome a pre-

sumption of murderous intent did not implicate *Winship* protections because, upon conviction of either offense, the defendant would lose his liberty and face societal stigma just the same. Rejecting this argument, we acknowledged that criminal law "is concerned not only with guilt or innocence in the abstract, but also with the degree of criminal culpability" assessed. 421 U. S., at 697–698. Because the "*consequences*" of a guilty verdict for murder and for manslaughter differed substantially, we dismissed the possibility that a State could circumvent the protections of *Winship* merely by "redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." 421 U. S., at 698.[12]

IV

It was in *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), that this Court, for the first time, coined the term "sentencing factor" to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge. That case involved a challenge to the State's Man-

[12] Contrary to the principal dissent's suggestion, *post*, at 530–532, *Patterson* v. *New York*, 432 U. S. 197, 198 (1977), posed no direct challenge to this aspect of *Mullaney*. In upholding a New York law allowing defendants to raise and prove extreme emotional distress as an affirmative defense to murder, *Patterson* made clear that the state law still required the State to prove every element of that State's offense of murder and its accompanying punishment. "No further facts are either presumed or inferred in order to constitute the crime." 432 U. S., at 205–206. New York, unlike Maine, had not made malice aforethought, or any described *mens rea*, part of its statutory definition of second-degree murder; one could tell from the face of the statute that if one intended to cause the death of another person and did cause that death, one could be subject to sentence for a second-degree offense. *Id.*, at 198. Responding to the argument that our view could be seen "to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes," the Court made clear in the very next breath that there were "obviously constitutional limits beyond which the States may not go in this regard." *Id.*, at 210.

datory Minimum Sentencing Act, 42 Pa. Cons. Stat. § 9712 (1982). According to its provisions, anyone convicted of certain felonies would be subject to a mandatory minimum penalty of five years' imprisonment if the judge found, by a preponderance of the evidence, that the person "visibly possessed a firearm" in the course of committing one of the specified felonies. 477 U. S., at 81–82. Articulating for the first time, and then applying, a multifactor set of criteria for determining whether the *Winship* protections applied to bar such a system, we concluded that the Pennsylvania statute did not run afoul of our previous admonitions against relieving the State of its burden of proving guilt, or tailoring the mere form of a criminal statute solely to avoid *Winship*'s strictures. 477 U. S., at 86–88.

We did not, however, there budge from the position that (1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense, *id.*, at 85–88, and (2) that a state scheme that keeps from the jury facts that "expos[e] [defendants] to greater or additional punishment," *id.*, at 88, may raise serious constitutional concern. As we explained:

> "Section 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. . . . The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense. Petitioners' claim that visible possession under the Pennsylvania statute is 'really' an element of the offenses for which they are being punished—that Pennsylvania has in effect defined a new set of upgraded felonies—would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punish-

ment, cf. 18 U. S. C. § 2113(d) (providing separate and greater punishment for bank robberies accomplished through 'use of a dangerous weapon or device'), but it does not." *Id.*, at 87–88.[13]

Finally, as we made plain in *Jones* last Term, *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), represents at best an exceptional departure from the historic practice that we have described. In that case, we considered a federal grand jury indictment, which charged the petitioner with "having been 'found in the United States . . . after being deported,'" in violation of 8 U. S. C. § 1326(a)—an offense carrying a maximum sentence of two years. 523 U. S., at 227. Almendarez-Torres pleaded guilty to the indictment, admitting at the plea hearing that he had been deported, that he had unlawfully reentered this country, and that "the earlier deportation had taken place 'pursuant to' three earlier 'convictions' for aggravated felonies." *Ibid.* The Government then filed a presentence report indicating that Almendarez-Torres' offense fell within the bounds of § 1326(b) because, as specified in that provision, his original deportation had been subsequent to an aggravated felony conviction; accordingly, Almendarez-Torres could be subject to a sentence of up to 20 years. Almendarez-Torres objected, contending that because the indictment "had not mentioned his earlier aggravated felony convictions," he could be sentenced to no more than two years in prison. *Ibid.*

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[13] The principal dissent accuses us of today "overruling *McMillan*." *Post*, at 533. We do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict—a limitation identified in the *McMillan* opinion itself. Conscious of the likelihood that legislative decisions may have been made in reliance on *McMillan*, we reserve for another day the question whether *stare decisis* considerations preclude reconsideration of its narrower holding.

Rejecting Almendarez-Torres' objection, we concluded that sentencing him to a term higher than that attached to the offense alleged in the indictment did not violate the strictures of *Winship* in that case. Because Almendarez-Torres had *admitted* the three earlier convictions for aggravated felonies—all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own—no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court. Although our conclusion in that case was based in part on our application of the criteria we had invoked in *McMillan*, the specific question decided concerned the sufficiency of the indictment. More important, as *Jones* made crystal clear, 526 U. S., at 248–249, our conclusion in *Almendarez-Torres* turned heavily upon the fact that the additional sentence to which the defendant was subject was "the prior commission of a serious crime." 523 U. S., at 230; see also *id.*, at 243 (explaining that "recidivism . . . is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence"); *id.*, at 244 (emphasizing "the fact that recidivism 'does not relate to the commission of the offense . . .' "); *Jones*, 526 U. S., at 249–250, n. 10 ("The majority and the dissenters in *Almendarez-Torres* disagreed over the legitimacy of the Court's decision to restrict its holding to recidivism, but both sides agreed that the Court had done just that"). Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range.[14]

[14] The principal dissent's contention that our decision in *Monge* v. *California*, 524 U. S. 721 (1998), "demonstrates that *Almendarez-Torres* was" something other than a limited exception to the jury trial rule is both

Even though it is arguable that *Almendarez-Torres* was incorrectly decided,[15] and that a logical application of our reasoning today should apply if the recidivist issue were

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inaccurate and misleading. *Post*, at 536. *Monge* was another recidivism case in which the question presented and the bulk of the Court's analysis related to the scope of double jeopardy protections in sentencing. The dissent extracts from that decision the majority's statement that "the Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence." 524 U. S., at 729. Far from being part of "reasoning essential" to the Court's holding, *post*, at 536, that statement was in response to a dissent by JUSTICE SCALIA on an issue that the Court itself had, a few sentences earlier, insisted "was neither considered by the state courts nor discussed in petitioner's brief before this Court." 524 U. S., at 728. Moreover, the sole citation supporting the *Monge* Court's proposition that "the Court has rejected" such a rule was none other than *Almendarez-Torres;* as we have explained, that case simply cannot bear that broad reading. Most telling of *Monge*'s distance from the issue at stake in this case is that the double jeopardy question in *Monge* arose because the State had failed to satisfy its own statutory burden of proving beyond a reasonable doubt that the defendant had committed a prior offense (and was therefore subject to an enhanced, recidivism-based sentence). 524 U. S., at 725 ("According to California law, a number of procedural safeguards surround the assessment of prior conviction allegations: Defendants may invoke the right to a jury trial . . . ; the prosecution must prove the allegations beyond a reasonable doubt; and the rules of evidence apply"). The Court thus itself warned against a contrary double jeopardy rule that could "create disincentives that would diminish these important procedural protections." *Id.*, at 734.

[15] In addition to the reasons set forth in JUSTICE SCALIA's dissent, 523 U. S., at 248–260, it is noteworthy that the Court's extensive discussion of the term "sentencing factor" virtually ignored the pedigree of the pleading requirement at issue. The rule was succinctly stated by Justice Clifford in his separate opinion in *United States* v. *Reese*, 92 U. S. 214, 232–233 (1876): "[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." As he explained in "[s]peaking of that principle, Mr. Bishop says it pervades the entire system of the adjudged law of criminal procedure, as appears by all the cases; that, wherever we move in that department of our jurisprudence, we come in contact with it; and that we can no more escape from it than from

contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U. S., at 252–253 (opinion of STEVENS, J.); see also *id.*, at 253 (opinion of SCALIA, J.).[16]

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the atmosphere which surrounds us. 1 Bishop, Cr. Pro., 2d ed., sect. 81; Archbold's Crim. Plead., 15th ed., 54; 1 Stark Crim. Plead., 236; 1 Am. Cr. Law, 6th rev. ed., sect. 364; *Steel* v. *Smith*, 1 Barn. & Ald. 99."

[16] The principal dissent would reject the Court's rule as a "meaningless formalism," because it can conceive of hypothetical statutes that would comply with the rule and achieve the same result as the New Jersey statute. *Post*, at 539–542. While a State could, hypothetically, undertake to revise its entire criminal code in the manner the dissent suggests, *post*, at 540—extending all statutory maximum sentences to, for example, 50 years and giving judges guided discretion as to a few specially selected factors within that range—this possibility seems remote. Among other reasons, structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose *every* defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime. This is as it should be. Our rule ensures that a State is obliged "to make its choices concerning the substantive content of its criminal laws with full awareness of the consequences, unable to mask substantive policy choices"

V

The New Jersey statutory scheme that Apprendi asks us to invalidate allows a jury to convict a defendant of a second-degree offense based on its finding beyond a reasonable doubt that he unlawfully possessed a prohibited weapon; after a subsequent and separate proceeding, it then allows a judge to impose punishment identical to that New Jersey provides for crimes of the first degree, N. J. Stat. Ann. § 2C:43–6(a)(1) (West 1999), based upon the judge's finding, by a preponderance of the evidence, that the defendant's "purpose" for unlawfully possessing the weapon was "to intimidate" his victim on the basis of a particular characteristic the victim possessed. In light of the constitutional rule ex-

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of exposing all who are convicted to the maximum sentence it provides. *Patterson* v. *New York*, 432 U. S., at 228–229, n. 13 (Powell, J., dissenting). So exposed, "[t]he political check on potentially harsh legislative action is then more likely to operate." *Ibid.*

In all events, if such an extensive revision of the State's entire criminal code were enacted for the purpose the dissent suggests, or if New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not, *post*, at 542), we would be required to question whether the revision was constitutional under this Court's prior decisions. See *Patterson*, 432 U. S., at 210; *Mullaney* v. *Wilbur*, 421 U. S. 684, 698–702 (1975).

Finally, the principal dissent ignores the distinction the Court has often recognized, see, *e. g.*, *Martin* v. *Ohio*, 480 U. S. 228 (1987), between facts in aggravation of punishment and facts in mitigation. See *post*, at 541–542. If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

plained above, and all of the cases supporting it, this practice cannot stand.

New Jersey's defense of its hate crime enhancement statute has three primary components: (1) The required finding of biased purpose is not an "element" of a distinct hate crime offense, but rather the traditional "sentencing factor" of motive; (2) *McMillan* holds that the legislature can authorize a judge to find a traditional sentencing factor on the basis of a preponderance of the evidence; and (3) *Almendarez-Torres* extended *McMillan*'s holding to encompass factors that authorize a judge to impose a sentence beyond the maximum provided by the substantive statute under which a defendant is charged. None of these persuades us that the constitutional rule that emerges from our history and case law should incorporate an exception for this New Jersey statute.

New Jersey's first point is nothing more than a disagreement with the rule we apply today. Beyond this, we do not see how the argument can succeed on its own terms. The state high court evinced substantial skepticism at the suggestion that the hate crime statute's "purpose to intimidate" was simply an inquiry into "motive." We share that skepticism. The text of the statute requires the factfinder to determine whether the defendant possessed, at the time he committed the subject act, a "purpose to intimidate" on account of, *inter alia*, race. By its very terms, this statute mandates an examination of the defendant's state of mind—a concept known well to the criminal law as the defendant's *mens rea*.[17] It makes no difference in identifying the nature

[17] Among the most common definitions of *mens rea* is "criminal intent." Black's Law Dictionary 1137 (rev. 4th ed. 1968). That dictionary unsurprisingly defines "purpose" as synonymous with intent, *id.*, at 1400, and "intent" as, among other things, "a state of mind," *id.*, at 947. But we need not venture beyond New Jersey's own criminal code for a definition of purpose that makes it central to the description of a criminal offense. As the dissenting judge on the state appeals court pointed out, according to the New Jersey Criminal Code, "[a] person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object

of this finding that Apprendi was also required, in order to receive the sentence he did for weapons possession, to have possessed the weapon with a "purpose to use [the weapon] unlawfully against the person or property of another," § 2C:39–4(a). A second *mens rea* requirement hardly defeats the reality that the enhancement statute imposes of its own force an intent requirement necessary for the imposition of sentence. On the contrary, the fact that the language and structure of the "purpose to use" criminal offense is identical in relevant respects to the language and structure of the "purpose to intimidate" provision demonstrates to us that it is precisely a particular criminal *mens rea* that the hate crime enhancement statute seeks to target. The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense "element."[18]

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to engage in conduct of that nature or to cause such a result." N. J. Stat. Ann. § 2C:2–2(b)(1) (West 1999). The hate crime statute's application to those who act "with a *purpose to intimidate* because of" certain status-based characteristics places it squarely within the inquiry whether it was a defendant's "conscious object" to intimidate for that reason.

[18] Whatever the effect of the State Supreme Court's comment that the law here targets "motive," 159 N. J. 7, 20, 731 A. 2d 485, 492 (1999)—and it is highly doubtful that one could characterize that comment as a "binding" interpretation of the state statute, see *Wisconsin* v. *Mitchell*, 508 U. S., at 483–484 (declining to be bound by state court's characterization of state law's "operative effect"), even if the court had not immediately thereafter called into direct question its "ability to view this finding as merely a search for motive," 159 N. J., at 21, 731 A. 2d, at 492—a State cannot through mere characterization change the nature of the conduct actually targeted. It is as clear as day that this hate crime law defines a particular kind of prohibited *intent*, and a particular intent is more often than not the *sine qua non* of a violation of a criminal law.

When the principal dissent at long last confronts the actual statute at issue in this case in the final few pages of its opinion, it offers in response to this interpretation only that our reading is contrary to "settled precedent" in *Mitchell*. *Post*, at 553. Setting aside the fact that Wisconsin's hate crime statute was, in text and substance, different from New Jersey's, *Mitchell* did not even begin to consider whether the Wisconsin hate crime

The foregoing notwithstanding, however, the New Jersey Supreme Court correctly recognized that it does not matter whether the required finding is characterized as one of intent or of motive, because "[l]abels do not afford an acceptable answer." 159 N. J., at 20, 731 A. 2d, at 492. That point applies as well to the constitutionally novel and elusive distinction between "elements" and "sentencing factors." *McMillan*, 477 U. S., at 86 (noting that the sentencing factor—visible possession of a firearm—"might well have been included as an element of the enumerated offenses"). Despite what appears to us the clear "elemental" nature of the factor here, the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?[19]

As the New Jersey Supreme Court itself understood in rejecting the argument that the required "motive" finding was simply a "traditional" sentencing factor, proof of motive did not ordinarily "increase the penal consequences to an actor." 159 N. J., at 20, 731 A. 2d, at 492. Indeed, the effect of New Jersey's sentencing "enhancement" here is unquestionably to turn a second-degree offense into a first-degree offense, under the State's own criminal code. The law thus runs directly into our warning in *Mullaney* that *Winship* is

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requirement was an offense "element" or not; it did not have to—the required finding under the Wisconsin statute was made by the jury.

[19] This is not to suggest that the term "sentencing factor" is devoid of meaning. The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense. See *post*, at 501–502 (THOMAS, J., concurring) (reviewing the relevant authorities).

concerned as much with the category of substantive offense as "with the degree of criminal culpability" assessed. 421 U. S., at 698. This concern flows not only from the historical pedigree of the jury and burden rights, but also from the powerful interests those rights serve. The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment.

The preceding discussion should make clear why the State's reliance on *McMillan* is likewise misplaced. The differential in sentence between what Apprendi would have received without the finding of biased purpose and what he could receive with it is not, it is true, as extreme as the difference between a small fine and mandatory life imprisonment. *Mullaney*, 421 U. S., at 700. But it can hardly be said that the potential doubling of one's sentence—from 10 years to 20—has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance. When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as "a tail which wags the dog of the substantive offense." *McMillan*, 477 U. S., at 88.

New Jersey would also point to the fact that the State did not, in placing the required biased purpose finding in a sentencing enhancement provision, create a "separate offense calling for a separate penalty." *Ibid.* As for this, we agree wholeheartedly with the New Jersey Supreme Court that merely because the state legislature placed its hate crime sentence "enhancer" "within the sentencing provisions" of the criminal code "does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." 159 N. J., at 20, 731 A. 2d, at 492. Indeed,

the fact that New Jersey, along with numerous other States, has also made precisely the same conduct the subject of an independent substantive offense makes it clear that the mere presence of this "enhancement" in a sentencing statute does not define its character.[20]

New Jersey's reliance on *Almendarez-Torres* is also unavailing. The reasons supporting an exception from the general rule for the statute construed in that case do not apply to the New Jersey statute. Whereas recidivism "does not relate to the commission of the offense" itself, 523 U. S., at 230, 244, New Jersey's biased purpose inquiry goes precisely to what happened in the "commission of the offense." Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. *Walton* v. *Arizona*, 497 U. S. 639, 647–649 (1990); *id.*, at 709–714 (STEVENS, J., dissenting). For reasons we have explained, the capital cases are not controlling:

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[20] Including New Jersey, N. J. Stat. Ann. §2C:33–4 (West Supp. 2000) ("A person commits a crime of the fourth degree if in committing an offense [of harassment] under this section, he acted with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation or ethnicity"), 26 States currently have laws making certain acts of racial or other bias freestanding violations of the criminal law, see generally F. Lawrence, Punishing Hate: Bias Crimes Under American Law 178–189 (1999) (listing current state hate crime laws).

> "Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed . . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge." *Almendarez-Torres*, 523 U. S., at 257, n. 2 (SCALIA, J., dissenting) (emphasis deleted).

See also *Jones*, 526 U. S., at 250–251; *post*, at 520–522 (THOMAS, J., concurring).[21]

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The New Jersey procedure challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system. Accordingly, the judgment of the Supreme Court of New Jersey is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[21] The principal dissent, in addition, treats us to a lengthy disquisition on the benefits of determinate sentencing schemes, and the effect of today's decision on the federal Sentencing Guidelines. *Post*, at 544–552. The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held. See, *e. g.*, *Edwards* v. *United States*, 523 U. S. 511, 515 (1998) (opinion of BREYER, J., for a unanimous court) (noting that "[o]f course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines. [United States Sentencing Commission, Guidelines Manual § 5G1.1 (Nov. 1994)]").

JUSTICE SCALIA, concurring.

I feel the need to say a few words in response to JUSTICE BREYER's dissent. It sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. (Judges, it is sometimes necessary to remind ourselves, are part of the State—and an increasingly bureaucratic part of it, at that.) The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.

As for fairness, which JUSTICE BREYER believes "[i]n modern times," *post*, at 555, the jury cannot provide: I think it not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of 30 years—and that if, upon conviction, he gets anything less than that he may thank the mercy of a tenderhearted judge (just as he may thank the mercy of a tenderhearted parole commission if he is let out inordinately early, or the mercy of a tenderhearted governor if his sentence is commuted). Will there be disparities? Of course. But the criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens.*

In JUSTICE BREYER's bureaucratic realm of perfect equity, by contrast, the facts that determine the length of sentence to which the defendant is exposed will be determined to exist (on a more-likely-than-not basis) by a single employee of the State. It is certainly arguable (JUSTICE BREYER argues it) that this sacrifice of prior protections is worth it. But it is not arguable that, just because one thinks it is a better system, it must be, or is even more likely to be, the system envisioned by a Constitution that guarantees trial by jury. What ultimately demolishes the case for the dis-

senters is that they are unable to say what the right to trial by jury *does* guarantee if, as they assert, it does not guarantee—what it has been assumed to guarantee throughout our history—the right to have a jury determine those facts that determine the maximum sentence the law allows. They provide no coherent alternative.

JUSTICE BREYER proceeds on the erroneous and all-too-common assumption that the Constitution means what we think it ought to mean. It does not; it means what it says. And the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury," has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins as to Parts I and II, concurring.

I join the opinion of the Court in full. I write separately to explain my view that the Constitution requires a broader rule than the Court adopts.

I

This case turns on the seemingly simple question of what constitutes a "crime." Under the Federal Constitution, "the accused" has the right (1) "to be informed of the nature and cause of the accusation" (that is, the basis on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and (3) to be tried by "an impartial jury of the State and district wherein the crime shall have been committed." Amdts. 5 and 6. See also Art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury"). With the exception of the Grand Jury Clause, see *Hurtado* v. *California*, 110 U. S. 516, 538 (1884), the Court has held that these protections apply in state prosecutions, *Herring* v. *New York*, 422 U. S. 853, 857, and n. 7 (1975). Further, the Court has held that due process requires that the jury find

beyond a reasonable doubt every fact necessary to constitute the crime. *In re Winship*, 397 U. S. 358, 364 (1970).

All of these constitutional protections turn on determining which facts constitute the "crime"—that is, which facts are the "elements" or "ingredients" of a crime. In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under *Winship*, proved beyond a reasonable doubt). See J. Story, Commentaries on the Constitution §§ 928–929, pp. 660–662, § 934, p. 664 (1833); J. Archbold, Pleading and Evidence in Criminal Cases *41, *99–*100 (hereinafter Archbold).[1]

Thus, it is critical to know which facts are elements. This question became more complicated following the Court's decision in *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), which spawned a special sort of fact known as a sentencing enhancement. See *ante*, at 478, 485, 494. Such a fact increases a defendant's punishment but is not subject to the constitutional protections to which elements are subject. JUSTICE O'CONNOR's dissent, in agreement with *McMillan* and *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), takes the view that a legislature is free (within unspecified outer limits) to decree which facts are elements and which are sentencing enhancements. *Post*, at 524.

Sentencing enhancements may be new creatures, but the question that they create for courts is not. Courts have

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[1] JUSTICE O'CONNOR mischaracterizes my argument. See *post*, at 527–528 (dissenting opinion). Of course the Fifth and Sixth Amendments did not codify common-law procedure wholesale. Rather, and as Story notes, they codified a few particular common-law procedural rights. As I have explained, the scope of those rights turns on what constitutes a "crime." In answering that question, it is entirely proper to look to the common law.

long had to consider which facts are elements in order to determine the sufficiency of an accusation (usually an indictment). The answer that courts have provided regarding the accusation tells us what an element is, and it is then a simple matter to apply that answer to whatever constitutional right may be at issue in a case—here, *Winship* and the right to trial by jury. A long line of essentially uniform authority addressing accusations, and stretching from the earliest reported cases after the founding until well into the 20th century, establishes that the original understanding of which facts are elements was even broader than the rule that the Court adopts today.

This authority establishes that a "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact—of whatever sort, including the fact of a prior conviction—the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact—such as a fine that is proportional to the value of stolen goods—that fact is also an element. No multifactor parsing of statutes, of the sort that we have attempted since *McMillan*, is necessary. One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

II

A

Cases from the founding to roughly the end of the Civil War establish the rule that I have described, applying it to

all sorts of facts, including recidivism. As legislatures varied common-law crimes and created new crimes, American courts, particularly from the 1840's on, readily applied to these new laws the common-law understanding that a fact that is by law the basis for imposing or increasing punishment is an element.[2]

Massachusetts, which produced the leading cases in the antebellum years, applied this rule as early as 1804, in *Commonwealth* v. *Smith*, 1 Mass. *245, and foreshadowed the fuller discussion that was to come. Smith was indicted for and found guilty of larceny, but the indictment failed to allege the value of all of the stolen goods. Massachusetts had abolished the common-law distinction between grand and simple larceny, replacing it with a single offense of larceny whose punishment (triple damages) was based on the value of the stolen goods. The prosecutor relied on this abolition of the traditional distinction to justify the indictment's omissions. The court, however, held that it could not sentence the defendant for the stolen goods whose value was not set out in the indictment. *Id.*, at *246–*247.

The understanding implicit in *Smith* was explained in *Hope* v. *Commonwealth*, 50 Mass. 134 (1845). Hope was indicted for and convicted of larceny. The larceny statute at

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[2] It is strange that JUSTICE O'CONNOR faults me for beginning my analysis with cases primarily from the 1840's, rather from the time of the founding. See *post*, at 527–528 (dissenting opinion). As the Court explains, *ante*, at 478–480, and as she concedes, *post*, at 525 (O'CONNOR, J., dissenting), the very idea of a sentencing enhancement was foreign to the common law of the time of the founding. JUSTICE O'CONNOR therefore, and understandably, does not contend that any history from the founding supports her position. As far as I have been able to tell, the argument that a fact that was by law the basis for imposing or increasing punishment might not be an element did not seriously arise (at least not in reported cases) until the 1840's. As I explain below, from that time on—for at least a century—essentially all authority rejected that argument, and much of it did so in reliance upon the common law. I find this evidence more than sufficient.

issue retained the single-offense structure of the statute addressed in *Smith*, and established two levels of sentencing based on whether the value of the stolen property exceeded $100. The statute was structured similarly to the statutes that we addressed in *Jones* v. *United States*, 526 U. S. 227, 230 (1999), and, even more, *Castillo* v. *United States*, *ante*, at 122, in that it first set out the core crime and then, in subsequent clauses, set out the ranges of punishments.[3] Further, the statute opened by referring simply to "the offence of larceny," suggesting, at least from the perspective of our post-*McMillan* cases, that larceny was the crime whereas the value of the stolen property was merely a fact for sentencing. But the matter was quite simple for the Massachusetts high court. Value was an element because punishment varied with value:

> "Our statutes, it will be remembered, prescribe the punishment for larceny, with reference to the value of the property stolen; and for this reason, as well as because it is in conformity with long established practice, the court are of opinion that the value of the property alleged to be stolen must be set forth in the indictment." 50 Mass., at 137.

Two years after *Hope*, the court elaborated on this rule in a case involving burglary, stating that if "certain acts are, by force of the statutes, made punishable with greater severity, when accompanied with aggravating circumstances," then

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[3] The Massachusetts statute provided: "Every person who shall commit the offence of larceny, by stealing of the property of another any money, goods or chattels [or other sort of property], if the property stolen shall exceed the value of one hundred dollars, shall be punished by imprisonment in the state prison, not more than five years, or by fine not exceeding six hundred dollars, and imprisonment in the county jail, not more than two years; and if the property stolen shall not exceed the value of one hundred dollars, he shall be punished by imprisonment in the state prison or the county jail, not more than one year, or by fine not exceeding three hundred dollars." Mass. Rev. Stat., ch. 126, § 17 (1836).

the statute has "creat[ed] two grades of crime." *Larned* v. *Commonwealth*, 53 Mass. 240, 242 (1847). See also *id.*, at 241 ("[T]here is a gradation of offences of the same species" where the statute sets out "various degrees of punishment").

Conversely, where a fact was *not* the basis for punishment, that fact was, for that reason, not an element. Thus, in *Commonwealth* v. *McDonald*, 59 Mass. 365 (1850), which involved an indictment for attempted larceny from the person, the court saw no error in the failure of the indictment to allege any value of the goods that the defendant had attempted to steal. The defendant, in challenging the indictment, apparently relied on *Smith* and *Hope*, and the court rejected his challenge by explaining that "[a]s the punishment . . . does not depend on the amount stolen, there was no occasion for any allegation as to value in this indictment." 59 Mass., at 367. See *Commonwealth* v. *Burke*, 94 Mass. 182, 183 (1866) (applying same reasoning to completed larceny from the person; finding no trial error where value was not proved to jury).

Similar reasoning was employed by the Wisconsin Supreme Court in *Lacy* v. *State*, 15 Wis. *13 (1862), in interpreting a statute that was also similar to the statutes at issue in *Jones* and *Castillo*. The statute, in a single paragraph, outlawed arson of a dwelling house at night. Arson that killed someone was punishable by life in prison; arson that did not kill anyone was punishable by 7 to 14 years in prison; arson of a house in which no person was lawfully dwelling was punishable by 3 to 10 years.[4] The court had no trouble

[4] The Wisconsin statute provided: "Every person who shall willfully and maliciously burn, in the night time, the dwelling house of another, whereby the life of any person shall be destroyed, or shall in the night time willfully and maliciously set fire to any other building, owned by himself or another, by the burning whereof such dwelling house shall be burnt in the night time, whereby the life of any person shall be destroyed, shall suffer the same punishment as provided for the crime of murder in the second degree; but if the life of no person shall have been destroyed, he shall be punished by imprisonment in the state prison, not more than fourteen

concluding that the statute "creates three distinct statutory offenses," 15 Wis., at *15, and that the lawful presence of a person in the dwelling was an element of the middle offense. The court reasoned from the gradations of punishment: "That the legislature considered the circumstance that a person was lawfully in the dwelling house when fire was set to it most material and important, and as greatly aggravating the crime, is clear from the severity of the punishment imposed." *Id.*, at *16. The "aggravating circumstances" created "the higher statutory offense[s]." *Id.*, at *17. Because the indictment did not allege that anyone had been present in the dwelling, the court reversed the defendant's 14-year sentence, but, relying on *Larned*, *supra*, the court remanded to permit sentencing under the lowest grade of the crime (which was properly alleged in the indictment). 15 Wis., at *17.

Numerous other state and federal courts in this period took the same approach to determining which facts are elements of a crime. See *Ritchey* v. *State*, 7 Blackf. 168, 169 (Ind. 1844) (citing *Commonwealth* v. *Smith*, 1 Mass. *245 (1804), and holding that indictment for arson must allege value of property destroyed, because statute set punishment based on value); *Spencer* v. *State*, 13 Ohio 401, 406, 408 (1844) (holding that value of goods intended to be stolen is not "an ingredient of the crime" of burglary with intent to steal, because punishment under statute did not depend on value; contrasting larceny, in which "[v]alue must be laid, and value proved, that the jury may find it, and the court, by that means, know whether it is grand or petit, and apply the grade of punishment the statute awards"); *United States* v. *Fisher*, 25 F. Cas. 1086 (CC Ohio 1849) (McLean, J.) ("A car-

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years nor less than seven years; and if at the time of committing the offense there was no person lawfully in the dwelling house so burnt, he shall be punished by imprisonment in the state prison, not more than ten years nor less than three years." Wis. Rev. Stat., ch. 165, § 1 (1858). The punishment for second-degree murder was life in prison. Ch. 164, § 2.

rier of the mail is subject to a higher penalty where he steals a letter out of the mail, which contains an article of value. And when this offense is committed, the indictment must allege the letter contained an article of value, which aggravates the offense and incurs a higher penalty"); *Brightwell* v. *State*, 41 Ga. 482, 483 (1871) ("When the law prescribes a different punishment for different phases of the same crime, there is good reason for requiring the indictment to specify which of the phases the prisoner is charged with. The record ought to show that the defendant is convicted of the offense for which he is sentenced"). Cf. *State* v. *Farr*, 12 Rich. 24, 29 (S. C. App. 1859) (where two statutes barred purchasing corn from a slave, and one referred to purchasing from slave who lacked a permit, absence of permit was not an element, because both statutes had the same punishment).

Also demonstrating the common-law approach to determining elements was the well-established rule that, if a statute increased the punishment of a common-law crime, whether felony or misdemeanor, based on some fact, then that fact must be charged in the indictment in order for the court to impose the increased punishment. Archbold *106; see *id.*, at *50; *ante*, at 480–481. There was no question of treating the statutory aggravating fact as merely a sentencing enhancement—as a nonelement enhancing the sentence of the common-law crime. The aggravating fact was an element of a new, aggravated grade of the common-law crime simply because it increased the punishment of the common-law crime. And the common-law crime was, in relation to the statutory one, essentially just like any other lesser included offense. See Archbold *106.

Further evidence of the rule that a crime includes every fact that is by law a basis for imposing or increasing punishment comes from early cases addressing recidivism statutes. As JUSTICE SCALIA has explained, there was a tradition of treating recidivism as an element. See *Almendarez-Torres*, 523 U. S., at 256–257, 261 (dissenting opinion). That tradi-

tion stretches back to the earliest years of the Republic. See, *e. g.*, *Commonwealth* v. *Welsh*, 4 Va. 57 (1817); *Smith* v. *Commonwealth*, 14 Serg. & Rawle 69 (Pa. 1826); see also Archbold *695–*696. For my purposes, however, what is noteworthy is not so much the fact of that tradition as the reason for it: Courts treated the fact of a prior conviction just as any other fact that increased the punishment by law. By the same reasoning that the courts employed in *Hope*, *Lacy*, and the other cases discussed above, the fact of a prior conviction was an element, together with the facts constituting the core crime of which the defendant was charged, of a new, aggravated crime.

The two leading antebellum cases on whether recidivism is an element were *Plumbly* v. *Commonwealth*, 43 Mass. 413 (1841), and *Tuttle* v. *Commonwealth*, 68 Mass. 505 (1854). In the latter, the court explained the reason for treating as an element the fact of the prior conviction:

> "When the statute imposes a higher penalty upon a second and third conviction, respectively, it makes the prior conviction of a similar offence a part of the description and character of the offence intended to be punished; and therefore the fact of such prior conviction must be charged, as well as proved. It is essential to an indictment, that the facts constituting the offence intended to be punished should be averred." *Id.*, at 506.

The court rested this rule on the common law and the Massachusetts equivalent of the Sixth Amendment's Notice Clause. *Ibid.* See also *Commonwealth* v. *Haynes*, 107 Mass. 194, 198 (1871) (reversing sentence, upon confession of error by attorney general, in case similar to *Tuttle*).

Numerous other cases treating the fact of a prior conviction as an element of a crime take the same view. They make clear, by both their holdings and their language, that when a statute increases punishment for some core crime based on the fact of a prior conviction, the core crime and

the fact of the prior crime together create a new, aggravated crime. *Kilbourn* v. *State*, 9 Conn. 560, 563 (1833) ("No person ought to be, or can be, subjected to a cumulative penalty, without being charged with a cumulative offence"); *Plumbly*, *supra*, at 414 (conviction under recidivism statute is "one conviction, upon one aggregate offence"); *Hines* v. *State*, 26 Ga. 614, 616 (1859) (reversing enhanced sentence imposed by trial judge and explaining: "[T]he question, whether the offence was a second one, or not, was a question for the jury. . . . The allegation [of a prior offence] is certainly one of the first importance to the accused, for if it is true, he becomes subject to a greatly increased punishment"). See also *Commonwealth* v. *Phillips*, 28 Mass. 28, 33 (1831) ("[U]pon a third conviction, the court may sentence the convict to hard labor for life. The punishment is to be awarded upon that conviction, and for the offence of which he is then and there convicted").

Even the exception to this practice of including the fact of a prior conviction in the indictment and trying it to the jury helps to prove the rule that that fact is an element because it increases the punishment by law. In *State* v. *Freeman*, 27 Vt. 523 (1855), the Vermont Supreme Court upheld a statute providing that, in an indictment or complaint for violation of a liquor law, it was not necessary to allege a prior conviction of that law in order to secure an increased sentence. But the court did not hold that the prior conviction was not an element; instead, it held that the liquor law created only minor offenses that did not qualify as crimes. Thus, the state constitutional protections that would attach were a "crime" at issue did not apply. *Id.*, at 527; see *Goeller* v. *State*, 119 Md. 61, 66–67, 85 A. 954, 956 (1912) (discussing *Freeman*). At the same time, the court freely acknowledged that it had "no doubt" of the general rule, particularly as articulated in Massachusetts, that "it is necessary to allege the former conviction, in the indictment, when a higher

sentence is claimed on that account." *Freeman*, *supra*, at 526. Unsurprisingly, then, a leading treatise explained *Freeman* as only "apparently" contrary to the general rule and as involving a "special statute." 3 F. Wharton, Criminal Law § 3417, p. 307, n. *r* (7th rev. ed. 1874) (hereinafter Wharton). In addition, less than a decade after *Freeman*, the same Vermont court held that if a defendant charged with a successive violation of the liquor laws contested identity—that is, whether the person in the record of the prior conviction was the same as the defendant—he should be permitted to have a jury resolve the question. *State* v. *Haynes*, 35 Vt. 570, 572–573 (1863). (*Freeman* itself had anticipated this holding by suggesting the use of a jury to resolve disputes over identity. See 27 Vt., at 528.) In so holding, *Haynes* all but applied the general rule, since a determination of identity was usually the chief factual issue whenever recidivism was charged. See Archbold *695–*696; see also, *e. g.*, *Graham* v. *West Virginia*, 224 U. S. 616, 620–621 (1912) (defendant had been convicted under three different names).[5]

[5] Some courts read *State* v. *Smith*, 8 Rich. 460 (S. C. App. 1832), a South Carolina case, to hold that the indictment need not allege a prior conviction in order for the defendant to suffer an enhanced punishment. See, *e. g.*, *State* v. *Burgett*, 22 Ark. 323, 324 (1860) (so reading *Smith* and questioning its correctness). The *Smith* court's holding was somewhat unclear because the court did not state whether the case involved a first or second offense—if a first, the court was undoubtedly correct in rejecting the defendant's challenge to the indictment, because there is no need in an indictment to negate the existence of any prior offense. See *Burgett*, *supra*, at 324 (reading indictment that was silent about prior offenses as only charging first offense and as sufficient for that purpose). In addition, the *Smith* court did not acknowledge the possibility of disputes over identity. Finally, the extent to which the court's apparent holding was followed in practice in South Carolina is unclear, and subsequent South Carolina decisions acknowledged that *Smith* was out of step with the general rule. See *State* v. *Parris*, 89 S. C. 140, 141, 71 S. E. 808, 809 (1911); *State* v. *Mitchell*, 220 S. C. 433, 434–436, 68 S. E. 2d 350, 351–352 (1951).

B

An 1872 treatise by one of the leading authorities of the era in criminal law and procedure confirms the common-law understanding that the above cases demonstrate. The treatise condensed the traditional understanding regarding the indictment, and thus regarding the elements of a crime, to the following: "[T]he indictment must allege whatever is in law essential to the punishment sought to be inflicted." 1 J. Bishop, Law of Criminal Procedure 50 (2d ed. 1872) (hereinafter Bishop, Criminal Procedure). See *id.*, § 81, at 51 ("[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted"); *id.*, § 540, at 330 ("[T]he indictment must . . . contain an averment of every particular thing which enters into the punishment"). Crimes, he explained, consist of those "acts to which the law affixes . . . punishment," *id.*, § 80, at 51, or, stated differently, a crime consists of the whole of "the wrong upon which the punishment is based," *id.*, § 84, at 53. In a later edition, Bishop similarly defined the elements of a crime as "that wrongful aggregation out of which the punishment proceeds." 1 J. Bishop, New Criminal Procedure § 84, p. 49 (4th ed. 1895).

Bishop grounded his definition in both a generalization from well-established common-law practice, 1 Bishop, Criminal Procedure §§ 81–84, at 51–53, and in the provisions of Federal and State Constitutions guaranteeing notice of an accusation in all criminal cases, indictment by a grand jury for serious crimes, and trial by jury. With regard to the common law, he explained that his rule was "not made apparent to our understandings by a single case only, but by all the cases," *id.*, § 81, at 51, and was followed "in all cases, without one exception," *id.*, § 84, at 53. To illustrate, he observed that there are

> "various statutes whereby, when . . . assault is committed with a particular intent, or with a particular

> weapon, or the like, it is subjected to a particular corresponding punishment, heavier than that for common assault, or differing from it, pointed out by the statute. And the reader will notice that, in all cases where the peculiar or aggravated punishment is to be inflicted, the peculiar or aggravating matter is required to be set out in the indictment." *Id.*, § 82, at 52.

He also found burglary statutes illustrative in the same way. *Id.*, § 83, at 52–53. Bishop made no exception for the fact of a prior conviction—he simply treated it just as any other aggravating fact: "[If] it is sought to make the sentence heavier by reason of its being [a second or third offence], the fact thus relied on must be averred in the indictment; because the rules of criminal procedure require the indictment, in all cases, to contain an averment of every fact essential to the punishment sought to be inflicted." 1 J. Bishop, Commentaries on Criminal Law § 961, pp. 564–565 (5th ed. 1872).

The constitutional provisions provided further support, in his view, because of the requirements for a proper accusation at common law and because of the common-law understanding that a proper jury trial required a proper accusation: "The idea of a jury trial, as it has always been known where the common law prevails, includes the allegation, as part of the machinery of the trial . . . . [A]n accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason." 1 Bishop, Criminal Procedure § 87, at 55. See *id.*, § 88, at 56 (notice and indictment requirements ensure that before "persons held for crimes . . . shall be convicted, there shall be an allegation made against them of every element of crime which the law makes essential to the punishment to be inflicted").

Numerous high courts contemporaneously and explicitly agreed that Bishop had accurately captured the common-law understanding of what facts are elements of a crime. See,

e. g., *Hobbs* v. *State*, 44 Tex. 353, 354 (1875) (favorably quoting 1 Bishop, Criminal Procedure § 81); *Maguire* v. *State*, 47 Md. 485, 497 (1878) (approvingly citing different Bishop treatise for the same rule); *Larney* v. *Cleveland*, 34 Ohio St. 599, 600 (1878) (rule and reason for rule "are well stated by Mr. Bishop"); *State* v. *Hayward*, 83 Mo. 299, 307 (1884) (extensively quoting § 81 of Bishop's "admirable treatise"); *Riggs* v. *State*, 104 Ind. 261, 262, 3 N. E. 886, 887 (1885) ("We agree with Mr. Bishop that the nature and cause of the accusation are not stated where there is no mention of the full act or series of acts for which the punishment is to be inflicted" (internal quotation marks omitted)); *State* v. *Perley*, 86 Me. 427, 431, 30 A. 74, 75 (1894) ("The doctrine of the court, says Mr. Bishop, is identical with that of reason, viz: that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted" (internal quotation marks omitted)); see also *United States* v. *Reese*, 92 U. S. 214, 232–233 (1876) (Clifford, J., concurring in judgment) (citing and paraphrasing 1 Bishop, Criminal Procedure § 81).

C

In the half century following publication of Bishop's treatise, numerous courts applied his statement of the common-law understanding; most of them explicitly relied on his treatise. Just as in the earlier period, every fact that was by law a basis for imposing or increasing punishment (including the fact of a prior conviction) was an element. Each such fact had to be included in the accusation of the crime and proved to the jury.

Courts confronted statutes quite similar to the ones with which we have struggled since *McMillan*, and, applying the traditional rule, they found it not at all difficult to determine whether a fact was an element. In *Hobbs*, *supra*, the defendant was indicted for a form of burglary punishable by 2 to 5 years in prison. A separate statutory section provided for an increased sentence, up to double the punishment

to which the defendant would otherwise be subject, if the entry into the house was effected by force exceeding that incidental to burglary. The trial court instructed the jury to sentence the defendant to 2 to 10 years if it found the requisite level of force, and the jury sentenced him to 3. The Texas Supreme Court, relying on Bishop, reversed because the indictment had not alleged such force; even though the jury had sentenced Hobbs within the range (2 to 5 years) that was permissible under the lesser crime that the indictment had charged, the court thought it "impossible to say . . . that the erroneous charge of the court may not have had some weight in leading the jury" to impose the sentence that it did. 44 Tex., at 355.[6] See also *Searcy* v. *State*, 1 Tex. App. 440, 444 (1876) (similar); *Garcia* v. *State*, 19 Tex. App. 389, 393 (1885) (not citing *Hobbs*, but relying on Bishop to reverse 10-year sentence for assault with a bowie knife or dagger, where statute doubled range for assault from 2 to 7 to 4 to 14 years if the assault was committed with either weapon but where indictment had not so alleged).

As in earlier cases, such as *McDonald* (discussed *supra*, at 504), courts also used the converse of the Bishop rule to explain when a fact was not an element of the crime. In *Perley*, *supra*, the defendant was indicted for and convicted of robbery, which was punishable by imprisonment for life

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[6] The gulf between the traditional approach to determining elements and that of our recent cases is manifest when one considers how one might, from the perspective of those cases, analyze the issue in *Hobbs*. The chapter of the Texas code addressing burglary was entitled simply "Of Burglary" and began with a section explicitly defining "the offense of burglary." After a series of sections defining terms, it then set out six separate sections specifying the punishment for various kinds of burglary. The section regarding force was one of these. See 1 G. Paschal, Digest of Laws of Texas, Part II, Tit. 20, ch. 6, pp. 462–463 (4th ed. 1875). Following an approach similar to that in *Almendarez-Torres* v. *United States*, 523 U. S. 224, 231–234, 242–246 (1998), and *Castillo* v. *United States*, *ante*, at 124–125, one would likely find a clear legislative intent to make force a sentencing enhancement rather than an element.

or any term of years. The court, relying on Bishop, *Hope*, *McDonald*, and other authority, rejected his argument that Maine's Notice Clause (which of course required all elements to be alleged) required the indictment to allege the value of the goods stolen, because the punishment did not turn on value: "[T]here is no provision of this statute which makes the amount of property taken an essential element of the offense; and there is no statute in this State which creates degrees in robbery, or in any way makes the punishment of the offense dependent upon the value of the property taken." 86 Me., at 432, 30 A., at 75. The court further explained that "where the value is not essential to the punishment it need not be distinctly alleged or proved." *Id.*, at 433, 30 A., at 76.

Reasoning similar to *Perley* and the Texas cases is evident in other cases as well. See *Jones* v. *State*, 63 Ga. 141, 143 (1879) (where punishment for burglary in the day is 3 to 5 years in prison and for burglary at night is 5 to 20, time of burglary is a "constituent of the offense"; indictment should "charge all that is requisite to render plain and certain every constituent of the offense"); *United States* v. *Woodruff*, 68 F. 536, 538 (Kan. 1895) (where embezzlement statute "contemplates that there should be an ascertainment of the exact sum for which a fine may be imposed" and jury did not determine amount, judge lacked authority to impose fine; "[o]n such an issue the defendant is entitled to his constitutional right of trial by jury").

Courts also, again just as in the pre-Bishop period, applied the same reasoning to the fact of a prior conviction as they did to any other fact that aggravated the punishment by law. Many, though far from all, of these courts relied on Bishop. In 1878, Maryland's high court, in *Maguire* v. *State*, 47 Md. 485, stated the rule and the reason for it in language indistinguishable from that of *Tuttle* a quarter century before:

> "The law would seem to be well settled, that if the party be proceeded against for a second or third offence under

> the statute, and the sentence prescribed be different from the first, or severer, by reason of its being such second or third offence, the fact thus relied on must be averred in the indictment; for the settled rule is, that the indictment must contain an averment of every fact essential to justify the punishment inflicted." *Maguire*, *supra*, at 496 (citing English cases, *Plumbly* v. *Commonwealth*, 43 Mass. 413 (1841), Wharton, and Bishop).

In *Goeller* v. *State*, 119 Md. 61, 85 A. 954 (1912), the same court reaffirmed *Maguire* and voided, as contrary to Maryland's Notice Clause, a statute that permitted the trial judge to determine the fact of a prior conviction. The court extensively quoted Bishop, who had, in the court's view, treated the subject "more fully, perhaps, than any other legal writer," and it cited, among other authorities, "a line of Massachusetts decisions" and *Riggs* (quoted *supra*, at 512). 119 Md., at 66, 85 A., at 955. In *Larney*, 34 Ohio St., at 600–601, the Supreme Court of Ohio, in an opinion citing only Bishop, reversed a conviction under a recidivism statute where the indictment had not alleged any prior conviction. (The defendant had also relied on *Plumbly*, *supra*, and *Kilbourn* v. *State*, 9 Conn. 560 (1833). 34 Ohio St., at 600.) And in *State* v. *Adams*, 64 N. H. 440, 13 A. 785 (1888), the court, relying on Bishop, explained that "[t]he former conviction being a part of the description and character of the offense intended to be punished, because of the higher penalty imposed, it must be alleged." *Id.*, at 442, 13 A., at 786. The defendant had been "charged with an offense aggravated by its repetitious character." *Ibid.* See also *Evans* v. *State*, 150 Ind. 651, 653, 50 N. E. 820 (1898) (similar); *Shiflett* v. *Commonwealth*, 114 Va. 876, 877, 77 S. E. 606, 607 (1913) (similar).

Even without any reliance on Bishop, other courts addressing recidivism statutes employed the same reasoning as did he and the above cases—that a crime includes any fact to which punishment attaches. One of the leading cases was

Wood v. *People*, 53 N. Y. 511 (1873). The statute in *Wood* provided for increased punishment if the defendant had previously been convicted of a felony then discharged from the conviction. The court, repeatedly referring to "the aggravated offence," *id.*, at 513, 515, held that the facts of the prior conviction and of the discharge must be proved to the jury, for "[b]oth enter into and make a part of the offence . . . subjecting the prisoner to the increased punishment." *Id.*, at 513; see *ibid.* (fact of prior conviction was an "essential ingredient" of the offense). See also *Johnson* v. *People*, 55 N. Y. 512, 514 (1874) ("A more severe penalty is denounced by the statute for a second offence; and all the facts to bring the case within the statute must be [alleged in the indictment and] established on the trial"); *People* v. *Sickles*, 156 N. Y. 541, 544–545, 51 N. E. 288, 289 (1898) (reaffirming *Wood* and *Johnson* and explaining that "the charge is not merely that the prisoner has committed the offense specifically described, but that, as a former convict, his second offense has subjected him to an enhanced penalty").

Contemporaneously with the New York Court of Appeals in *Wood* and *Johnson*, state high courts in California and Pennsylvania offered similar explanations for why the fact of a prior conviction is an element. In *People* v. *Delany*, 49 Cal. 394 (1874), which involved a statute making petit larceny (normally a misdemeanor) a felony if committed following a prior conviction for petit larceny, the court left no doubt that the fact of the prior conviction was an element of an aggravated crime consisting of petit larceny committed following a prior conviction for petit larceny:

> "The particular circumstances of the offense are stated [in the indictment], and consist of the prior convictions and of the facts constituting the last larceny.
>
> . . . . . .
>
> "[T]he former convictions are made to adhere to and constitute a portion of the aggravated offense." *Id.*, at 395.

> "The felony consists both of the former convictions and of the particular larceny. . . . [T]he former convictions were a separate fact; which, taken in connection with the facts constituting the last offense, make a distinct and greater offense than that charged, exclusive of the prior convictions." *Id.*, at 396.[7]

See also *People* v. *Coleman*, 145 Cal. 609, 610–611, 79 P. 283, 284–285 (1904).

Similarly, in *Rauch* v. *Commonwealth*, 78 Pa. 490 (1876), the court applied its 1826 decision in *Smith* v. *Commonwealth*, 14 Serg. & Rawle 69, and reversed the trial court's imposition of an enhanced sentence "upon its own knowledge of its records." 78 Pa., at 494. The court explained that "imprisonment in jail is not a lawful consequence of a mere conviction for an unlawful sale of liquors. It is the lawful consequence of a second sale only after a former conviction. On every principle of personal security and the due administration of justice, the fact which gives rightfulness to the greater punishment should appear in the record." *Ibid.* See also *id.*, at 495 ("But clearly the substantive offence, which draws to itself the greater punishment, is the unlawful sale after a former conviction. This, therefore, is the very offence he is called upon to defend against").

Meanwhile, Massachusetts reaffirmed its earlier decisions, striking down, in *Commonwealth* v. *Harrington*, 130 Mass. 35 (1880), a liquor law that provided a small fine for a first or second conviction, provided a larger fine or imprisonment up to a year for a third conviction, and specifically provided that a prior conviction need not be alleged in the complaint. The court found this law plainly inconsistent with *Tuttle* and with the State's Notice Clause, explaining that "the offence which is punishable with the higher penalty is not fully and

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[7] The court held that a general plea of "guilty" to an indictment that includes an allegation of a prior conviction applies to the fact of the prior conviction.

substantially described to the defendant, if the complaint fails to set forth the former convictions which are essential features of it." 130 Mass., at 36.[8]

Without belaboring the point any further, I simply note that this traditional understanding—that a "crime" includes every fact that is by law a basis for imposing or increasing punishment—continued well into the 20th century, at least until the middle of the century. See Knoll & Singer, Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of *McMillan v. Pennsylvania*, 22 Seattle U. L. Rev. 1057, 1069–1081 (1999) (surveying 20th-century decisions of federal courts prior to *McMillan*); see also *People* v. *Ratner*, 67 Cal. App. 2d Supp. 902, 903–906, 153 P. 2d 790, 791–793 (1944). In fact, it is fair to say that *McMillan* began a revolution in the law regarding the definition of "crime." Today's decision, far from being a sharp break with the past, marks nothing more than a return to the *status quo ante*—the status quo that reflected the original meaning of the Fifth and Sixth Amendments.

III

The consequence of the above discussion for our decisions in *Almendarez-Torres* and *McMillan* should be plain enough, but a few points merit special mention.

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[8] See also *State* v. *Austin*, 113 Mo. 538, 542, 21 S. W. 31, 32 (1893) (prior conviction is a "material fac[t]" of the "aggravated offense"); *Bandy* v. *Hehn*, 10 Wyo. 167, 172–174, 67 P. 979, 980 (1902) ("[I]n reason, and by the great weight of authority, as the fact of a former conviction enters into the offense to the extent of aggravating it and increasing the punishment, it must be alleged in the information and proved like any other material fact, if it is sought to impose the greater penalty. The statute makes the prior conviction a part of the description and character of the offense intended to be punished" (citing *Tuttle* v. *Commonwealth*, 68 Mass. 505 (1854))); *State* v. *Smith*, 129 Iowa 709, 711–712, 106 N. W. 187, 188–189 (1906) (similar); *State* v. *Scheminisky*, 31 Idaho 504, 506–507, 174 P. 611, 611–612 (1918) (similar).

First, it is irrelevant to the question of which facts are elements that legislatures have allowed sentencing judges discretion in determining punishment (often within extremely broad ranges). See *ante*, at 481–482; *post*, at 544–545 (O'CONNOR, J., dissenting). Bishop, immediately after setting out the traditional rule on elements, explained why:

> "The reader should distinguish between the foregoing doctrine, and the doctrine . . . that, within the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment. . . . The aggravating circumstances spoken of cannot swell the penalty above what the law has provided for the acts charged against the prisoner, and they are interposed merely to check the judicial discretion in the exercise of the permitted mercy [in finding mitigating circumstances]. This is an entirely different thing from punishing one for what is not alleged against him." 1 Bishop, Criminal Procedure § 85, at 54.

See also 1 J. Bishop, New Commentaries on the Criminal Law §§ 600–601, pp. 370–371, § 948, p. 572 (8th ed. 1892) (similar). In other words, establishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things.[9]

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[9] This is not to deny that there may be laws on the borderline of this distinction. In *Brightwell* v. *State*, 41 Ga. 482 (1871), the court stated a rule for elements equivalent to Bishop's, then held that whether a defendant had committed arson in the day or at night need not be in the indictment. The court explained that there was "no provision that arson in the night shall be punished for any different period" than arson in the day (both being punishable by 2 to 7 years in prison). *Id.*, at 483. Although there was a statute providing that "arson in the day time shall be punished for a less period than arson in the night time," the court concluded that it merely set "a rule for the exercise of [the sentencing

Cf. 4 W. Blackstone, Commentaries on the Law of England 371–372 (1769) (noting judges' broad discretion in setting amount of fine and length of imprisonment for misdemeanors, but praising determinate punishment and "discretion . . . regulated by law"); *Perley*, 86 Me., at 429, 432, 30 A., at 74, 75–76 (favorably discussing Bishop's rule on elements without mentioning, aside from quotation of statute in statement of facts, that defendant's conviction for robbery exposed him to imprisonment for life or any term of years). Thus, it is one thing to consider what the Constitution requires the prosecution to do in order to entitle itself to a particular kind, degree, or range of punishment of the accused, see *Woodruff*, 68 F., at 538, and quite another to consider what constitutional constraints apply either to the imposition of punishment within the limits of that entitlement or to a legislature's ability to set broad ranges of punishment. In answering the former constitutional question, I need not, and do not, address the latter.

Second, and related, one of the chief errors of *Almendarez-Torres*—an error to which I succumbed—was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. 523 U. S., at 243–244; see *id.*, at 230, 241. For the

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judge's] discretion" by specifying a particular fact for the judge to consider along with the many others that would enter into his sentencing decision. *Ibid.* Cf. *Jones* v. *State*, 63 Ga. 141, 143 (1879) (whether burglary occurred in day or at night is a "constituent of the offense" because law fixes different ranges of punishment based on this fact). And the statute attached no definite consequence to that particular fact: A sentencing judge presumably could have imposed a sentence of seven years less one second for daytime arson. Finally, it is likely that the statute in *Brightwell*, given its language ("a less period") and its placement in a separate section, was read as setting out an affirmative defense or mitigating circumstance. See *Wright* v. *State*, 113 Ga. App. 436, 437–438, 148 S. E. 2d 333, 335–336 (1966) (suggesting that it would be error to refuse to charge later version of this statute to jury upon request of defendant). See generally Archbold *52, *105–*106 (discussing rules for determining whether fact is an element or a defense).

reasons I have given, it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment—for establishing or increasing the prosecution's entitlement—it is an element. (To put the point differently, I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment.) When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute. Indeed, cases addressing such statutes provide some of the best discussions of what constitutes an element of a crime. One reason frequently offered for treating recidivism differently, a reason on which we relied in *Almendarez-Torres*, *supra*, at 235, is a concern for prejudicing the jury by informing it of the prior conviction. But this concern, of which earlier courts were well aware, does not make the traditional understanding of what an element is any less applicable to the fact of a prior conviction. See, *e. g.*, *Maguire*, 47 Md., at 498; *Sickles*, 156 N. Y., at 547, 51 N. E., at 290.[10]

Third, I think it clear that the common-law rule would cover the *McMillan* situation of a mandatory minimum sentence (in that case, for visible possession of a firearm during the commission of certain crimes). No doubt a defendant could, under such a scheme, find himself sentenced to the same term to which he could have been sentenced absent the mandatory minimum. The range for his underlying crime

[10] In addition, it has been common practice to address this concern by permitting the defendant to stipulate to the prior conviction, in which case the charge of the prior conviction is not read to the jury, or, if the defendant decides not to stipulate, to bifurcate the trial, with the jury only considering the prior conviction after it has reached a guilty verdict on the core crime. See, *e. g.*, 1 J. Bishop, Criminal Law § 964, pp. 566–567 (5th ed. 1872) (favorably discussing English practice of bifurcation); *People* v. *Saunders*, 5 Cal. 4th 580, 587–588, 853 P. 2d 1093, 1095–1096 (1993) (detailing California approach, since 1874, of permitting stipulation and, more recently, of also permitting bifurcation).

could be 0 to 10 years, with the mandatory minimum of 5 years, and he could be sentenced to 7. (Of course, a similar scenario is possible with an increased maximum.) But it is equally true that his expected punishment has increased as a result of the narrowed range and that the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum "entitl[es] the government," *Woodruff, supra,* at 538, to more than it would otherwise be entitled (5 to 10 years, rather than 0 to 10 and the risk of a sentence below 5). Thus, the fact triggering the mandatory minimum is part of "the punishment sought to be inflicted," Bishop, Criminal Procedure 50; it undoubtedly "enters into the punishment" so as to aggravate it, *id.*, § 540, at 330, and is an "ac[t] to which the law affixes . . . punishment," *id.*, § 80, at 51. Further, just as in *Hobbs* and *Searcy,* see *supra,* at 512–513, it is likely that the change in the range available to the judge affects his choice of sentence. Finally, in numerous cases, such as *Lacy, Garcia,* and *Jones,* see *supra,* at 504–505, 514, the aggravating fact raised the whole range—both the top and bottom. Those courts, in holding that such a fact was an element, did not bother with any distinction between changes in the maximum and the minimum. What mattered was simply the overall increase in the punishment provided by law. And in several cases, such as *Smith* and *Woodruff,* see *supra,* at 502, 514, the very concept of maximums and minimums had no applicability, yet the same rule for elements applied. See also *Harrington* (discussed *supra,* at 517–518).

Finally, I need not in this case address the implications of the rule that I have stated for the Court's decision in *Walton* v. *Arizona,* 497 U. S. 639, 647–649 (1990). See *ante,* at 496. *Walton* did approve a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment. In this sense, that fact is an element. But that scheme exists in a unique context, for in the area of cap-

ital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment—we have restricted the legislature's ability to define crimes. Under our recent capital-punishment jurisprudence, neither Arizona nor any other jurisdiction could provide—as, previously, it freely could and did—that a person shall be death eligible automatically upon conviction for certain crimes. We have interposed a barrier between a jury finding of a capital crime and a court's ability to impose capital punishment. Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day.[11]

* * *

For the foregoing reasons, as well as those given in the Court's opinion, I agree that the New Jersey procedure at issue is unconstitutional.

Justice O'Connor, with whom The Chief Justice, Justice Kennedy, and Justice Breyer join, dissenting.

Last Term, in *Jones* v. *United States*, 526 U. S. 227 (1999), this Court found that our prior cases suggested the following principle: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.*, at 243, n. 6. At the time, Justice Kennedy rightly criticized the Court for its failure to ex-

[11] It is likewise unnecessary to consider whether (and, if so, how) the rule regarding elements applies to the Sentencing Guidelines, given the unique status that they have under *Mistretta* v. *United States*, 488 U. S. 361 (1989). But it may be that this special status is irrelevant, because the Guidelines "have the force and effect of laws." *Id.*, at 413 (Scalia, J., dissenting).

plain the origins, contours, or consequences of its purported constitutional principle; for the inconsistency of that principle with our prior cases; and for the serious doubt that the holding cast on sentencing systems employed by the Federal Government and States alike. *Id.*, at 254, 264–272 (dissenting opinion). Today, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in *Jones*.

I

Our Court has long recognized that not every fact that bears on a defendant's punishment need be charged in an indictment, submitted to a jury, and proved by the government beyond a reasonable doubt. Rather, we have held that the "legislature's definition of the elements of the offense is usually dispositive." *McMillan* v. *Pennsylvania*, 477 U. S. 79, 85 (1986); see also *Almendarez-Torres* v. *United States*, 523 U. S. 224, 228 (1998); *Patterson* v. *New York*, 432 U. S. 197, 210, 211, n. 12 (1977). Although we have recognized that "there are obviously constitutional limits beyond which the States may not go in this regard," *id.*, at 210, and that "in certain limited circumstances *Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged," *McMillan*, *supra*, at 86, we have proceeded with caution before deciding that a certain fact must be treated as an offense element despite the legislature's choice not to characterize it as such. We have therefore declined to establish any bright-line rule for making such judgments and have instead approached each case individually, sifting through the considerations most relevant to determining whether the legislature has acted properly within its broad power to define crimes and their punishments or instead has sought to evade the constitutional requirements associated with the characterization of a fact as an offense element. See, *e. g.*, *Monge* v. *California*, 524 U. S. 721, 728–729 (1998); *McMillan*, *supra*, at 86.

In one bold stroke the Court today casts aside our traditional cautious approach and instead embraces a universal and seemingly bright-line rule limiting the power of Congress and state legislatures to define criminal offenses and the sentences that follow from convictions thereunder. The Court states: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Ante*, at 490. In its opinion, the Court marshals virtually no authority to support its extraordinary rule. Indeed, it is remarkable that the Court cannot identify a *single instance*, in the over 200 years since the ratification of the Bill of Rights, that our Court has applied, as a constitutional requirement, the rule it announces today.

According to the Court, its constitutional rule "emerges from our history and case law." *Ante*, at 492. None of the history contained in the Court's opinion requires the rule it ultimately adopts. The history cited by the Court can be divided into two categories: first, evidence that judges at common law had virtually no discretion in sentencing, *ante*, at 478–480, and, second, statements from a 19th-century criminal procedure treatise that the government must charge in an indictment and prove at trial the elements of a statutory offense for the defendant to be sentenced to the punishment attached to that statutory offense, *ante*, at 480–481. The relevance of the first category of evidence can be easily dismissed. Indeed, the Court does not even claim that the historical evidence of nondiscretionary sentencing at common law supports its "increase in the maximum penalty" rule. Rather, almost as quickly as it recites that historical practice, the Court rejects its relevance to the constitutional question presented here due to the conflicting American practice of judges exercising sentencing discretion and our decisions recognizing the legitimacy of that American practice. See *ante*, at 481–482 (citing *Williams* v. *New York*, 337 U. S. 241, 246 (1949)). Even if the Court were to

claim that the common-law history on this point did bear on the instant case, one wonders why the historical practice of judges pronouncing judgments in cases between private parties is relevant at all to the question of criminal punishment presented here. See *ante*, at 479–480 (quoting 3 W. Blackstone, Commentaries on the Laws of England 396 (1768), which pertains to "remed[ies] prescribed by law for the redress of injuries").

Apparently, then, the historical practice on which the Court places so much reliance consists of only two quotations taken from an 1862 criminal procedure treatise. See *ante*, at 480–481 (quoting J. Archbold, Pleading and Evidence in Criminal Cases 51, 188 (15th ed. 1862)). A closer examination of the two statements reveals that neither supports the Court's "increase in the maximum penalty" rule. Both of the excerpts pertain to circumstances in which a common-law felony had also been made a separate statutory offense carrying a greater penalty. Taken together, the statements from the Archbold treatise demonstrate nothing more than the unremarkable proposition that a defendant could receive the greater statutory punishment only if the indictment expressly charged and the prosecutor proved the facts that made up the statutory offense, as opposed to simply those facts that made up the common-law offense. See *id.*, at 51 (indictment); *id.*, at 188 (proof). In other words, for the defendant to receive the statutory punishment, the prosecutor had to charge in the indictment and prove at trial *the elements* of the statutory offense. To the extent there is any doubt about the precise meaning of the treatise excerpts, that doubt is dispelled by looking to the treatise sections from which the excerpts are drawn and the broader principle each section is meant to illustrate. See *id.*, at 43 ("Every offence consists of certain acts done or omitted under certain circumstances; and in an indictment for the offence, it is not sufficient to charge the defendant generally with having committed it, . . . but all the facts and circumstances constituting

the offence must be specially set forth"); *id.*, at 180 ("Every offence consists of certain acts done or omitted, under certain circumstances, all of which must be stated in the indictment . . . and be proved as laid"). And, to the extent further clarification is needed, the authority cited by the Archbold treatise to support its stated proposition with respect to the requirements of an indictment demonstrates that the treatise excerpts mean only that the prosecutor must charge and then prove at trial *the elements* of the statutory offense. See 2 M. Hale, Pleas of the Crown *170 (hereinafter Hale) ("An indictment grounded upon an offense made by act of parliament must by express words bring the offense within the substantial description made in the act of parliament"). No Member of this Court questions the proposition that a State must charge in the indictment and prove at trial beyond a reasonable doubt the actual elements of the offense. This case, however, concerns the distinct question of when a fact that bears on a defendant's punishment, but which the legislature has not classified as an element of the charged offense, must nevertheless be treated as an offense element. The excerpts drawn from the Archbold treatise do not speak to this question at all. The history on which the Court's opinion relies provides no support for its "increase in the maximum penalty" rule.

In his concurring opinion, JUSTICE THOMAS cites additional historical evidence that, in his view, dictates an even broader rule than that set forth in the Court's opinion. The history cited by JUSTICE THOMAS does not require, as a matter of federal constitutional law, the application of the rule he advocates. To understand why, it is important to focus on the basis for JUSTICE THOMAS' argument. First, he claims that the Fifth and Sixth Amendments "codified" preexisting common law. Second, he contends that the relevant common law treated any fact that served to increase a defendant's punishment as an element of an offense. See *ante*, at 500–501. Even if JUSTICE THOMAS' first assertion were

correct—a proposition this Court has not before embraced—he fails to gather the evidence necessary to support his second assertion. Indeed, for an opinion that purports to be founded upon the original understanding of the Fifth and Sixth Amendments, JUSTICE THOMAS' concurrence is notable for its failure to discuss any historical practice, or to cite any decisions, predating (or contemporary with) the ratification of the Bill of Rights. Rather, JUSTICE THOMAS divines the common-law understanding of the Fifth and Sixth Amendment rights by consulting decisions rendered by American courts well after the ratification of the Bill of Rights, ranging primarily from the 1840's to the 1890's. Whatever those decisions might reveal about the way American state courts resolved questions regarding the distinction between a crime and its punishment under general rules of criminal pleading or their own state constitutions, the decisions fail to demonstrate any settled understanding with respect to the definition of a crime under the relevant, pre-existing common law. Thus, there is a crucial disconnect between the historical evidence JUSTICE THOMAS cites and the proposition he seeks to establish with that evidence.

An examination of the decisions cited by JUSTICE THOMAS makes clear that they did not involve a simple application of a long-settled common-law rule that any fact that increases punishment must constitute an offense element. That would have been unlikely, for there does not appear to have been any such common-law rule. The most relevant common-law principles in this area were that an indictment must charge the elements of the relevant offense and must do so with certainty. See, *e. g.*, 2 Hale *182 ("Touching the thing wherein or of which the offense is committed, there is required a certainty in an indictment"); *id.*, at *183 ("The fact itself must be certainly set down in an indictment"); *id.*, at *184 ("The offense itself must be alledged, and the manner of it"). Those principles, of course, say little about when a specific fact constitutes an element of the offense.

JUSTICE THOMAS is correct to note that American courts in the 19th century came to confront this question in their cases, and often treated facts that served to increase punishment as elements of the relevant statutory offenses. To the extent JUSTICE THOMAS' broader rule can be drawn from those decisions, the rule was one of those courts' own invention, and not a previously existing rule that would have been "codified" by the ratification of the Fifth and Sixth Amendments. Few of the decisions cited by JUSTICE THOMAS indicate a reliance on pre-existing common-law principles. In fact, the converse rule that he identifies in the 19th-century American cases—that a fact that does not make a difference in punishment need not be charged in an indictment, see, *e. g.*, *Larned* v. *Commonwealth*, 53 Mass. 240, 242–244 (1847)—was assuredly created by American courts, given that English courts of roughly the same period followed a contrary rule. See, *e. g.*, *Rex* v. *Marshall*, 1 Moody C. C. 158, 168 Eng. Rep. 1224 (1827). JUSTICE THOMAS' collection of state-court opinions is therefore of marginal assistance in determining the original understanding of the Fifth and Sixth Amendments. While the decisions JUSTICE THOMAS cites provide some authority for the rule he advocates, they certainly do not control our resolution of the *federal constitutional* question presented in the instant case and cannot, standing alone, justify overruling three decades' worth of decisions by this Court.

In contrast to JUSTICE THOMAS, the Court asserts that its rule is supported by "our cases in this area." *Ante*, at 490. That the Court begins its review of our precedent with a quotation from a dissenting opinion speaks volumes about the support that actually can be drawn from our cases for the "increase in the maximum penalty" rule announced today. See *ante*, at 484 (quoting *Almendarez-Torres*, 523 U. S., at 251 (SCALIA, J., dissenting)). The Court then cites our decision in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), to demonstrate the "lesson" that due process and jury protec-

tions extend beyond those factual determinations that affect a defendant's guilt or innocence. *Ante*, at 484. The Court explains *Mullaney* as having held that the due process proof-beyond-a-reasonable-doubt requirement applies to those factual determinations that, under a State's criminal law, make a difference in the degree of punishment the defendant receives. *Ante*, at 484. The Court chooses to ignore, however, the decision we issued two years later, *Patterson* v. *New York*, 432 U. S. 197 (1977), which clearly rejected the Court's broad reading of *Mullaney*.

In *Patterson*, the jury found the defendant guilty of second-degree murder. Under New York law, the fact that a person intentionally killed another while under the influence of extreme emotional disturbance distinguished the reduced offense of first-degree manslaughter from the more serious offense of second-degree murder. Thus, the presence or absence of this one fact was the defining factor separating a greater from a lesser punishment. Under New York law, however, the State did not need to prove the absence of extreme emotional disturbance beyond a reasonable doubt. Rather, state law imposed the burden of proving the presence of extreme emotional disturbance on the defendant, and required that the fact be proved by a preponderance of the evidence. 432 U. S., at 198–200. We rejected Patterson's due process challenge to his conviction:

> "We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch." *Id.*, at 210.

Although we characterized the factual determination under New York law as one going to the mitigation of culpability, *id.*, at 206, as opposed to the aggravation of the punishment, it is difficult to understand why the rule adopted by the Court in today's case (or the broader rule advocated by JUSTICE THOMAS) would not require the overruling of *Patterson*. Unless the Court is willing to defer to a legislature's formal definition of the elements of an offense, it is clear that the fact that Patterson did not act under the influence of extreme emotional disturbance, in substance, "increase[d] the penalty for [his] crime beyond the prescribed statutory maximum" for first-degree manslaughter. *Ante*, at 490. Nonetheless, we held that New York's requirement that the defendant, rather than the State, bear the burden of proof on this factual determination comported with the Fourteenth Amendment's Due Process Clause. *Patterson*, 432 U. S., at 205–211, 216; see also *id.*, at 204–205 (reaffirming *Leland* v. *Oregon*, 343 U. S. 790 (1952), which upheld against due process challenge Oregon's requirement that the defendant, rather than the State, bear the burden on factual determination of defendant's insanity).

Patterson is important because it plainly refutes the Court's expansive reading of *Mullaney*. Indeed, the defendant in *Patterson* characterized *Mullaney* exactly as the Court has today and we *rejected* that interpretation:

> "*Mullaney*'s holding, it is argued, is that the State may not permit the blameworthiness of an act *or the severity of punishment authorized for its commission* to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt. In our view, the *Mullaney* holding should not be so broadly read." *Patterson*, *supra*, at 214–215 (emphasis added) (footnote omitted).

We explained *Mullaney* instead as holding only "that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." 432 U. S., at 215. Because nothing had been presumed against Patterson under New York law, we found no due process violation. *Id.*, at 216. Ever since our decision in *Patterson,* we have consistently explained the holding in *Mullaney* in these limited terms and have rejected the broad interpretation the Court gives *Mullaney* today. See *Jones,* 526 U. S., at 241 ("We identified the use of a presumption to establish an essential ingredient of the offense as the curse of the Maine law [in *Mullaney*]"); *Almendarez-Torres,* 523 U. S., at 240 ("*[Mullaney]* suggests that Congress cannot permit judges to increase a sentence in light of recidivism, or any other factor, not set forth in an indictment and proved to a jury beyond a reasonable doubt. This Court's later case, *Patterson* v. *New York*, . . . however, makes absolutely clear that such a reading of *Mullaney* is wrong"); *McMillan,* 477 U. S., at 84 (same).

The case law from which the Court claims that its rule emerges consists of only one other decision—*McMillan* v. *Pennsylvania.* The Court's reliance on *McMillan* is also puzzling, given that our holding in that case points to the rejection of the Court's rule. There, we considered a Pennsylvania statute that subjected a defendant to a mandatory minimum sentence of five years' imprisonment if a judge found, by a preponderance of the evidence, that the defendant had visibly possessed a firearm during the commission of the offense for which he had been convicted. *Id.*, at 81. The petitioners claimed that the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's jury trial guarantee (as incorporated by the Fourteenth Amendment) required the State to prove to the jury beyond a reasonable

doubt that they had visibly possessed firearms. We rejected both constitutional claims. *Id.*, at 84–91, 93.

The essential holding of *McMillan* conflicts with at least two of the several formulations the Court gives to the rule it announces today. First, the Court endorses the following principle: "'[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts *that increase the prescribed range of penalties* to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" *Ante*, at 490 (emphasis added) (quoting *Jones*, *supra*, at 252–253 (STEVENS, J., concurring)). Second, the Court endorses the rule as restated in JUSTICE SCALIA's concurring opinion in *Jones*. See *ante*, at 490. There, JUSTICE SCALIA wrote: "[I]t is unconstitutional to remove from the jury the assessment of facts *that alter the congressionally prescribed range of penalties* to which a criminal defendant is exposed." *Jones*, *supra*, at 253 (emphasis added). Thus, the Court appears to hold that any fact that increases or alters *the range* of penalties to which a defendant is exposed—which, by definition, must include increases or alterations to either the minimum or maximum penalties—must be proved to a jury beyond a reasonable doubt. In *McMillan*, however, we rejected such a rule to the extent it concerned those facts that increase or alter the minimum penalty to which a defendant is exposed. Accordingly, it is incumbent on the Court not only to admit that it is overruling *McMillan*, but also to explain why such a course of action is appropriate under normal principles of *stare decisis*.

The Court's opinion does neither. Instead, it attempts to lay claim to *McMillan* as support for its "increase in the maximum penalty" rule. According to the Court, *McMillan* acknowledged that permitting a judge to make findings that expose a defendant to greater or additional punishment "may raise serious constitutional concern." *Ante*, at 486. We said nothing of the sort in *McMillan*. To the contrary, we

began our discussion of the petitioners' constitutional claims by emphasizing that we had already "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt." 477 U. S., at 84 (quoting *Patterson*, 432 U. S., at 214). We then reaffirmed the rule set forth in *Patterson*—"that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive." *McMillan*, 477 U. S., at 85. Although we acknowledged that there are constitutional limits to the State's power to define crimes and prescribe penalties, we found no need to establish those outer boundaries in *McMillan* because "several factors" persuaded us that the Pennsylvania statute did not exceed those limits, however those limits might be defined. *Id.*, at 86. The Court's assertion that *McMillan* supports the application of its bright-line rule in this area is, therefore, unfounded.

The Court nevertheless claims to find support for its rule in our discussion of one factor in *McMillan*—namely, our statement that the petitioners' claim would have had "at least more superficial appeal" if the firearm possession finding had exposed them to greater or additional punishment. *Id.*, at 88. To say that a claim may have had "more superficial appeal" is, of course, a far cry from saying that a claim would have been upheld. Moreover, we made that statement in the context of examining one of several factors that, in combination, ultimately gave "no doubt that Pennsylvania's [statute fell] on the permissible side of the constitutional line." *Id.*, at 91. The confidence of that conclusion belies any argument that our ruling would have been different had the Pennsylvania statute instead increased the maximum penalty to which the petitioners were exposed. In short, it is clear that we did not articulate any bright-line rule that States must prove to a jury beyond a reasonable doubt any fact that exposes a defendant to a greater punishment.

Such a rule would have been in substantial tension with both our earlier acknowledgment that *Patterson* rejected such a rule, see 477 U. S., at 84, and our recognition that a state legislature's definition of the elements is normally dispositive, see *id.*, at 85. If any single rule can be derived from *McMillan*, it is not the Court's "increase in the maximum penalty" principle, but rather the following: When a State takes a fact that has always been considered by sentencing courts to bear on punishment, and dictates the precise weight that a court should give that fact in setting a defendant's sentence, the relevant fact need not be proved to a jury beyond a reasonable doubt as would an element of the offense. See *id.*, at 89–90.

Apart from *Mullaney* and *McMillan*, the Court does not claim to find support for its rule in any other pre-*Jones* decision. Thus, the Court is in error when it says that its rule emerges from our case law. Nevertheless, even if one were willing to assume that *Mullaney* and *McMillan* lend some support for the Court's position, that feeble foundation is shattered by several of our precedents directly addressing the issue. The only one of those decisions that the Court addresses at any length is *Almendarez-Torres*. There, we squarely rejected the "increase in the maximum penalty" rule: "Petitioner also argues, in essence, that this Court should simply adopt a rule that any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement. We have explained why we believe the Constitution, as interpreted in *McMillan* and earlier cases, does not impose that requirement." 523 U. S., at 247. Whether *Almendarez-Torres* directly refuted the "increase in the maximum penalty" rule was extensively debated in *Jones*, and that debate need not be repeated here. See 526 U. S., at 248–249; *id.*, at 268–270 (KENNEDY, J., dissenting). I continue to agree with JUSTICE KENNEDY that *Almendarez-Torres* constituted a clear repudiation of the rule the Court adopts today. See *Jones*, *supra*, at 268 (dis-

senting opinion). My understanding is bolstered by *Monge* v. *California*, a decision relegated to a footnote by the Court today. In *Monge*, in reasoning essential to our holding, we reiterated that "the Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed." 524 U. S., at 729 (citing *Almendarez-Torres*). At the very least, *Monge* demonstrates that *Almendarez-Torres* was not an "exceptional departure" from "historic practice." *Ante*, at 487.

Of all the decisions that refute the Court's "increase in the maximum penalty" rule, perhaps none is as important as *Walton* v. *Arizona*, 497 U. S. 639 (1990). There, a jury found Walton, the petitioner, guilty of first-degree murder. Under Arizona law, a trial court conducts a separate sentencing hearing to determine whether a defendant convicted of first-degree murder should receive the death penalty or life imprisonment. See *id.*, at 643 (citing Ariz. Rev. Stat. Ann. § 13–703(B) (1989)). At that sentencing hearing, the judge, rather than the jury, must determine the existence or nonexistence of the statutory aggravating and mitigating factors. See *Walton*, 497 U. S., at 643 (quoting § 13–703(B)). The Arizona statute directs the judge to "'impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in [the statute] and that there are no mitigating circumstances sufficiently substantial to call for leniency.'" *Id.*, at 644 (quoting § 13–703(E)). Thus, under Arizona law, a defendant convicted of first-degree murder can be sentenced to death *only if* the judge finds the existence of a statutory aggravating factor.

Walton challenged the Arizona capital sentencing scheme, arguing that the Constitution requires that the jury, and not the judge, make the factual determination of the existence or nonexistence of the statutory aggravating factors. We rejected that contention: "'Any argument that the Constitution requires that a jury impose the sentence of death or

make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.'" *Id.*, at 647 (quoting *Clemons* v. *Mississippi*, 494 U. S. 738, 745 (1990)). Relying in part on our decisions rejecting challenges to Florida's capital sentencing scheme, which also provided for sentencing by the trial judge, we added that "'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" *Walton*, *supra*, at 648 (quoting *Hildwin* v. *Florida*, 490 U. S. 638, 640–641 (1989) *(per curiam)*).

While the Court can cite no decision that would require its "increase in the maximum penalty" rule, *Walton* plainly rejects it. Under Arizona law, the fact that a statutory aggravating circumstance exists in the defendant's case "'increases the maximum penalty for [the] crime'" of first-degree murder to death. *Ante*, at 476 (quoting *Jones*, *supra*, at 243, n. 6). If the judge does not find the existence of a statutory aggravating circumstance, the maximum punishment authorized by the jury's guilty verdict is life imprisonment. Thus, using the terminology that the Court itself employs to describe the constitutional fault in the New Jersey sentencing scheme presented here, under Arizona law, the judge's finding that a statutory aggravating circumstance exists "exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Ante*, at 483 (emphasis in original). Even JUSTICE THOMAS, whose vote is necessary to the Court's opinion today, agrees on this point. See *ante*, at 522 (concurring opinion). If a State can remove from the jury a factual determination that makes the difference between life and death, as *Walton* holds that it can, it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence to which a defendant is exposed.

The distinction of *Walton* offered by the Court today is baffling, to say the least. The key to that distinction is the Court's claim that, in Arizona, the jury makes all of the findings necessary to expose the defendant to a death sentence. See *ante*, at 496–497 (quoting *Almendarez-Torres*, 523 U. S., at 257, n. 2 (SCALIA, J., dissenting)). As explained above, that claim is demonstrably untrue. A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty. Indeed, at the time *Walton* was decided, the author of the Court's opinion today understood well the issue at stake. See *Walton*, 497 U. S., at 709 (STEVENS, J., dissenting) ("[U]nder Arizona law, as construed by Arizona's highest court, a first-degree murder is not punishable by a death sentence until at least one statutory aggravating circumstance has been proved"). In any event, the extent of our holding in *Walton* should have been perfectly obvious from the face of our decision. We upheld the Arizona scheme specifically on the ground that the Constitution does not require the jury to make the factual findings that serve as the "'prerequisite to imposition of [a death] sentence,'" *id.*, at 647 (quoting *Clemons*, *supra*, at 745), or "'the specific findings authorizing the imposition of the sentence of death,'" *Walton*, *supra*, at 648 (quoting *Hildwin*, *supra*, at 640–641). If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today.

The distinction of *Walton* offered by JUSTICE THOMAS is equally difficult to comprehend. According to JUSTICE THOMAS, because the Constitution requires state legislatures to narrow sentencing discretion in the capital punishment context, facts that expose a convicted defendant to a capital sentence may be different from all other facts that expose a defendant to a more severe sentence. See *ante*, at 522–523.

JUSTICE THOMAS gives no specific reason for excepting capital defendants from the constitutional protections he would extend to defendants generally, and none is readily apparent. If JUSTICE THOMAS means to say that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence, his reasoning is without precedent in our constitutional jurisprudence.

In sum, the Court's statement that its "increase in the maximum penalty" rule emerges from the history and case law that it cites is simply incorrect. To make such a claim, the Court finds it necessary to rely on irrelevant historical evidence, to ignore our controlling precedent *(e. g., Patterson)*, and to offer unprincipled and inexplicable distinctions between its decision and previous cases addressing the same subject in the capital sentencing context *(e. g., Walton)*. The Court has failed to offer any meaningful justification for deviating from years of cases both suggesting and holding that application of the "increase in the maximum penalty" rule is not required by the Constitution.

II

That the Court's rule is unsupported by the history and case law it cites is reason enough to reject such a substantial departure from our settled jurisprudence. Significantly, the Court also fails to explain adequately why the Due Process Clauses of the Fifth and Fourteenth Amendments and the jury trial guarantee of the Sixth Amendment require application of its rule. Upon closer examination, it is possible that the Court's "increase in the maximum penalty" rule rests on a meaningless formalism that accords, at best, marginal protection for the constitutional rights that it seeks to effectuate.

Any discussion of either the constitutional necessity or the likely effect of the Court's rule must begin, of course, with an understanding of what exactly that rule is. As was the case in *Jones*, however, that discussion is complicated here by the Court's failure to clarify the contours of the constitutional principle underlying its decision. See *Jones*, 526 U. S., at 267 (KENNEDY, J., dissenting). In fact, there appear to be several plausible interpretations of the constitutional principle on which the Court's decision rests.

For example, under one reading, the Court appears to hold that the Constitution requires that a fact be submitted to a jury and proved beyond a reasonable doubt only if that fact, as a formal matter, extends the range of punishment *beyond the prescribed statutory maximum*. See, *e. g.*, *ante*, at 490. A State could, however, remove from the jury (and subject to a standard of proof below "beyond a reasonable doubt") the assessment of those facts that define narrower ranges of punishment, *within the overall statutory range*, to which the defendant may be sentenced. See, *e. g.*, *ante*, at 494, n. 19. Thus, apparently New Jersey could cure its sentencing scheme, and achieve virtually the same results, by drafting its weapons possession statute in the following manner: First, New Jersey could prescribe, in the weapons possession statute itself, a range of 5 to 20 years' imprisonment for one who commits that criminal offense. Second, New Jersey could provide that only those defendants convicted under the statute who are found by a judge, by a preponderance of the evidence, to have acted with a purpose to intimidate an individual on the basis of race may receive a sentence greater than 10 years' imprisonment.

The Court's proffered distinction of *Walton* v. *Arizona* suggests that it means to announce a rule of only this limited effect. The Court claims the Arizona capital sentencing scheme is consistent with the constitutional principle underlying today's decision because Arizona's first-degree murder statute itself authorizes both life imprisonment and

the death penalty. See Ariz. Rev. Stat. Ann. § 13–1105(C) (1989). "'[O]nce a *jury* has found the defendant *guilty* of *all the elements* of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.'" *Ante*, at 497 (emphasis in original) (quoting *Almendarez-Torres*, 523 U. S., at 257, n. 2 (SCALIA, J., dissenting)). Of course, as explained above, an Arizona sentencing judge can impose the maximum penalty of death only if the judge first makes a statutorily required finding that at least one aggravating factor exists in the defendant's case. Thus, the Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense. In real terms, however, the Arizona sentencing scheme removes from the jury the assessment of a fact that determines whether the defendant can receive that maximum punishment. The only difference, then, between the Arizona scheme and the New Jersey scheme we consider here—apart from the magnitude of punishment at stake—is that New Jersey has not prescribed the 20-year maximum penalty in the same statute that it defines the crime to be punished. It is difficult to understand, and the Court does not explain, why the Constitution would require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes.

Under another reading of the Court's decision, it may mean only that the Constitution requires that a fact be submitted to a jury and proved beyond a reasonable doubt if it, as a formal matter, *increases* the range of punishment *beyond that which could legally be imposed absent that fact.* See, *e. g.*, *ante*, at 482–483, 490. A State could, however, remove from the jury (and subject to a standard of proof below "beyond a reasonable doubt") the assessment of those facts that, as a formal matter, *decrease* the range of punishment *below that which could legally be imposed absent that fact.* Thus, consistent with our decision in *Patterson*, New

Jersey could cure its sentencing scheme, and achieve virtually the same results, by drafting its weapons possession statute in the following manner: First, New Jersey could prescribe, in the weapons possession statute itself, a range of 5 to 20 years' imprisonment for one who commits that criminal offense. Second, New Jersey could provide that a defendant convicted under the statute whom a judge finds, by a preponderance of the evidence, *not* to have acted with a purpose to intimidate an individual on the basis of race may receive a sentence no greater than 10 years' imprisonment.

The rule that JUSTICE THOMAS advocates in his concurring opinion embraces this precise distinction between a fact that increases punishment and a fact that decreases punishment. See *ante*, at 501 ("[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)"). The historical evidence on which JUSTICE THOMAS relies, however, demonstrates both the difficulty and the pure formalism of making a constitutional "elements" rule turn on such a difference. For example, the Wisconsin statute considered in *Lacy* v. *State*, 15 Wis. *13 (1862), could plausibly qualify as either increasing or mitigating punishment on the basis of the same specified fact. There, Wisconsin provided that the willful and malicious burning of a dwelling house in which "the life of no person shall have been destroyed" was punishable by 7 to 14 years in prison, but that the same burning at a time in which "there was no person lawfully in the dwelling house" was punishable by only 3 to 10 years in prison. Wis. Rev. Stat., ch. 165, § 1 (1858). Although the statute appeared to make the *absence* of persons from the affected dwelling house a fact that mitigated punishment, the Wisconsin Supreme Court found that the *presence* of a person in the affected house constituted an aggravating circumstance. *Lacy*, *supra*, at *15–*16. As both this example and the above hypothetical redrafted New Jersey statute demonstrate, see *supra*, at 540, whether a fact is responsible for an

increase or a decrease in punishment rests in the eye of the beholder. Again, it is difficult to understand, and neither the Court nor JUSTICE THOMAS explains, why the Constitution would require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes.

If either of the above readings is all that the Court's decision means, "the Court's principle amounts to nothing more than chastising [the New Jersey Legislature] for failing to use the approved phrasing in expressing its intent as to how [unlawful weapons possession] should be punished." *Jones*, 526 U. S., at 267 (KENNEDY, J., dissenting). If New Jersey can, consistent with the Constitution, make precisely the same differences in punishment turn on precisely the same facts, and can remove the assessment of those facts from the jury and subject them to a standard of proof below "beyond a reasonable doubt," it is impossible to say that the Fifth, Sixth, and Fourteenth Amendments require the Court's rule. For the same reason, the "structural democratic constraints" that might discourage a legislature from enacting either of the above hypothetical statutes would be no more significant than those that would discourage the enactment of New Jersey's present sentence-enhancement statute. See *ante*, at 490–491, n. 16 (majority opinion). In all three cases, the legislature is able to calibrate punishment perfectly, and subject to a maximum penalty only those defendants whose cases satisfy the sentence-enhancement criterion. As JUSTICE KENNEDY explained in *Jones*, "[n]o constitutional values are served by so formalistic an approach, while its constitutional costs in statutes struck down . . . are real." 526 U. S., at 267.

Given the pure formalism of the above readings of the Court's opinion, one suspects that the constitutional principle underlying its decision is more far reaching. The actual principle underlying the Court's decision may be that any fact (other than prior conviction) that has the effect, *in real terms*, of increasing the maximum punishment beyond an

otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt. See, *e. g.*, *ante*, at 494 ("[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"). The principle thus would apply not only to schemes like New Jersey's, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (*e. g.*, the federal Sentencing Guidelines). JUSTICE THOMAS essentially concedes that the rule outlined in his concurring opinion would require the invalidation of the Sentencing Guidelines. See *ante*, at 523, n. 11.

I would reject any such principle. As explained above, it is inconsistent with our precedent and would require the Court to overrule, at a minimum, decisions like *Patterson* and *Walton*. More importantly, given our approval of—and the significant history in this country of—discretionary sentencing by judges, it is difficult to understand how the Fifth, Sixth, and Fourteenth Amendments could possibly require the Court's or JUSTICE THOMAS' rule. Finally, in light of the adoption of determinate-sentencing schemes by many States and the Federal Government, the consequences of the Court's and JUSTICE THOMAS' rules in terms of sentencing schemes invalidated by today's decision will likely be severe.

As the Court acknowledges, we have never doubted that the Constitution permits Congress and the state legislatures to define criminal offenses, to prescribe broad ranges of punishment for those offenses, and to give judges discretion to decide where within those ranges a particular defendant's punishment should be set. See *ante*, at 481–482. That view accords with historical practice under the Constitution. "From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion. The great

majority of federal criminal statutes have stated only a maximum term of years and a maximum monetary fine, permitting the sentencing judge to impose any term of imprisonment and any fine up to the statutory maximum." K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1998) (footnote omitted). Under discretionary-sentencing schemes, a judge bases the defendant's sentence on any number of facts neither presented at trial nor found by a jury beyond a reasonable doubt. As one commentator has explained:

> "During the age of broad judicial sentencing discretion, judges frequently made sentencing decisions on the basis of facts that they determined for themselves, on less than proof beyond a reasonable doubt, without eliciting very much concern from civil libertarians. . . . The sentence in any number of traditional discretionary situations depended quite directly on judicial findings of specific contested facts. . . . Whether because such facts were directly relevant to the judge's retributionist assessment of how serious the particular offense was (within the spectrum of conduct covered by the statute of conviction), or because they bore on a determination of how much rehabilitation the offender's character was likely to need, the sentence would be higher or lower, in some specific degree determined by the judge, based on the judge's factual conclusions." Lynch, Towards A Model Penal Code, Second (Federal?), 2 Buffalo Crim. L. Rev. 297, 320 (1998) (footnote omitted).

Accordingly, under the discretionary-sentencing schemes, a factual determination made by a judge on a standard of proof below "beyond a reasonable doubt" often made the difference between a lesser and a greater punishment.

For example, in *Williams* v. *New York*, a jury found the defendant guilty of first-degree murder and recommended life imprisonment. The judge, however, rejected the jury's

recommendation and sentenced Williams to death on the basis of additional facts that he learned through a presentence investigation report and that had neither been charged in an indictment nor presented to the jury. 337 U. S., at 242–245. In rejecting Williams' due process challenge to his death sentence, we explained that there was a long history of sentencing judges exercising "wide discretion in the sources and types of evidence used to assist [them] in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id.*, at 246. Specifically, we held that the Constitution does not restrict a judge's sentencing decision to information that is charged in an indictment and subject to cross-examination in open court. "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." *Id.*, at 251.

Under our precedent, then, a State may leave the determination of a defendant's sentence to a judge's discretionary decision within a prescribed range of penalties. When a judge, pursuant to that sentencing scheme, decides to increase a defendant's sentence on the basis of certain contested facts, those facts need not be proved to a jury beyond a reasonable doubt. The judge's findings, whether by proof beyond a reasonable doubt or less, suffice for purposes of the Constitution. Under the Court's decision today, however, it appears that once a legislature constrains judges' sentencing discretion by prescribing certain sentences that may only be imposed (or must be imposed) in connection with the same determinations of the same contested facts, the Constitution requires that the facts instead be proved to a jury beyond a reasonable doubt. I see no reason to treat the two schemes differently. See, *e. g.*, *McMillan*, 477 U. S., at 92 ("We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance"). In this respect, I agree with the Solicitor General that "[a] sen-

tence that is constitutionally permissible when selected by a court on the basis of whatever factors it deems appropriate does not become impermissible simply because the court is permitted to select that sentence only after making a finding prescribed by the legislature." Brief for United States as *Amicus Curiae* 7. Although the Court acknowledges the legitimacy of discretionary sentencing by judges, see *ante*, at 481–482, it never provides a sound reason for treating judicial factfinding under determinate-sentencing schemes differently under the Constitution.

Justice Thomas' attempt to explain this distinction is similarly unsatisfying. His explanation consists primarily of a quotation, in turn, of a 19th-century treatise writer, who contended that the aggravation of punishment within a statutory range on the basis of facts found by a judge "'is an entirely different thing from punishing one for what is not alleged against him.'" *Ante*, at 519 (quoting 1 J. Bishop, Commentaries on Law of Criminal Procedure § 85, p. 54 (rev. 2d ed. 1872)). As our decision in *Williams* v. *New York* demonstrates, however, that statement does not accurately describe the reality of discretionary sentencing conducted by judges. A defendant's actual punishment can be affected in a very real way by facts never alleged in an indictment, never presented to a jury, and never proved beyond a reasonable doubt. In Williams' case, facts presented for the first time to the judge, for purposes of sentencing alone, made the difference between life imprisonment and a death sentence.

Consideration of the purposes underlying the Sixth Amendment's jury trial guarantee further demonstrates why our acceptance of judge-made findings in the context of discretionary sentencing suggests the approval of the same judge-made findings in the context of determinate sentencing as well. One important purpose of the Sixth Amendment's jury trial guarantee is to protect the criminal defendant against potentially arbitrary judges. It effectuates this promise by preserving, as a constitutional matter, certain

fundamental decisions for a jury of one's peers, as opposed to a judge. For example, the Court has recognized that the Sixth Amendment's guarantee was motivated by the English experience of "competition . . . between judge and jury over the real significance of their respective roles," *Jones*, 526 U. S., at 245, and "measures [that were taken] to diminish the juries' power," *ibid.* We have also explained that the jury trial guarantee was understood to provide "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968). Blackstone explained that the right to trial by jury was critically important in criminal cases because of "the violence and partiality of judges appointed by the crown, . . . who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure." 4 Blackstone, Commentaries, at 343. Clearly, the concerns animating the Sixth Amendment's jury trial guarantee, if they were to extend to the sentencing context at all, would apply with greater strength to a discretionary-sentencing scheme than to determinate sentencing. In the former scheme, the potential for mischief by an arbitrary judge is much greater, given that the judge's decision of where to set the defendant's sentence within the prescribed statutory range is left almost entirely to discretion. In contrast, under a determinate-sentencing system, the discretion the judge wields within the statutory range is tightly constrained. Accordingly, our approval of discretionary-sentencing schemes, in which a defendant is not entitled to have a jury make factual findings relevant to sentencing despite the effect those findings have on the severity of the defendant's sentence, demonstrates that the defendant should have no right to demand that a jury make

the equivalent factual determinations under a determinate-sentencing scheme.

The Court appears to hold today, however, that a defendant is entitled to have a jury decide, by proof beyond a reasonable doubt, every fact relevant to the determination of sentence under a determinate-sentencing scheme. If this is an accurate description of the constitutional principle underlying the Court's opinion, its decision will have the effect of invalidating significant sentencing reform accomplished at the federal and state levels over the past three decades. JUSTICE THOMAS' rule, as he essentially concedes, see *ante*, at 523, n. 11, would have the same effect.

Prior to the most recent wave of sentencing reform, the Federal Government and the States employed indeterminate-sentencing schemes in which judges and executive branch officials (*e. g.*, parole board officials) had substantial discretion to determine the actual length of a defendant's sentence. See, *e. g.*, U. S. Dept. of Justice, S. Shane-DuBow, A. Brown, & E. Olsen, Sentencing Reform in the United States: History, Content, and Effect 6–7 (Aug. 1985) (hereinafter Shane-DuBow); Report of Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment 11–13 (1976) (hereinafter Task Force Report); A. Dershowitz, Criminal Sentencing in the United States: An Historical and Conceptual Overview, 423 Annals Am. Acad. Pol. & Soc. Sci. 117, 128–129 (1976). Studies of indeterminate-sentencing schemes found that similarly situated defendants often received widely disparate sentences. See, *e. g.*, Shane-Dubow 7; Task Force Report 14. Although indeterminate sentencing was intended to soften the harsh and uniform sentences formerly imposed under mandatory-sentencing systems, some studies revealed that indeterminate sentencing actually had the opposite effect. See, *e. g.*, A. Campbell, Law of Sentencing 13 (1978) ("Paradoxically the humanitarian impulse sparking the adoption of indeterminate sentencing systems in this country has resulted in

an actual increase of the average criminal's incarceration term"); Task Force Report 13 ("[T]he data seem to indicate that in those jurisdictions where the sentencing structure is more indeterminate, judicially imposed sentences tend to be longer").

In response, Congress and the state legislatures shifted to determinate-sentencing schemes that aimed to limit judges' sentencing discretion and, thereby, afford similarly situated offenders equivalent treatment. See, *e. g.*, Cal. Penal Code Ann. § 1170 (West Supp. 2000). The most well known of these reforms was the federal Sentencing Reform Act of 1984, 18 U. S. C. § 3551 *et seq.* In the Act, Congress created the United States Sentencing Commission, which in turn promulgated the Sentencing Guidelines that now govern sentencing by federal judges. See, *e. g.*, United States Sentencing Commission, Guidelines Manual (Nov. 1998). Whether one believes the determinate-sentencing reforms have proved successful or not—and the subject is one of extensive debate among commentators—the apparent effect of the Court's opinion today is to halt the current debate on sentencing reform in its tracks and to invalidate with the stroke of a pen three decades' worth of nationwide reform, all in the name of a principle with a questionable constitutional pedigree. Indeed, it is ironic that the Court, in the name of constitutional rights meant to protect criminal defendants from the potentially arbitrary exercise of power by prosecutors and judges, appears to rest its decision on a principle that would render unconstitutional efforts by Congress and the state legislatures to place constraints on that very power in the sentencing context.

Finally, perhaps the most significant impact of the Court's decision will be a practical one—its unsettling effect on sentencing conducted under current federal and state determinate-sentencing schemes. As I have explained, the Court does not say whether these schemes are constitutional,

but its reasoning strongly suggests that they are not. Thus, with respect to past sentences handed down by judges under determinate-sentencing schemes, the Court's decision threatens to unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of the Court's decision today. Statistics compiled by the United States Sentencing Commission reveal that almost a half-million cases have been sentenced under the Sentencing Guidelines since 1989. See Memorandum from U. S. Sentencing Commission to Supreme Court Library, dated June 8, 2000 (total number of cases sentenced under federal Sentencing Guidelines since 1989) (available in Clerk of Court's case file). Federal cases constitute only the tip of the iceberg. In 1998, for example, federal criminal prosecutions represented only about 0.4% of the total number of criminal prosecutions in federal and state courts. See National Center for State Courts, A National Perspective: Court Statistics Project (federal and state court filings, 1998), http://www.ncsc.dni.us/divisions/research/csp/csp98-fscf.html (showing that, in 1998, 57,691 criminal cases were filed in federal court compared to 14,623,330 in state courts) (available in Clerk of Court's case file). Because many States, like New Jersey, have determinate-sentencing schemes, the number of individual sentences drawn into question by the Court's decision could be colossal.

The decision will likely have an even more damaging effect on sentencing conducted in the immediate future under current determinate-sentencing schemes. Because the Court fails to clarify the precise contours of the constitutional principle underlying its decision, federal and state judges are left in a state of limbo. Should they continue to assume the constitutionality of the determinate-sentencing schemes under which they have operated for so long, and proceed to sentence convicted defendants in accord with those governing statutes and guidelines? The Court provides no answer,

yet its reasoning suggests that each new sentence will rest on shaky ground. The most unfortunate aspect of today's decision is that our precedents did not foreordain this disruption in the world of sentencing. Rather, our cases traditionally took a cautious approach to questions like the one presented in this case. The Court throws that caution to the wind and, in the process, threatens to cast sentencing in the United States into what will likely prove to be a lengthy period of considerable confusion.

III

Because I do not believe that the Court's "increase in the maximum penalty" rule is required by the Constitution, I would evaluate New Jersey's sentence-enhancement statute, N. J. Stat. Ann. § 2C:44–3 (West Supp. 2000), by analyzing the factors we have examined in past cases. See, *e. g.*, *Almendarez-Torres*, 523 U. S., at 242–243; *McMillan*, 477 U. S., at 86–90. First, the New Jersey statute does not shift the burden of proof on an essential ingredient of the offense by presuming that ingredient upon proof of other elements of the offense. See, *e. g.*, *id.*, at 86–87; *Patterson*, 432 U. S., at 215. Second, the magnitude of the New Jersey sentence enhancement, as applied in petitioner's case, is constitutionally permissible. Under New Jersey law, the weapons possession offense to which petitioner pleaded guilty carries a sentence range of 5 to 10 years' imprisonment. N. J. Stat. Ann. §§ 2C:39–4(a), 2C:43–6(a)(2) (West 1995). The fact that petitioner, in committing that offense, acted with a purpose to intimidate because of race exposed him to a higher sentence range of 10 to 20 years' imprisonment. § 2C:43–7(a)(3). The 10-year increase in the maximum penalty to which petitioner was exposed falls well within the range we have found permissible. See *Almendarez-Torres*, *supra*, at 226, 242–243 (approving 18-year enhancement). Third, the New Jersey statute gives no impression of having been

enacted to evade the constitutional requirements that attach when a State makes a fact an element of the charged offense. For example, New Jersey did not take what had previously been an element of the weapons possession offense and transform it into a sentencing factor. See *McMillan*, 477 U. S., at 89.

In sum, New Jersey "simply took one factor that has always been considered by sentencing courts to bear on punishment"—a defendant's motive for committing the criminal offense—"and dictated the precise weight to be given that factor" when the motive is to intimidate a person because of race. *Id.*, at 89–90. The Court claims that a purpose to intimidate on account of race is a traditional *mens rea* element, and not a motive. See *ante*, at 492–493. To make this claim, the Court finds it necessary once again to ignore our settled precedent. In *Wisconsin* v. *Mitchell*, 508 U. S. 476 (1993), we considered a statute similar to the one at issue here. The Wisconsin statute provided for an increase in a convicted defendant's punishment if the defendant intentionally selected the victim of the crime because of that victim's race. *Id.*, at 480. In a unanimous decision upholding the statute, we specifically characterized it as providing a sentence enhancement based on the "motive" of the defendant. See *id.*, at 485 (distinguishing between punishment of defendant's "criminal conduct" and penalty enhancement "for conduct *motivated* by a discriminatory point of view" (emphasis added)); *id.*, at 484–485 ("[U]nder the Wisconsin statute the same criminal conduct may be more heavily punished if the victim is selected because of his race . . . than if no such *motive* obtained" (emphasis added)). That same characterization applies in the case of the New Jersey statute. As we also explained in *Mitchell*, the motive for committing an offense has traditionally been an important factor in determining a defendant's sentence. *Id.*, at 485. New Jersey, therefore, has done no more than what we held permissible

in *McMillan;* it has taken a traditional sentencing factor and dictated the precise weight judges should attach to that factor when the specific motive is to intimidate on the basis of race.

The New Jersey statute resembles the Pennsylvania statute we upheld in *McMillan* in every respect but one. That difference—that the New Jersey statute increases the maximum punishment to which petitioner was exposed—does not persuade me that New Jersey "sought to evade the constitutional requirements associated with the characterization of a fact as an offense element." *Supra,* at 524. There is no question that New Jersey could prescribe a range of 5 to 20 years' imprisonment as punishment for its weapons possession offense. Thus, as explained above, the specific means by which the State chooses to control judges' discretion within that permissible range is of no moment. Cf. *Patterson, supra,* at 207–208 ("The Due Process Clause, as we see it, does not put New York to the choice of abandoning [the affirmative defense] or undertaking to disprove [its] existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment"). The New Jersey statute also resembles in virtually every respect the federal statute we considered in *Almendarez-Torres.* That the New Jersey statute provides an enhancement based on the defendant's motive while the statute in *Almendarez-Torres* provided an enhancement based on the defendant's commission of a prior felony is a difference without constitutional importance. Both factors are traditional bases for increasing an offender's sentence and, therefore, may serve as the grounds for a sentence enhancement.

On the basis of our prior precedent, then, I would hold that the New Jersey sentence-enhancement statute is constitutional, and affirm the judgment of the Supreme Court of New Jersey.

Justice Breyer, with whom The Chief Justice joins, dissenting.

The majority holds that the Constitution contains the following requirement: "[A]ny fact [other than recidivism] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Ante*, at 490. This rule would seem to promote a procedural ideal—that of juries, not judges, determining the existence of those facts upon which increased punishment turns. But the real world of criminal justice cannot hope to meet any such ideal. It can function only with the help of procedural compromises, particularly in respect to sentencing. And those compromises, which are themselves necessary for the fair functioning of the criminal justice system, preclude implementation of the procedural model that today's decision reflects. At the very least, the impractical nature of the requirement that the majority now recognizes supports the proposition that the Constitution was not intended to embody it.

I

In modern times, the law has left it to the sentencing judge to find those facts which (within broad sentencing limits set by the legislature) determine the sentence of a convicted offender. The judge's factfinding role is not inevitable. One could imagine, for example, a pure "charge offense" sentencing system in which the degree of punishment depended only upon the crime charged (*e. g.*, eight mandatory years for robbery, six for arson, three for assault). But such a system would ignore many harms and risks of harm that the offender caused or created, and it would ignore many relevant offender characteristics. See United States Sentencing Commission, Sentencing Guidelines and Policy Statements, Part A, at 1.5 (1987) (hereinafter Sentencing Guidelines or Guidelines) (pointing out that a "charge offense"

system by definition would ignore any fact "that did not constitute [a] statutory elemen[t] of the offens[e] of which the defendant was convicted"). Hence, that imaginary "charge offense" system would not be a fair system, for it would lack proportionality, *i. e.*, it would treat different offenders similarly despite major differences in the manner in which each committed the same crime.

There are many such manner-related differences in respect to criminal behavior. Empirical data collected by the Sentencing Commission make clear that, before the Guidelines, judges who exercised discretion within broad legislatively determined sentencing limits (say, a range of 0 to 20 years) would impose very different sentences upon offenders engaged in the same basic criminal conduct, depending, for example, upon the amount of drugs distributed (in respect to drug crimes), the amount of money taken (in respect to robbery, theft, or fraud), the presence or use of a weapon, injury to a victim, the vulnerability of a victim, the offender's role in the offense, recidivism, and many other offense-related or offender-related factors. See United States Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 35–39 (1987) (hereinafter Supplementary Report) (table listing data representing more than 20 such factors); see generally Department of Justice, W. Rhodes & C. Conly, Analysis of Federal Sentencing (May 1981). The majority does not deny that judges have exercised, and, constitutionally speaking, *may* exercise sentencing discretion in this way.

Nonetheless, it is important for present purposes to understand why *judges*, rather than *juries*, traditionally have determined the presence or absence of such sentence-affecting facts in any given case. And it is important to realize that the reason is not a theoretical one, but a practical one. It does not reflect (JUSTICE SCALIA's opinion to the contrary notwithstanding) an ideal of procedural "fairness," *ante*, at 498 (concurring opinion), but rather an administrative need

for procedural *compromise.* There are, to put it simply, far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury. As the Sentencing Guidelines state the matter,

> "[a] bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth." Sentencing Guidelines, Part A, at 1.2.

The Guidelines note that "a sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect." *Ibid.* To ask a jury to consider all, or many, such matters would do the same.

At the same time, to require jury consideration of all such factors—say, during trial where the issue is guilt or innocence—could easily place the defendant in the awkward (and conceivably unfair) position of having to deny he committed the crime yet offer proof about how he committed it, *e. g.*, "I did not sell drugs, but I sold no more than 500 grams." And while special postverdict sentencing juries could cure this problem, they have seemed (but for capital cases) not worth their administrative costs. Hence, before the Guidelines, federal sentencing judges typically would obtain relevant factual sentencing information from probation officers' presentence reports, while permitting a convicted offender to challenge the information's accuracy at a hearing before the judge without benefit of trial-type evidentiary rules. See *Williams* v. *New York*, 337 U. S. 241,

249–251 (1949) (describing the modern "practice of individualizing punishments" under which judges often consider otherwise inadmissible information gleaned from probation reports); see also Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 Harv. L. Rev. 904, 915–917 (1962).

It is also important to understand how a judge traditionally determined which factors should be taken into account for sentencing purposes. In principle, the number of potentially relevant behavioral characteristics is endless. A judge might ask, for example, whether an unlawfully possessed knife was "a switchblade, drawn or concealed, opened or closed, large or small, used in connection with a car theft (where victim confrontation is rare), a burglary (where confrontation is unintended) or a robbery (where confrontation is intentional)." United States Sentencing Commission, Preliminary Observations of the Commission on Commissioner Robinson's Dissent 3, n. 3 (May 1, 1987). Again, the method reflects practical, rather than theoretical, considerations. Prior to the Sentencing Guidelines, federal law left the individual sentencing judge free to determine which factors were relevant. That freedom meant that each judge, in an effort to tailor punishment to the individual offense and offender, was guided primarily by experience, relevance, and a sense of proportional fairness. Cf. Supplementary Report 16–17 (noting that the goal of the Sentencing Guidelines was to create greater sentencing uniformity among judges, but in doing so the Guidelines themselves had to rely primarily upon empirical studies that showed which factors had proved important to federal judges in the past).

Finally, it is important to understand how a legislature decides which factual circumstances among all those potentially related to generally harmful behavior it should transform into elements of a statutorily defined crime (where they would become relevant to the guilt or innocence of an accused), and which factual circumstances it should leave to

the sentencing process (where, as sentencing factors, they would help to determine the sentence imposed upon one who has been found guilty). Again, theory does not provide an answer. Legislatures, in defining crimes in terms of elements, have looked for guidance to common-law tradition, to history, and to current social need. And, traditionally, the Court has left legislatures considerable freedom to make the element determination. See *Almendarez-Torres* v. *United States*, 523 U. S. 224, 228 (1998); *McMillan* v. *Pennsylvania*, 477 U. S. 79, 85 (1986).

By placing today's constitutional question in a broader context, this brief survey may help to clarify the nature of today's decision. It also may explain why, in respect to sentencing systems, proportionality, uniformity, and administrability are all aspects of that basic "fairness" that the Constitution demands. And it suggests my basic problem with the Court's rule: A sentencing system in which judges have discretion to find sentencing-related factors is a workable system and one that has long been thought consistent with the Constitution; why, then, would the Constitution treat sentencing *statutes* any differently?

II

As JUSTICE THOMAS suggests, until fairly recent times many legislatures rarely focused upon sentencing factors. Rather, it appears they simply identified typical forms of antisocial conduct, defined basic "crimes," and attached a broad sentencing range to each definition—leaving judges free to decide how to sentence within those ranges in light of such factors as they found relevant. *Ante*, at 510–512, 518 (concurring opinion). But the Constitution does not freeze 19th-century sentencing practices into permanent law. And dissatisfaction with the traditional sentencing system (reflecting its tendency to treat similar cases differently) has led modern legislatures to write new laws that refer specifically to sentencing factors. See Supplementary Report 1

(explaining that "a growing recognition of the need to bring greater rationality and consistency to penal statutes and to sentences imposed under those statutes" led to reform efforts such as the Federal Sentencing Guidelines).

Legislatures have tended to address the problem of too much judicial sentencing discretion in two ways. First, legislatures sometimes have created sentencing commissions armed with delegated authority to make more uniform judicial exercise of that discretion. Congress, for example, has created a federal Sentencing Commission, giving it the power to create Guidelines that (within the sentencing range set by individual statutes) reflect the host of factors that might be used to determine the actual sentence imposed for each individual crime. See 28 U. S. C. § 994(a); see also United States Sentencing Commission, Guidelines Manual (Nov. 1999). Federal judges must apply those Guidelines in typical cases (those that lie in the "heartland" of the crime as the statute defines it) while retaining freedom to depart in atypical cases. *Id.*, ch. 1, pt. A, 4(b).

Second, legislatures sometimes have directly limited the use (by judges or by a commission) of particular factors in sentencing, either by specifying statutorily how a particular factor will affect the sentence imposed or by specifying how a commission should use a particular factor when writing a guideline. Such a statute might state explicitly, for example, that a particular factor, say, use of a weapon, recidivism, injury to a victim, or bad motive, "shall" increase, or "may" increase, a particular sentence in a particular way. See, *e. g.*, *McMillan*, *supra*, at 83 (Pennsylvania statute expressly treated "visible possession of a firearm" as a sentencing consideration that subjected a defendant to a mandatory 5-year term of imprisonment).

The issue the Court decides today involves this second kind of legislation. The Court holds that a legislature cannot enact such legislation (where an increase in the maximum is involved) unless the factor at issue has been charged,

tried to a jury, and found to exist beyond a reasonable doubt. My question in respect to this holding is, simply, "*why* would the Constitution contain such a requirement"?

III

In light of the sentencing background described in Parts I and II, I do not see how the majority can find in the Constitution a requirement that "any fact" (other than recidivism) that increases the maximum penalty for a crime "must be submitted to a jury." *Ante*, at 490. As JUSTICE O'CONNOR demonstrates, this Court has previously failed to view the Constitution as embodying any such principle, while sometimes finding to the contrary. See *Almendarez-Torres*, *supra*, at 239–247; *McMillan*, *supra*, at 84–91. The majority raises no objection to traditional pre-Guidelines sentencing procedures under which judges, not juries, made the factual findings that would lead to an increase in an individual offender's sentence. How does a legislative determination differ in any significant way? For example, if a judge may on his or her own decide that victim injury or bad motive should increase a bank robber's sentence from 5 years to 10, why does it matter that a legislature instead enacts a statute that increases a bank robber's sentence from 5 years to 10 based on this same judicial finding?

With the possible exception of the last line of JUSTICE SCALIA's concurring opinion, the majority also makes no constitutional objection to a legislative delegation to a commission of the authority to create guidelines that determine how a judge is to exercise sentencing discretion. See also *ante*, at 523, n. 11 (THOMAS, J., concurring) (reserving the question). But if the Constitution permits Guidelines, why does it not permit Congress similarly to guide the exercise of a judge's sentencing discretion? That is, if the Constitution permits a delegatee (the commission) to exercise sentencing-related rulemaking power, how can it deny the

delegator (the legislature) what is, in effect, the same rule-making power?

The majority appears to offer two responses. First, it argues for a limiting principle that would prevent a legislature with broad authority from transforming (jury-determined) facts that constitute elements of a crime into (judge-determined) sentencing factors, thereby removing procedural protections that the Constitution would otherwise require. See *ante*, at 486 ("[C]onstitutional limits" prevent States from "defin[ing] away facts necessary to constitute a criminal offense"). The majority's cure, however, is not aimed at the disease.

The same "transformational" problem exists under traditional sentencing law, where legislation, silent as to sentencing factors, grants the judge virtually unchecked discretion to sentence within a broad range. Under such a system, judges or prosecutors can similarly "transform" crimes, punishing an offender convicted of one crime as if he had committed another. A prosecutor, for example, might charge an offender with five counts of embezzlement (each subject to a 10-year maximum penalty), while asking the judge to impose maximum and consecutive sentences because the embezzler murdered his employer. And, as part of the traditional sentencing discretion that the majority concedes judges retain, the judge, not a jury, would determine the last-mentioned relevant fact, *i. e.*, that the murder actually occurred.

This egregious example shows the problem's complexity. The source of the problem lies not in a legislature's power to enact sentencing factors, but in the traditional legislative power to select elements defining a crime, the traditional legislative power to set broad sentencing ranges, and the traditional judicial power to choose a sentence within that range on the basis of relevant offender conduct. Conversely, the solution to the problem lies, not in prohibiting legislatures from enacting sentencing factors, but in sentencing rules that determine punishments on the basis of properly defined

relevant conduct, with sensitivity to the need for procedural protections where sentencing factors are determined by a judge (for example, use of a "reasonable doubt" standard), and invocation of the Due Process Clause where the history of the crime at issue, together with the nature of the facts to be proved, reveals unusual and serious procedural unfairness. Cf. *McMillan*, 477 U. S., at 88 (upholding statute in part because it "gives no impression of having been tailored to permit the [sentencing factor] to be a tail which wags the dog of the substantive offense").

Second, the majority, in support of its constitutional rule, emphasizes the concept of a statutory "maximum." The Court points out that a sentencing judge (or a commission) traditionally has determined, and now still determines, sentences *within* a legislated range capped by a maximum (a range that the legislature itself sets). See *ante*, at 481–482. I concede the truth of the majority's statement, but I do not understand its relevance.

From a defendant's perspective, the legislature's decision to cap the possible range of punishment at a statutorily prescribed "maximum" would affect the actual sentence imposed no differently than a sentencing commission's (or a sentencing judge's) similar determination. Indeed, as a practical matter, a legislated mandatory "minimum" is far more important to an actual defendant. A judge and a commission, after all, are legally free to select any sentence below a statute's maximum, but they are not free to subvert a statutory minimum. And, as JUSTICE THOMAS indicates, all the considerations of fairness that might support submission to a jury of a factual matter that increases a statutory maximum apply *a fortiori* to any matter that would increase a statutory minimum. See *ante*, at 521–522 (concurring opinion). To repeat, I do not understand why, when a legislature *authorizes* a judge to impose a higher penalty for bank robbery (based, say, on the court's finding that a victim was injured or the defendant's motive was bad), a new crime is born; but

where a legislature *requires* a judge to impose a higher penalty than he otherwise would (within a pre-existing statutory range) based on similar criteria, it is not. Cf. *Almendarez-Torres*, 523 U. S., at 246.

IV

I certainly do not believe that the present sentencing system is one of "perfect equity," *ante*, at 498 (SCALIA, J., concurring), and I am willing, consequently, to assume that the majority's rule would provide a degree of increased procedural protection in respect to those particular sentencing factors currently embodied in statutes. I nonetheless believe that any such increased protection provides little practical help and comes at too high a price. For one thing, by leaving mandatory minimum sentences untouched, the majority's rule simply encourages any legislature interested in asserting control over the sentencing process to do so by creating those minimums. That result would mean significantly less procedural fairness, not more.

For another thing, this Court's case law, prior to *Jones* v. *United States*, 526 U. S. 227, 243, n. 6 (1999), led legislatures to believe that they were permitted to increase a statutory maximum sentence on the basis of a sentencing factor. See *ante*, at 529–539 (O'CONNOR, J., dissenting); see also, *e. g.*, *McMillan*, *supra*, at 84–91 (indicating that a legislature could impose mandatory sentences on the basis of sentencing factors, thereby suggesting it could impose more flexible statutory maximums on same basis). And legislatures may well have relied upon that belief. See, *e. g.*, 21 U. S. C. § 841(b) (1994 ed. and Supp. III) (providing penalties for, among other things, possessing a "controlled substance" with intent to distribute it, which sentences vary dramatically depending upon the amount of the drug possessed, without requiring jury determination of the amount); N. J. Stat. Ann. §§ 2C:43–6, 2C:43–7, 2C:44–1a–f, 2C:44–3 (West 1995 and Supp. 1999–2000) (setting sentencing ranges for crimes, while providing for lesser or greater punishments

depending upon judicial findings regarding certain "aggravating" or "mitigating" factors); Cal. Penal Code Ann. § 1170 (West Supp. 2000) (similar); see also Cal. Court Rule 420(b) (1996) (providing that "[c]ircumstances in aggravation and mitigation" are to be established by the sentencing judge based on "the case record, the probation officer's report, [and] other reports and statements properly received").

As JUSTICE O'CONNOR points out, the majority's rule creates serious uncertainty about the constitutionality of such statutes and about the constitutionality of the confinement of those punished under them. See *ante*, at 549–552 (dissenting opinion). The few *amicus* briefs that the Court received in this case do not discuss the impact of the Court's new rule on, for example, drug crime statutes or state criminal justice systems. This fact, I concede, may suggest that my concerns about disruption are overstated; yet it may also suggest that (despite *Jones* and given *Almendarez-Torres*) so absolute a constitutional prohibition is unexpected. Moreover, the rationale that underlies the Court's rule suggests a principle—jury determination of all sentencing-related facts—that, unless restricted, threatens the workability of every criminal justice system (if applied to judges) or threatens efforts to make those systems more uniform, hence more fair (if applied to commissions).

Finally, the Court's new rule will likely impede legislative attempts to provide authoritative guidance as to how courts should respond to the presence of traditional sentencing factors. The factor at issue here—motive—is such a factor. Whether a robber takes money to finance other crimes or to feed a starving family can matter, and long has mattered, when the length of a sentence is at issue. The State of New Jersey has determined that one motive—racial hatred—is particularly bad and ought to make a difference in respect to punishment for a crime. That determination is reasonable. The procedures mandated are consistent with traditional sentencing practice. Though additional proce-

dural protections might well be desirable, for the reasons JUSTICE O'CONNOR discusses and those I have discussed, I do not believe the Constitution requires them where ordinary sentencing factors are at issue. Consequently, in my view, New Jersey's statute is constitutional.

I respectfully dissent.

Syllabus

CALIFORNIA DEMOCRATIC PARTY ET AL. *v.* JONES, SECRETARY OF STATE OF CALIFORNIA, ET AL.

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

No. 99–401. Argued April 24, 2000—Decided June 26, 2000

One way that candidates for public office in California gain access to the general ballot is by winning a qualified political party's primary. In 1996, Proposition 198 changed the State's partisan primary from a closed primary, in which only a political party's members can vote on its nominees, to a blanket primary, in which each voter's ballot lists every candidate regardless of party affiliation and allows the voter to choose freely among them. The candidate of each party who wins the most votes is that party's nominee for the general election. Each of petitioner political parties prohibits nonmembers from voting in the party's primary. They filed suit against respondent state official, alleging, *inter alia*, that the blanket primary violated their First Amendment rights of association. Respondent Californians for an Open Primary intervened. The District Court held that the primary's burden on petitioners' associational rights was not severe and was justified by substantial state interests. The Ninth Circuit affirmed.

Held: California's blanket primary violates a political party's First Amendment right of association. Pp. 572–586.

(a) States play a major role in structuring and monitoring the primary election process, but the processes by which political parties select their nominees are not wholly public affairs that States may regulate freely. To the contrary, States must act within limits imposed by the Constitution when regulating parties' internal processes. See, *e. g.*, *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214. Respondents misplace their reliance on *Smith* v. *Allwright*, 321 U. S. 649, and *Terry* v. *Adams*, 345 U. S. 461, which held not that party affairs are public affairs, free of First Amendment protections, see, *e. g.*, *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, but only that, when a State prescribes an election process that gives a special role to political parties, the parties' discriminatory action becomes state action under the Fifteenth Amendment. This Nation has a tradition of political associations in which citizens band together to promote candidates who espouse their political views. The First Amendment protects the freedom to join together to further common political beliefs, *id.*, at 214–215, which presupposes the freedom to identify those who constitute the

association, and to limit the association to those people, *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 122. In no area is the political association's right to exclude more important than in its candidate-selection process. That process often determines the party's positions on significant public policy issues, and it is the nominee who is the party's ambassador charged with winning the general electorate over to its views. The First Amendment reserves a special place, and accords a special protection, for that process, *Eu*, *supra*, at 224, because the moment of choosing the party's nominee is the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power, *Tashjian*, *supra*, at 216. California's blanket primary violates these principles. Proposition 198 forces petitioners to adulterate their candidate-selection process—a political party's basic function—by opening it up to persons wholly unaffiliated with the party, who may have different views from the party. Such forced association has the likely outcome—indeed, it is Proposition 198's intended outcome—of changing the parties' message. Because there is no heavier burden on a political party's associational freedom, Proposition 198 is unconstitutional unless it is narrowly tailored to serve a compelling state interest. See *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 358. Pp. 572–582.

(b) None of respondents' seven proffered state interests—producing elected officials who better represent the electorate, expanding candidate debate beyond the scope of partisan concerns, ensuring that disenfranchised persons enjoy the right to an effective vote, promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy—is a compelling interest justifying California's intrusion into the parties' associational rights. Pp. 582–586.

169 F. 3d 646, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 586. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Part I, *post*, p. 590.

George Waters argued the cause for petitioners. With him on the briefs were *Lance H. Olson*, *N. Eugene Hill*, and *Charles H. Bell, Jr.*

Thomas F. Gede, Special Assistant Attorney General of California, argued the cause for respondents. With him on the brief were *Bill Lockyer*, Attorney General, *Manuel*

M. Medeiros, Senior Assistant Attorney General, *Andrea Lynn Hoch,* Lead Supervising Deputy Attorney General, and *James P. Clark.**

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether the State of California may, consistent with the First Amendment to the United States Constitution, use a so-called "blanket" primary to determine a political party's nominee for the general election.

I

Under California law, a candidate for public office has two routes to gain access to the general ballot for most state and federal elective offices. He may receive the nomination of a qualified political party by winning its primary,[1] see Cal.

*Briefs of *amici curiae* urging reversal were filed for the Eagle Forum Education & Legal Defense Fund et al. by *Erik S. Jaffe;* for the Republican National Committee et al. by *Joseph E. Sandler* and *Thomas J. Josefiak;* and for the Republican Party of Alaska, Inc., et al. by *Kenneth P. Jacobus.*

Briefs of *amici curiae* urging affirmance were filed for the State of Washington et al. by *Christine O. Gregoire,* Attorney General of Washington, *Maureen A. Hart,* Senior Assistant Attorney General, *Jeffrey T. Evan,* Assistant Attorney General, *Bruce Botelho,* Attorney General of Alaska, and *Dan Schweitzer;* for California Governor Gray Davis by *Demetrios A. Boutris, D. Robert Shuman, Shelleyanne W. L. Chang,* and *Allen Sumner;* for Alaskan Voters for an Open Primary (AVOP) by *Max F. Gruenberg, Jr.,* and for Senator William E. Brock et al. by *James M. Johnson.*

Briefs of *amici curiae* were filed for the Brennan Center for Justice by *Burt Neuborne;* and for the Northern California Committee for Party Renewal et al. by *E. Mark Braden.*

[1] A party is qualified if it meets one of three conditions: (1) in the last gubernatorial election, one of its statewide candidates polled at least two percent of the statewide vote; (2) the party's membership is at least one percent of the statewide vote at the last preceding gubernatorial election; or (3) voters numbering at least 10 percent of the statewide vote at the last gubernatorial election sign a petition stating that they intend to form a new party. See Cal. Elec. Code Ann. § 5100 (West 1996 and Supp. 2000).

Elec. Code Ann. §§ 15451, 13105(a) (West 1996); or he may file as an independent by obtaining (for a statewide race) the signatures of one percent of the State's electorate or (for other races) the signatures of three percent of the voting population of the area represented by the office in contest, see § 8400.

Until 1996, to determine the nominees of qualified parties California held what is known as a "closed" partisan primary, in which only persons who are members of the political party—*i. e.*, who have declared affiliation with that party when they register to vote, see Cal. Elec. Code Ann. §§ 2150, 2151 (West 1996 and Supp. 2000)—can vote on its nominee, see Cal. Elec. Code Ann. § 2151 (West 1996). In 1996 the citizens of California adopted by initiative Proposition 198. Promoted largely as a measure that would "weaken" party "hard-liners" and ease the way for "moderate problem-solvers," App. 89–90 (reproducing ballot pamphlet distributed to voters), Proposition 198 changed California's partisan primary from a closed primary to a blanket primary. Under the new system, "[a]ll persons entitled to vote, including those not affiliated with any political party, shall have the right to vote . . . for any candidate regardless of the candidate's political affiliation." Cal. Elec. Code Ann. § 2001 (West Supp. 2000); see also § 2151. Whereas under the closed primary each voter received a ballot limited to candidates of his own party, as a result of Proposition 198 each voter's primary ballot now lists every candidate regardless of party affiliation and allows the voter to choose freely among them. It remains the case, however, that the candidate of each party who wins the greatest number of votes "is the nominee of that party at the ensuing general election." Cal. Elec. Code Ann. § 15451 (West 1996).[2]

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[2] California's new blanket primary system does not apply directly to the apportionment of Presidential delegates. See Cal. Elec. Code Ann. §§ 15151, 15375, 15500 (West Supp. 2000). Instead, the State tabulates the Presidential primary in two ways: according to the number of votes

Petitioners in this case are four political parties—the California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party—each of which has a rule prohibiting persons not members of the party from voting in the party's primary.[3] Petitioners brought suit in the United States District Court for the Eastern District of California against respondent California Secretary of State, alleging, *inter alia*, that California's blanket primary violated their First Amendment rights of association, and seeking declaratory and injunctive relief. The group Californians for an Open Primary, also respondent, intervened as a party defendant. The District Court recognized that the new law would inject into each party's primary substantial numbers of voters unaffiliated with the party. 984 F. Supp. 1288, 1298–1299 (1997). It further recognized that this might result in selection of a nominee different from the one party members would select, or at the least cause the same nominee to commit himself to different positions. *Id.*, at 1299. Nevertheless, the District Court held that the burden on petitioners' rights of association was not a severe one, and was justified by state interests ultimately reducing to this: "enhanc[ing] the democratic nature of the election process and the representativeness of elected officials." *Id.*, at 1301. The Ninth Circuit, adopting the District Court's opinion as its own, affirmed. 169 F. 3d 646 (1999). We granted certiorari. 528 U. S. 1133 (2000).

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each candidate received from the entire voter pool and according to the amount each received from members of his own party. The national parties may then use the latter figure to apportion delegates. Nor does it apply to the election of political party central or district committee members; only party members may vote in these elections. See Cal. Elec. Code Ann. §2151 (West 1996 and Supp. 2000).

[3] Each of the four parties was qualified under California law when they filed this suit. Since that time, the Peace and Freedom Party has apparently lost its qualified status. See Brief for Petitioners 16 (citing Child of the '60s Slips, Los Angeles Times, Feb. 17, 1999, p. B–6).

II

Respondents rest their defense of the blanket primary upon the proposition that primaries play an integral role in citizens' selection of public officials. As a consequence, they contend, primaries are public rather than private proceedings, and the States may and must play a role in ensuring that they serve the public interest. Proposition 198, respondents conclude, is simply a rather pedestrian example of a State's regulating its system of elections.

We have recognized, of course, that States have a major role to play in structuring and monitoring the election process, including primaries. See *Burdick* v. *Takushi*, 504 U. S. 428, 433 (1992); *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 217 (1986). We have considered it "too plain for argument," for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion. *American Party of Tex.* v. *White*, 415 U. S. 767, 781 (1974); see also *Tashjian*, *supra*, at 237 (SCALIA, J., dissenting). Similarly, in order to avoid burdening the general election ballot with frivolous candidacies, a State may require parties to demonstrate "a significant modicum of support" before allowing their candidates a place on that ballot. See *Jenness* v. *Fortson*, 403 U. S. 431, 442 (1971). Finally, in order to prevent "party raiding"—a process in which dedicated members of one party formally switch to another party to alter the outcome of that party's primary—a State may require party registration a reasonable period of time before a primary election. See *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973). Cf. *Kusper* v. *Pontikes*, 414 U. S. 51 (1973) (23-month waiting period unreasonable).

What we have not held, however, is that the processes by which political parties select their nominees are, as respondents would have it, wholly public affairs that States

may regulate freely.[4] To the contrary, we have continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution. See, *e. g.*, *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214 (1989); *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107 (1981). In this regard, respondents' reliance on *Smith* v. *Allwright*, 321 U. S. 649 (1944), and *Terry* v. *Adams*, 345 U. S. 461 (1953), is misplaced. In *Allwright*, we invalidated the Texas Democratic Party's rule limiting participation in its primary to whites; in *Terry*, we invalidated the same rule promulgated by the Jaybird Democratic Association, a "self-governing voluntary club," 345 U. S., at 463. These cases held only that, when a State prescribes an election process that gives a special role to political parties, it "endorses, adopts and enforces the discrimination against Negroes" that the parties (or, in the case of the Jaybird Democratic Association, organizations that are "part and parcel" of the parties, see *id.*, at 482 (Clark, J., concurring)) bring into the process—so that the parties' discriminatory action becomes state action under the Fifteenth Amendment. *Allwright*, *supra*, at 664; see also *Terry*, 345 U. S., at 484 (Clark, J., concurring); *id.*, at 469 (opinion of Black, J.). They do not stand for the proposition that party affairs are public affairs, free of First Amendment protections—and our later holdings make that entirely clear.[5] See, *e. g.*, *Tashjian*, *supra*.

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[4] On this point, the dissent shares respondents' view, at least where the selection process is a state-run election. The right not to associate, it says, "is simply inapplicable to participation in a state election." "[A]n election, unlike a convention or caucus, is a public affair." *Post*, at 595 (opinion of STEVENS, J.). Of course it is, but when the election determines a party's nominee it is a party affair as well, and, as the cases to be discussed in text demonstrate, the constitutional rights of those composing the party cannot be disregarded.

[5] The dissent is therefore wrong to conclude that *Allwright* and *Terry* demonstrate that "[t]he protections that the First Amendment affords

Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself. See Cunningham, The Jeffersonian Republican Party, in 1 History of U. S. Political Parties 239, 241 (A. Schlesinger ed. 1973). Consistent with this tradition, the Court has recognized that the First Amendment protects "the freedom to join together in furtherance of common political beliefs," *Tashjian*, *supra*, at 214–215, which "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only," *La Follette*, 450 U. S., at 122. That is to say, a corollary of the right to associate is the right not to associate. "'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.'" *Id.*, at 122,

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to the internal processes of a political party do not encompass a right to exclude nonmembers from voting in a state-required, state-financed primary election." *Post*, at 594–595 (internal quotation marks and citation omitted). Those cases simply prevent exclusion that violates some independent constitutional proscription. The closest the dissent comes to identifying such a proscription in this case is its reference to "the First Amendment associational interests" of citizens to participate in the primary of a party to which they do not belong, and the "fundamental right" of citizens "to cast a meaningful vote for the candidate of their choice." *Post*, at 601. As to the latter: Selecting a candidate is quite different from voting for the candidate of one's choice. If the "fundamental right" to cast a meaningful vote were really at issue in this context, Proposition 198 would be not only constitutionally permissible but constitutionally required, which no one believes. As for the associational "interest" in selecting the candidate of a group to which one does not belong, that falls far short of a constitutional right, if indeed it can even fairly be characterized as an interest. It has been described in our cases as a "desire"—and rejected as a basis for disregarding the First Amendment right to exclude. See *infra*, at 583.

n. 22 (quoting L. Tribe, American Constitutional Law 791 (1978)). See also *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623 (1984).

In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views. See *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 372 (1997) (STEVENS, J., dissenting) ("But a party's choice of a candidate is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support"). Some political parties—such as President Theodore Roosevelt's Bull Moose Party, the La Follette Progressives of 1924, the Henry Wallace Progressives of 1948, and the George Wallace American Independent Party of 1968—are virtually inseparable from their nominees (and tend not to outlast them). See generally E. Kruschke, Encyclopedia of Third Parties in the United States (1991).

Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party "select[s] a standard bearer who best represents the party's ideologies and preferences." *Eu*, *supra*, at 224 (internal quotation marks omitted). The moment of choosing the party's nominee, we have said, is "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian*, 479 U. S., at 216; see also *id.*, at 235–236 (SCALIA, J., dissenting) ("The ability of the members of the Republican Party to select their own candidate . . . unquestionably implicates an associational freedom"); *Timmons*, 520 U. S., at 359 ("[T]he New Party, and not some-

one else, has the right to select the New Party's standard bearer" (internal quotation marks omitted)); *id.*, at 371 (STEVENS, J., dissenting) ("The members of a recognized political party unquestionably have a constitutional right to select their nominees for public office").

In *La Follette*, the State of Wisconsin conducted an open presidential preference primary.[6] Although the voters did not select the delegates to the Democratic Party's National Convention directly—they were chosen later at caucuses of party members—Wisconsin law required these delegates to vote in accord with the primary results. Thus allowing nonparty members to participate in the selection of the party's nominee conflicted with the Democratic Party's rules. We held that, whatever the strength of the state interests supporting the open primary itself, they could not justify this "substantial intrusion into the associational freedom of members of the National Party."[7] 450 U. S., at 126.

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[6] An open primary differs from a blanket primary in that, although as in the blanket primary any person, regardless of party affiliation, may vote for a party's nominee, his choice is limited to that party's nominees *for all offices.* He may not, for example, support a Republican nominee for Governor and a Democratic nominee for attorney general.

[7] The dissent, in attempting to fashion its new rule—that the right not to associate does not exist with respect to primary elections, see *post*, at 594–595—rewrites *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107 (1981), to stand merely for the proposition that a political party has a First Amendment right to "defin[e] the organization and composition of its governing units," *post*, at 592. In fact, however, the state-imposed burden at issue in *La Follette* was the "'intrusion by those with adverse political principles'" upon the selection of the party's nominee (in that case its presidential nominee). 450 U. S., at 122 (quoting *Ray* v. *Blair*, 343 U. S. 214, 221–222 (1952)). See also 450 U. S., at 125 (comparing asserted state interests with burden created by the "imposition of voting requirements upon" delegates). Of course *La Follette* involved the burden a state regulation imposed on a national party, but that factor affected only the weight of the State's interest, and had no bearing upon the existence *vel non* of a party's First Amendment right to exclude. *Id.*, at 121–122, 125–126. Although JUSTICE STEVENS now considers this interpretation of *La Follette* "specious," see *post*, at 592, n. 3, he once

California's blanket primary violates the principles set forth in these cases. Proposition 198 forces political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival. In this respect, it is qualitatively different from a closed primary. Under that system, even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to "cross over," at least he must formally *become a member of the party;* and once he does so, he is limited to voting for candidates of that party.[8]

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subscribed to it himself. His dissent from the order dismissing the appeals in *Bellotti* v. *Connolly,* 460 U. S. 1057 (1983), described *La Follette* thusly: "There this Court rejected Wisconsin's requirement that delegates to the party's Presidential nominating convention, selected in a primary open to nonparty voters, must cast their convention votes in accordance with the primary election results. In our view, the interests advanced by the State . . . did not justify its substantial intrusion into the associational freedom of members of the National Party. . . . Wisconsin *required* convention delegates to cast their votes for candidates who might have drawn their support from nonparty members. The results of the party's decisionmaking process might thereby have been distorted." 460 U. S., at 1062–1063 (emphasis in original).

Not only does the dissent's principle of no right to exclude conflict with our precedents, but it also leads to nonsensical results. In *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208 (1986), we held that the First Amendment protects a party's right to invite independents to participate in the primary. Combining *Tashjian* with the dissent's rule affirms a party's constitutional right to allow outsiders to select its candidates, but denies a party's constitutional right to reserve candidate selection to its own members. The First Amendment would thus guarantee a party's right to lose its identity, but not to preserve it.

[8] In this sense, the blanket primary also may be constitutionally distinct from the open primary, see n. 6, *supra,* in which the voter is limited to one party's ballot. See *La Follette, supra,* at 130, n. 2 (Powell, J., dissenting) ("[T]he act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party. . . . The situation might be different in those States with 'blanket' primaries—*i. e.,* those where voters are allowed to participate in the primaries of more than one

The evidence in this case demonstrates that under California's blanket primary system, the prospect of having a party's nominee determined by adherents of an opposing party is far from remote—indeed, it is a clear and present danger. For example, in one 1997 survey of California voters 37 percent of Republicans said that they planned to vote in the 1998 Democratic gubernatorial primary, and 20 percent of Democrats said they planned to vote in the 1998 Republican United States Senate primary. Tr. 668–669. Those figures are comparable to the results of studies in other States with blanket primaries. One expert testified, for example, that in Washington the number of voters crossing over from one party to another can rise to as high as 25 percent, *id.*, at 511, and another that only 25 to 33 percent of all Washington voters limit themselves to candidates of one party throughout the ballot, App. 136. The impact of voting by nonparty members is much greater upon minor parties, such as the Libertarian Party and the Peace and Freedom Party. In the first primaries these parties conducted following California's implementation of Proposition 198, the total votes cast for party candidates in some races was more than *double* the total number of *registered party members.* California Secretary of State, Statement of Vote, Primary Election, June 2, 1998, http://primary98.ss.ca.gov/Final/Official_Results.htm; California Secretary of State, Report of Registration, May 1998, http://www.ss.ca.gov/elections/elections_u.htm.

The record also supports the obvious proposition that these substantial numbers of voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from those of the party faithful. The 1997 survey of California voters revealed significantly different policy preferences between party members and primary voters who "crossed over" from another party. Pl. Exh. 8

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party on a single occasion, selecting the primary they wish to vote in with respect to each individual elective office"). This case does not require us to determine the constitutionality of open primaries.

(Addendum to Mervin Field Report). One expert went so far as to describe it as "inevitable [under Proposition 198] that parties will be forced in some circumstances to give their official designation to a candidate who's not preferred by a majority or even plurality of party members." Tr. 421 (expert testimony of Bruce Cain).

In concluding that the burden Proposition 198 imposes on petitioners' rights of association is not severe, the Ninth Circuit cited testimony that the prospect of malicious crossover voting, or raiding, is slight, and that even though the numbers of "benevolent" crossover voters were significant, they would be determinative in only a small number of races.[9] 169 F. 3d, at 656–657. But a single election in which the party nominee is selected by nonparty members could be enough to destroy the party. In the 1860 Presidential election, if opponents of the fledgling Republican Party had been able to cause its nomination of a proslavery candidate in place of Abraham Lincoln, the coalition of intraparty factions forming behind him likely would have disintegrated, endangering the party's survival and thwarting its effort to fill the vacuum left by the dissolution of the Whigs. See generally 1 Political Parties & Elections in the United States: An Encyclopedia 398–408, 587 (L. Maisel ed. 1991). Ordinarily, however, being saddled with an unwanted, and possibly antithetical, nominee would not destroy the party but severely transform it. "[R]egulating the identity of the parties' leaders," we have said, "may . . . color the parties' message and interfere with the parties' decisions as to the best means to promote that message." *Eu*, 489 U. S., at 231, n. 21.

In any event, the deleterious effects of Proposition 198 are not limited to altering the identity of the nominee. Even

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[9] The Ninth Circuit defined a crossover voter as one "who votes for a candidate of a party in which the voter is not registered. Thus, the cross-over voter could be an independent voter or one who is registered to a competing political party." 169 F. 3d 646, 656 (1999).

when the person favored by a majority of the party members prevails, he will have prevailed by taking somewhat different positions—and, should he be elected, will continue to take somewhat different positions in order to be *re*nominated. As respondents' own expert concluded: "The policy positions of Members of Congress elected from blanket primary states are . . . more moderate, both in an absolute sense and relative to the other party, and so are more reflective of the preferences of the mass of voters at the center of the ideological spectrum." App. 109 (expert report of Elisabeth R. Gerber). It is unnecessary to cumulate evidence of this phenomenon, since, after all, the whole *purpose* of Proposition 198 was to favor nominees with "moderate" positions. *Id.*, at 89. It encourages candidates—and officeholders who hope to be renominated—to curry favor with persons whose views are more "centrist" than those of the party base. In effect, Proposition 198 has simply moved the general election one step earlier in the process, at the expense of the parties' ability to perform the "basic function" of choosing their own leaders. *Kusper*, 414 U. S., at 58.

Nor can we accept the Court of Appeals' contention that the burden imposed by Proposition 198 is minor because petitioners are free to endorse and financially support the candidate of their choice in the primary. 169 F. 3d, at 659. The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee. In *Eu*, we recognized that party-leadership endorsements are not always effective—for instance, in New York's 1982 gubernatorial primary, Edward Koch, the Democratic Party leadership's choice, lost out to Mario Cuomo. 489 U. S., at 228, n. 18. One study has concluded, moreover, that even when the leadership-endorsed candidate has won, the effect of the endorsement has been negligible. *Ibid.* (citing App. in *Eu* v. *San Francisco County Democratic Central Comm.*, O. T. 1988, No. 87–1269, pp. 97–98). New York's was a closed primary; one

would expect leadership endorsement to be even less effective in a blanket primary, where many of the voters are unconnected not only to the party leadership but even to the party itself. In any event, the ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with the party leadership, but do not want the party's choice decided by outsiders.

We are similarly unconvinced by respondents' claim that the burden is not severe because Proposition 198 does not limit the parties from engaging fully in *other* traditional party behavior, such as ensuring orderly internal party governance, maintaining party discipline in the legislature, and conducting campaigns. The accuracy of this assertion is highly questionable, at least as to the first two activities. That party nominees will be equally observant of internal party procedures and equally respectful of party discipline when their nomination depends on the general electorate rather than on the party faithful seems to us improbable. Respondents themselves suggest as much when they assert that the blanket primary system "'will lead to the election of more representative "problem solvers" *who are less beholden to party officials.*'" Brief for Respondents 41 (emphasis added) (quoting 169 F. 3d, at 661). In the end, however, the effect of Proposition 198 on these other activities is beside the point. We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired. See, *e. g.*, *Spence* v. *Washington*, 418 U. S. 405, 411, n. 4 (1974) *(per curiam); Kusper*, 414 U. S., at 58. There is simply no substitute for a party's selecting its own candidates.

In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process—the "basic function of a political party," *ibid.*—by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome—indeed, in this case the *intended* outcome—

of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest. See *Timmons*, 520 U. S., at 358 ("Regulations imposing severe burdens on [parties'] rights must be narrowly tailored and advance a compelling state interest"). It is to that question which we now turn.

III

Respondents proffer seven state interests they claim are compelling. Two of them—producing elected officials who better represent the electorate and expanding candidate debate beyond the scope of partisan concerns—are simply circumlocution for producing nominees and nominee positions other than those the parties would choose if left to their own devices. Indeed, respondents admit as much. For instance, in substantiating their interest in "representativeness," respondents point to the fact that "officials elected under blanket primaries stand closer to the median policy positions of their districts" than do those selected only by party members. Brief for Respondents 40. And in explaining their desire to increase debate, respondents claim that a blanket primary forces parties to reconsider long standing positions since it "compels [their] candidates to appeal to a larger segment of the electorate." *Id.*, at 46. Both of these supposed interests, therefore, reduce to nothing more than a stark repudiation of freedom of political association: Parties should not be free to select their own nominees because those nominees, and the positions taken by those nominees, will not be congenial to the majority.

We have recognized the inadmissibility of this sort of "interest" before. In *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995), the South Boston Allied War Veterans Council refused to allow an organization of openly gay, lesbian, and bisexual persons (GLIB) to participate in the council's annual

St. Patrick's Day parade. GLIB sued the council under Massachusetts' public accommodation law, claiming that the council impermissibly denied them access on account of their sexual orientation. After noting that parades are expressive endeavors, we rejected GLIB's contention that Massachusetts' public accommodation law overrode the council's right to choose the content of its own message. Applying the law in such circumstances, we held, made apparent that its "object [was] simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. . . . [I]n the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids." *Id.*, at 578.

Respondents' third asserted compelling interest is that the blanket primary is the only way to ensure that disenfranchised persons enjoy the right to an effective vote. By "disenfranchised," respondents do not mean those who cannot vote; they mean simply independents and members of the minority party in "safe" districts. These persons are disenfranchised, according to respondents, because under a closed primary they are unable to participate in what amounts to the determinative election—the majority party's primary; the only way to ensure they have an "effective" vote is to force the party to open its primary to them. This also appears to be nothing more than reformulation of an asserted state interest we have already rejected—recharacterizing nonparty members' keen desire to participate in selection of the party's nominee as "disenfranchisement" if that desire is not fulfilled. We have said, however, that a "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." *Tashjian*, 479 U. S., at 215–216, n. 6 (citing *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973), and *Nader* v. *Schaffer*, 417 F. Supp. 837 (Conn.), summarily aff'd, 429 U. S. 989 (1976)). The voter's desire to

participate does not become more weighty simply because the State supports it. Moreover, even if it were accurate to describe the plight of the non-party-member in a safe district as "disenfranchisement," Proposition 198 is not needed to solve the problem. The voter who feels himself disenfranchised should simply join the party. That may put him to a hard choice, but it is not a state-imposed restriction upon *his* freedom of association, whereas compelling party members to accept his selection of their nominee *is* a state-imposed restriction upon theirs.

Respondents' remaining four asserted state interests—promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy—are not, like the others, automatically out of the running; but neither are they, *in the circumstances of this case*, compelling. That determination is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant. And for all four of these asserted interests, we find it not to be.

The aspect of fairness addressed by Proposition 198 is presumably the supposed inequity of not permitting nonparty members in "safe" districts to determine the party nominee. If that is unfair at all (rather than merely a consequence of the eminently democratic principle that—except where constitutional imperatives intervene—the majority rules), it seems to us less unfair than permitting nonparty members to hijack the party. As for affording voters greater choice, it is obvious that the net effect of this scheme—indeed, its avowed purpose—is to *reduce* the scope of choice, by assuring a range of candidates who are all more "centrist." This may well be described as broadening the range of choices *favored by the majority*—but that is hardly a compelling state interest, if indeed it is even a legitimate one. The interest in increasing voter participation is just a variation on the same theme (more choices favored by the majority will

produce more voters), and suffers from the same defect. As for the protection of privacy: The specific privacy interest at issue is not the confidentiality of medical records or personal finances, but confidentiality of one's party affiliation. Even if (as seems unlikely) a scheme for administering a closed primary could not be devised in which the voter's declaration of party affiliation would not be public information, we do not think that the State's interest in assuring the privacy of this piece of information in all cases can conceivably be considered a "compelling" one. If such information were generally so sacrosanct, federal statutes would not require a declaration of party affiliation as a condition of appointment to certain offices. See, *e. g.*, 47 U. S. C. § 154(b)(5) ("[M]aximum number of commissioners [of the Federal Communications Commission] who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission"); 47 U. S. C. § 396(c)(1) (1994 ed., Supp. III) (no more than five members of Board of Directors of Corporation for Public Broadcasting may be of same party); 42 U. S. C. § 2000e–4(a) (no more than three members of Equal Employment Opportunity Commission may be of same party).

Finally, we may observe that even if all these state interests were compelling ones, Proposition 198 is not a narrowly tailored means of furthering them. Respondents could protect them all by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot—which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the

constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness"—all without severely burdening a political party's First Amendment right of association.

* * *

Respondents' legitimate state interests and petitioners' First Amendment rights are not inherently incompatible. To the extent they are in this case, the State of California has made them so by forcing political parties to associate with those who do not share their beliefs. And it has done this at the "crucial juncture" at which party members traditionally find their collective voice and select their spokesman. *Tashjian*, 479 U. S., at 216. The burden Proposition 198 places on petitioners' rights of political association is both severe and unnecessary. The judgment for the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

JUSTICE KENNEDY, concurring.

Proposition 198, the product of a statewide popular initiative, is a strong and recent expression of the will of California's electorate. It is designed, in part, to further the object of widening the base of voter participation in California elections. Until a few weeks or even days before an election, many voters pay little attention to campaigns and even less to the details of party politics. Fewer still participate in the direction and control of party affairs, for most voters consider the internal dynamics of party organization remote, partisan, and of slight interest. Under these conditions voters tend to become disinterested, and so they refrain from voting altogether. To correct this, California seeks to make primary voting more responsive to the views and preferences of the electorate as a whole. The results of California's blanket primary system may demonstrate the efficacy

of its solution, for there appears to have been a substantial increase in voter interest and voter participation. See Brief for Respondents 45–46.

Encouraging citizens to vote is a legitimate, indeed essential, state objective; for the constitutional order must be preserved by a strong, participatory democratic process. In short, there is much to be said in favor of California's law; and I might find this to be a close case if it were simply a way to make elections more fair and open or addressed matters purely of party structure.

The true purpose of this law, however, is to force a political party to accept a candidate it may not want and, by so doing, to change the party's doctrinal position on major issues. *Ante*, at 581–582. From the outset the State has been fair and candid to admit that doctrinal change is the intended operation and effect of its law. See, *e. g.*, Brief for Respondents 40, 46. It may be that organized parties, controlled—in fact or perception—by activists seeking to promote their self-interest rather than enhance the party's long-term support, are shortsighted and insensitive to the views of even their own members. A political party might be better served by allowing blanket primaries as a means of nominating candidates with broader appeal. Under the First Amendment's guarantee of speech through free association, however, this is an issue for the party to resolve, not for the State. Political parties advance a shared political belief, but to do so they often must speak through their candidates. When the State seeks to direct changes in a political party's philosophy by forcing upon it unwanted candidates and wresting the choice between moderation and partisanship away from the party itself, the State's incursion on the party's associational freedom is subject to careful scrutiny under the First Amendment. For these reasons I agree with the Court's opinion.

I add this separate concurrence to say that Proposition 198 is doubtful for a further reason. In justification of its stat-

ute California tells us a political party has the means at hand to protect its associational freedoms. The party, California contends, can simply use its funds and resources to support the candidate of its choice, thus defending its doctrinal positions by advising the voters of its own preference. To begin with, this does not meet the parties' First Amendment objection, as the Court well explains. *Ante*, at 580–581. The important additional point, however, is that, by reason of the Court's denial of First Amendment protections to a political party's spending of its own funds and resources in cooperation with its preferred candidate, see *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604 (1996), the Federal Government or the State has the power to prevent the party from using the very remedy California now offers up to defend its law.

Federal campaign finance laws place strict limits on the manner and amount of speech parties may undertake in aid of candidates. Of particular relevance are limits on coordinated party expenditures, which the Federal Election Campaign Act of 1971 deems to be contributions subject to specific monetary restrictions. See 90 Stat. 488, 2 U. S. C. § 441a(a)(7)(B)(i) ("[E]xpenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate"). Though we invalidated limits on independent party expenditures in *Colorado Republican*, the principal opinion did not question federal limits placed on coordinated expenditures. See 518 U. S., at 624–625 (opinion of BREYER, J.). Two Justices in dissent said that "all money spent by a political party to secure the election of its candidate" would constitute coordinated expenditures and would have upheld the statute as applied in that case. See *id.*, at 648 (opinion of STEVENS, J.). Thus, five Justices of the Court subscribe to the position that Congress or a State may limit the amount a political party spends in direct collaboration with its preferred candidate for elected office.

In my view, as stated in both *Colorado Republican*, *supra*, at 626 (opinion concurring in judgment and dissenting in part), and in *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 405–406 (2000) (dissenting opinion), these recent cases deprive political parties of their First Amendment rights. Our constitutional tradition is one in which political parties and their candidates make common cause in the exercise of political speech, which is subject to First Amendment protection. There is a practical identity of interests between parties and their candidates during an election. Our unfortunate decisions remit the political party to use of indirect or covert speech to support its preferred candidate, hardly a result consistent with free thought and expression. It is a perversion of the First Amendment to force a political party to warp honest, straightforward speech, exemplified by its vigorous and open support of its favored candidate, into the covert speech of soft money and issue advocacy so that it may escape burdensome spending restrictions. In a regime where campaign spending cannot otherwise be limited—the structure this Court created on its own in *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*—restricting the amounts a political party may spend in collaboration with its own candidate is a violation of the political party's First Amendment rights.

Were the views of those who would uphold both California's blanket primary system and limitations on coordinated party expenditures to become prevailing law, the State could control political parties at two vital points in the election process. First, it could mandate a blanket primary to weaken the party's ability to defend and maintain its doctrinal positions by allowing nonparty members to vote in the primary. Second, it could impose severe restrictions on the amount of funds and resources the party could spend in efforts to counteract the State's doctrinal intervention. In other words, the First Amendment injury done by the Court's ruling in *Colorado Republican* would be compounded were California to prevail in the instant case.

When the State seeks to regulate a political party's nomination process as a means to shape and control political doctrine and the scope of political choice, the First Amendment gives substantial protection to the party from the manipulation. In a free society the State is directed by political doctrine, not the other way around. With these observations, I join the opinion of the Court.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins as to Part I, dissenting.

Today the Court construes the First Amendment as a limitation on a State's power to broaden voter participation in elections conducted by the State. The Court's holding is novel and, in my judgment, plainly wrong. I am convinced that California's adoption of a blanket primary pursuant to Proposition 198 does not violate the First Amendment, and that its use in primary elections for state offices is therefore valid. The application of Proposition 198 to elections for United States Senators and Representatives, however, raises a more difficult question under the Elections Clause of the United States Constitution, Art. I, § 4, cl. 1. I shall first explain my disagreement with the Court's resolution of the First Amendment issue and then comment on the Elections Clause issue.

I

A State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty. This case is about the State of California's power to decide who may vote in an election conducted, and paid for, by the State.[1] The United States Constitution imposes constraints

[1] See *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 217 (1986) (observing that the United States Constitution grants States a broad power to prescribe the manner of elections for certain federal offices, which power is matched by state control over the election process for state offices). In California, the Secretary of State administers the pro-

on the States' power to limit access to the polls, but we have never before held or suggested that it imposes any constraints on States' power to authorize additional citizens to participate in any state election for a state office. In my view, principles of federalism require us to respect the policy choice made by the State's voters in approving Proposition 198.

The blanket primary system instituted by Proposition 198 does not abridge "the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Ante*, at 574.[2] The Court's contrary conclusion rests on the premise that a political party's freedom of expressive association includes a "right not to associate," which in turn includes a right to exclude voters unaffiliated with the party from participating in the selection of that party's nominee in a primary election. *Ante*, at 574–575. In drawing this conclusion, however, the Court blurs two distinctions that are critical: (1) the distinction between

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visions of the State Elections Code and has some supervisory authority over county election officers. Cal. Govt. Code Ann. § 12172.5 (West 1992 and Supp. 2000). Primary and other elections are administered and paid for primarily by county governments. Cal. Elec. Code Ann. §§ 13000–13001 (West 1996 and Supp. 2000). Anecdotal evidence suggests that each statewide election in California (whether primary or general) costs governmental units between $45 million and $50 million.

[2] Prominent members of the founding generation would have disagreed with the Court's suggestion that representative democracy is "unimaginable" without political parties, *ante*, at 574, though their antiparty thought ultimately proved to be inconsistent with their partisan actions. See, *e. g.*, R. Hofstadter, The Idea of a Party System 2–3 (1969) (noting that "the creators of the first American party system on both sides, Federalists and Republicans, were men who looked upon parties as sores on the body politic"). At best, some members of that generation viewed parties as an unavoidable product of a free state that were an evil to be endured, though most viewed them as an evil to be abolished or suppressed. *Id.*, at 16–17, 24. Indeed, parties ranked high on the list of evils that the Constitution was designed to check. *Id.*, at 53; see The Federalist No. 10 (J. Madison).

a private organization's right to define itself and its messages, on the one hand, and the State's right to define the obligations of citizens and organizations performing public functions, on the other; and (2) the distinction between laws that abridge participation in the political process and those that encourage such participation.

When a political party defines the organization and composition of its governing units, when it decides what candidates to endorse, and when it decides whether and how to communicate those endorsements to the public, it is engaged in the kind of private expressive associational activity that the First Amendment protects. *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 354–355, n. 4, 359 (1997) (recognizing party's right to select its own standard-bearer in context of minor party that selected its candidate through means other than a primary); *id.*, at 371 (STEVENS, J., dissenting); *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214 (1989); *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 124 (1981) ("A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution"); *Cousins* v. *Wigoda*, 419 U. S. 477, 491 (1975) ("*Illinois*' interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the *National* Party Convention" (emphasis added)).[3] A political

[3] The Court's disagreement with this interpretation of *La Follette* is specious. *Ante*, at 576–577, n. 7 (claiming that state-imposed burden actually at issue in *La Follette* was intrusion of those with adverse political principles into party's primary). A more accurate characterization of the nature of *La Follette*'s reasoning is provided by Justice Powell: "In analyzing the burden imposed on associational freedoms in this case, the Court treats the Wisconsin law as the equivalent of one regulating delegate selection, and, relying on *Cousins* v. *Wigoda*, 419 U. S. 477 (1975), concludes that any interference with the National Party's accepted delegate-selection procedures impinges on constitutionally protected rights." *Democratic Party of United States* v. *Wisconsin ex rel. La Fol-*

party could, if a majority of its members chose to do so, adopt a platform advocating white supremacy and opposing the election of any non-Caucasians. Indeed, it could decide to use its funds and oratorical skills to support only those candidates who were loyal to its racist views. Moreover, if a State permitted its political parties to select their candidates through conventions or caucuses, a racist party would also be free to select only candidates who would adhere to the party line.

As District Judge Levi correctly observed in an opinion adopted by the Ninth Circuit, however, the associational rights of political parties are neither absolute nor as comprehensive as the rights enjoyed by wholly private associations. 169 F. 3d 646, 654–655 (1999); cf. *Timmons*, 520 U. S., at 360 (concluding that while regulation of endorsements implicates political parties' internal affairs and core associational ac-

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lette, 450 U. S. 107, 128 (1981) (dissenting opinion). Indeed, the *La Follette* Court went out of its way to characterize the Wisconsin law in this manner in order to avoid casting doubt on the constitutionality of open primaries. *Id.*, at 121 (majority opinion) (noting that the issue was not whether an open primary was constitutional but "whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party"). The fact that the *La Follette* Court also characterizes the Wisconsin law at one point as a law "impos[ing] . . . voting requirements" on delegates, *id.*, at 125, does not alter the conclusion that *La Follette* is a case about state regulation of internal party processes, not about regulation of primary elections. State-mandated intrusion upon either delegate selection or delegate voting would surely implicate the affected party's First Amendment right to define the organization and composition of its governing units, but it is clear that California intrudes upon neither in this case. *Ante*, at 570–571, n. 2.

La Follette and *Cousins* also stand for the proposition that a State's interest in regulating at the *national* level the types of party activities mentioned in the text is outweighed by the burden that state regulation would impose on the parties' associational rights. See *Bellotti* v. *Connolly*, 460 U. S. 1057, 1062–1063, and n. 3 (1983) (STEVENS, J., dissenting) (quoted in part *ante*, at 577, n. 7). In this case, however, California does not seek to regulate such activities at all, much less to do so at the national level.

tivities, regulation of access to election ballot does not); *La Follette*, 450 U. S., at 120–121 (noting that it "may well be correct" to conclude that party associational rights are not unconstitutionally infringed by state open primary); *id.*, at 131–132 (Powell, J., dissenting) (concluding that associational rights of major political parties are limited by parties' lack of defined ideological orientation and political mission). I think it clear—though the point has never been decided by this Court—"that a State may require parties to use the primary format for selecting their nominees." *Ante*, at 572. The reason a State may impose this significant restriction on a party's associational freedoms is that both the general election and the primary are quintessential forms of state action.[4] It is because the primary is state action that an organization—whether it calls itself a political party or just a "Jaybird" association—may not deny non-Caucasians the right to participate in the selection of its nominees. *Terry* v. *Adams*, 345 U. S. 461 (1953); *Smith* v. *Allwright*, 321 U. S. 649, 663–664 (1944). The Court is quite right in stating that those cases "do not stand for the proposition that party affairs are *[wholly]* public affairs, free of First Amendment protections." *Ante*, at 573. They do, however, stand for the proposition that primary elections, unlike most "party affairs," are state action.[5] The protections that the First

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[4] Indeed, the primary serves an essential public function given that, "[a]s a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations [by the major political parties] have been made." *Morse* v. *Republican Party of Va.*, 517 U. S. 186, 205–206 (1996) (opinion of STEVENS, J.) (internal quotation marks omitted); see also *United States* v. *Classic*, 313 U. S. 299, 319 (1941).

[5] Contrary to what the Court seems to think, I do not rely on *Terry* and *Allwright* as the basis for an argument that state accommodation of the parties' desire to exclude nonmembers from primaries would necessarily violate an independent constitutional proscription such as the Equal Protection Clause (though I do not rule that out). Cf. *ante*, at 573–574, n. 5. Rather, I cite them because our recognition that constitutional proscriptions apply to primaries illustrates that primaries—as integral parts

Amendment affords to the "internal processes" of a political party, *ibid.*, do not encompass a right to exclude nonmembers from voting in a state-required, state-financed primary election.

The so-called "right not to associate" that the Court relies upon, then, is simply inapplicable to participation in a state election. A political party, like any other association, may refuse to allow nonmembers to participate in the party's decisions when it is conducting its own affairs;[6] California's blanket primary system does not infringe this principle. *Ante*, at 570–571, n. 2. But an election, unlike a convention or caucus, is a public affair. Although it is true that we have extended First Amendment protection to a party's right to invite independents to participate in its primaries, *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208 (1986), neither that case nor any other has held or suggested that the "right not to associate" imposes a limit on the State's power to open up its primary elections to all voters eligible to vote in a general election. In my view, while state rules abridging participation in its elections should be closely scrutinized,[7] the First Amendment does not inhibit the State from acting to broaden voter access to state-run, state-financed elections. When a State acts not to limit democratic participation but to expand the ability of individuals to participate in the dem-

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of the election process by which the people select their government—are state affairs, not internal party affairs.

[6] "The State asserts a compelling interest in preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters. But all those interests go to the conduct of the Presidential preference primary—not to the imposition of voting requirements upon those who, in a separate process, are eventually selected as delegates." *La Follette*, 450 U. S., at 124–125.

[7] See *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 370 (1997) (STEVENS, J., dissenting) (general election ballot access restriction); *Bullock* v. *Carter*, 405 U. S. 134 (1972) (primary election ballot access restriction).

ocratic process, it is acting not as a foe of the First Amendment but as a friend and ally.

Although I would not endorse it, I could at least understand a constitutional rule that protected a party's associational rights by allowing it to refuse to select its candidates through state-regulated primary elections. See *Marchioro* v. *Chaney*, 442 U. S. 191, 199 (1979) ("There can be no complaint that [a] party's [First Amendment] right to govern itself has been substantially burdened by [state regulation] when the source of the complaint is the party's own decision to confer critical authority on the [party governing unit being regulated]"); cf. *Tashjian*, 479 U. S., at 237 (SCALIA, J., dissenting) ("It is beyond my understanding why the Republican Party's delegation of its democratic choice [of candidates] to a Republican Convention [rather than a primary] can be proscribed [by the State], but its delegation of that choice to nonmembers of the Party cannot"). A meaningful "right not to associate," if there is such a right in the context of limiting an electorate, ought to enable a party to insist on choosing its nominees at a convention or caucus where nonmembers could be excluded. In the real world, however, anyone can "join" a political party merely by asking for the appropriate ballot at the appropriate time or (at most) by registering within a state-defined reasonable period of time before an election; neither past voting history nor the voter's race, religion, or gender can provide a basis for the party's refusal to "associate" with an unwelcome new member. See 169 F. 3d, at 655, and n. 20. There is an obvious mismatch between a supposed constitutional right "not to associate" and a rule that turns on nothing more than the state-defined timing of the new associate's application for membership. See *La Follette*, 450 U. S., at 133 (Powell, J., dissenting) ("As Party affiliation becomes . . . easy for a voter to change [shortly before a particular primary election] in order to participate in [that] election, the difference between open and closed primaries loses its practical significance").

The Court's reliance on a political party's "right not to associate" as a basis for limiting a State's power to conduct primary elections will inevitably require it either to draw unprincipled distinctions among various primary configurations or to alter voting practices throughout the Nation in fundamental ways. Assuming that a registered Democrat or independent who wants to vote in the Republican gubernatorial primary can do so merely by asking for a Republican ballot, the Republican Party's constitutional right "not to associate" is pretty feeble if the only cost it imposes on that Democrat or independent is a loss of his right to vote for non-Republican candidates for other offices. Cf. *ante*, at 577–578, n. 8. Subtle distinctions of this minor import are grist for state legislatures, but they demean the process of constitutional adjudication. Or, as JUSTICE SCALIA put the matter in his dissenting opinion in *Tashjian:*

> "The . . . voter who, while steadfastly refusing to register as a Republican, casts a vote in [a nonclosed] Republican primary, forms no more meaningful an 'association' with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster. If the concept of freedom of association is extended to such casual contacts, it ceases to be of any analytic use." 479 U. S., at 235.

It is noteworthy that the bylaws of each of the political parties that are petitioners in this case unequivocally state that participation in partisan primary elections is to be limited to registered members of the party only. App. 7, 15, 16, 18. Under the Court's reasoning, it would seem to follow that conducting anything but a closed partisan primary in the face of such bylaws would necessarily burden the parties' "'freedom to identify the people who constitute the association.'" *Ante*, at 574. Given that open primaries are supported by essentially the same state interests that the Court disparages today and are not as "narrow" as nonpartisan pri-

maries, *ante*, at 582–586, there is surely a danger that open primaries will fare no better against a First Amendment challenge than blanket primaries have.

By the District Court's count, 3 States presently have blanket primaries, while an additional 21 States have open primaries and 8 States have semiclosed primaries in which independents may participate. 169 F. 3d, at 650. This Court's willingness to invalidate the primary schemes of 3 States and cast serious constitutional doubt on the schemes of 29 others at the parties' behest is, as the District Court rightly observed, "an extraordinary intrusion into the complex and changing election laws of the States [that] . . . remove[s] from the American political system a method for candidate selection that many States consider beneficial and which in the uncertain future could take on new appeal and importance." *Id.*, at 654.[8]

In my view, the First Amendment does not mandate that a putatively private association be granted the power to dictate the organizational structure of state-run, state-financed primary elections. It is not this Court's constitutional function to choose between the competing visions of what makes democracy work—party autonomy and discipline versus progressive inclusion of the entire electorate in

[8] When coupled with our decision in *Tashjian* that a party may require a State to open up a closed primary, this intrusion has even broader implications. It is arguable that, under the Court's reasoning combined with *Tashjian*, the only nominating options open for the States to choose without party consent are: (1) not to have primary elections, or (2) to have what the Court calls a "nonpartisan primary"—a system presently used in Louisiana—in which candidates previously nominated by the various political parties and independent candidates compete. *Ante*, at 585. These two options are the same in practice because the latter is not actually a "primary" in the common, partisan sense of that term at all. Rather, it is a general election with a runoff that has few of the benefits of democratizing the party nominating process that led the Court to declare the State's ability to require nomination by primary "'too plain for argument.'" *Ante*, at 572; see *Lightfoot* v. *Eu*, 964 F. 2d 865, 872–873 (CA9 1992) (explaining state interest in requiring direct partisan primary).

the process of selecting their public officials—that are held by the litigants in this case. *O'Callaghan* v. *State*, 914 P. 2d 1250, 1263 (Alaska 1996); see also *Tashjian*, 479 U. S., at 222–223; *Luther* v. *Borden*, 7 How. 1, 40–42 (1849). That choice belongs to the people. *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 795 (1995).

Even if the "right not to associate" did authorize the Court to review the State's policy choice, its evaluation of the competing interests at stake is seriously flawed. For example, the Court's conclusion that a blanket primary severely burdens the parties' associational interests in selecting their standard-bearers does not appear to be borne out by experience with blanket primaries in Alaska and Washington. See, *e. g.*, 169 F. 3d, at 656–659, and n. 23. Moreover, that conclusion rests substantially upon the Court's claim that "[t]he evidence [before the District Court]" disclosed a "clear and present danger" that a party's nominee may be determined by adherents of an opposing party. *Ante*, at 578. This hyperbole is based upon the Court's liberal view of its appellate role, not upon the record and the District Court's factual findings. Following a bench trial and the receipt of expert witness reports, the District Court found that "there is little evidence that raiding [by members of an opposing party] will be a factor under the blanket primary. On this point there is almost unanimity among the political scientists who were called as experts by the plaintiffs and defendants." 169 F. 3d, at 656. While the Court is entitled to test this finding by making an independent examination of the record, the evidence it cites—including the results of the June 1998 primaries, *ante*, at 578, which should not be considered because they are not in the record—does not come close to demonstrating that the District Court's factual finding is clearly erroneous. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 498–501 (1984).

As to the Court's concern that benevolent crossover voting impinges on party associational interests, *ante*, at 579, the

District Court found that experience with a blanket primary in Washington and other evidence "suggest[ed] that there will be particular elections in which there will be a substantial amount of cross-over voting . . . although the cross-over vote will rarely change the outcome of any election and in the typical contest will not be at significantly higher levels than in open primary states." 169 F. 3d, at 657. In my view, an empirically debatable assumption about the relative number and effect of likely crossover voters in a blanket primary, as opposed to an open primary or a nominally closed primary with only a brief preregistration requirement, is too thin a reed to support a credible First Amendment distinction. See *Tashjian*, 479 U. S., at 219 (rejecting State's interest in keeping primary closed to curtail benevolent crossover voting by independents given that independents could easily cross over even under closed primary by simply registering as party members).

On the other side of the balance, I would rank as "substantial, indeed compelling," just as the District Court did, California's interest in fostering democratic government by "[i]ncreasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout and participation in [electoral processes]." 169 F. 3d, at 662;[9] cf. *Timmons*, 520 U. S., at 364 ("[W]e [do not] require elaborate, empirical verification of the weightiness of the State's asserted justifications"). The Court's glib rejection of the

[9] In his concurrence, JUSTICE KENNEDY argues that the State has no valid interest in changing party doctrine through an open primary, and suggests that the State's assertion of this interest somehow irrevocably taints its blanket primary system. *Ante*, at 587. The *Timmons* balancing test relied upon by the Court, *ante*, at 582, however, does not support that analysis. *Timmons* and our myriad other constitutional cases that weigh burdens against state interests merely ask whether *a* state interest justifies the burden that the State is imposing on a constitutional right; the fact that one of the asserted state interests may not be valid or compelling under the circumstances does not end the analysis.

State's interest in increasing voter participation, *ante*, at 584–585, is particularly regrettable. In an era of dramatically declining voter participation, States should be free to experiment with reforms designed to make the democratic process more robust by involving the entire electorate in the process of selecting those who will serve as government officials. Opening the nominating process to all and encouraging voters to participate in any election that draws their interest is one obvious means of achieving this goal. See Brief for Respondents 46 (noting that study presented to District Court showed higher voter turnout levels in blanket primary States than in open or closed primary States); *ante*, at 586–587 (KENNEDY, J., concurring). I would also give some weight to the First Amendment associational interests of nonmembers of a party seeking to participate in the primary process,[10] to the fundamental right of such nonmembers to cast a meaningful vote for the candidate of their choice, *Burdick* v. *Takushi*, 504 U. S. 428, 445 (1992) (KENNEDY, J., dissenting), and to the preference of almost 60% of California voters—including a majority of registered Democrats and Republicans—for a blanket primary. 169 F. 3d, at 649; see *Tashjian*, 479 U. S., at 236 (SCALIA, J., dissenting) (preferring information on whether majority of rank-and-file party members support a particular proposition than whether state party convention does so). In my view, a State is unquestionably entitled to rely on this combination of interests in deciding who may vote in a primary election conducted by the State. It is indeed strange to find that the First Amendment forecloses this decision.

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[10] See *La Follette*, 450 U. S., at 135–136 (Powell, J., dissenting); cf. *Tashjian*, 479 U. S., at 215–216, n. 6 (discussing cases such as *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973), in which nonmembers' associational interests were overborne by state interests that coincided with party interests); *Bellotti* v. *Connolly*, 460 U. S., at 1062 (STEVENS, J., dissenting) (discussing associational rights of voters).

II

The Elections Clause of the United States Constitution, Art. I, § 4, cl. 1, provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof." (Emphasis added.) This broad constitutional grant of power to state legislatures is "matched by state control over the election process for state offices." *Tashjian*, 479 U. S., at 217. For the reasons given in Part I, *supra*, I believe it would be a proper exercise of these powers and would not violate the First Amendment for the California Legislature to adopt a blanket primary system. This particular blanket primary system, however, was adopted by popular initiative. Although this distinction is not relevant with respect to elections for state offices, it is unclear whether a state election system not adopted by the legislature is constitutional insofar as it applies to the manner of electing United States Senators and Representatives.

The California Constitution empowers the voters of the State to propose statutes and to adopt or reject them. Art. 2, § 8. If approved by a majority vote, such "initiative statutes" generally take effect immediately and may not be amended or repealed by the California Legislature unless the voters consent. Art. 2, § 10. The amendments to the California Election Code that changed the state primary from a closed system to the blanket system presently at issue were the result of the voters' March 1996 adoption of Proposition 198, an initiative statute.

The text of the Elections Clause suggests that such an initiative system, in which popular choices regarding the manner of state elections are unreviewable by independent legislative action, may not be a valid method of exercising the power that the Clause vests in state "Legislature[s]." It could be argued that this reasoning does not apply in California, as the California Constitution further provides that "[t]he legislative power of this State is vested in the Cali-

fornia Legislature . . . , but the people reserve to themselves the powers of initiative and referendum." Art. 4, § 1. The vicissitudes of state nomenclature, however, do not necessarily control the meaning of the Federal Constitution. Moreover, the United States House of Representatives has determined in an analogous context that the Elections Clause's specific reference to "the Legislature" is not so broad as to encompass the general "legislative power of this State."[11] Under that view, California's classification of voter-approved initiatives as an exercise of legislative power would not render such initiatives the act of the California Legislature within the meaning of the Elections Clause. Arguably, therefore, California's blanket primary system for electing United States Senators and Representatives is invalid. Because the point was neither raised by the parties nor discussed by the courts below, I reserve judgment on it. I believe, however, that the importance of the point merits further attention.

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For the reasons stated in Part I of this opinion, as well as those stated more fully in the District Court's excellent opinion, I respectfully dissent.

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[11] *Baldwin* v. *Trowbridge*, 2 Bartlett Contested Election Cases, H. R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46, 47 (1866) ("[Under the Elections Clause,] power is conferred upon the *legislature*. But what is meant by 'the legislature?' Does it mean the legislative power of the State, which would include a convention authorized to prescribe fundamental law; or does it mean the legislature *eo nomine*, as known in the political history of the country? The [C]ommittee [of Elections for the U. S. House of Representatives] have adopted the latter construction").

Syllabus

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC. *v.* UNITED STATES

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

No. 99–244. Argued March 22, 2000—Decided June 26, 2000*

Two oil companies, petitioners here, paid the Government $156 million in return for lease contracts giving them the rights to explore for and develop oil off the North Carolina coast, provided that the companies received exploration and development permission in accordance with procedures set out in, *inter alia*, the Outer Continental Shelf Lands Act (OCSLA), the Coastal Zone Management Act of 1972 (CZMA), and regulations promulgated pursuant to those Acts. OCSLA, among other things, requires the Department of the Interior to approve a company's Plan of Exploration (Plan) within 30 days of its submission if the Plan meets certain criteria. A company must also obtain an exploratory well drilling permit after certifying under CZMA that its Plan is consistent with each affected State's coastal zone management program. If a State objects, the Secretary of Commerce must override the objection or the certification fails. Interior may grant the permit if Commerce rules against the State. While the companies' Plan was pending before Interior, the Outer Banks Protection Act (OBPA) became law. OBPA prohibited the Interior Secretary from approving any Plan until, *inter alia*, an OBPA-created Environmental Sciences Review Panel (Panel) reported to the Secretary and the Secretary certified to Congress that he had sufficient information to make OCSLA-required approval decisions. In no event could he approve any Plan for 13 months. Interior told Mobil the Plan met OCSLA requirements but that it would not approve the Plan until the OBPA requirements were met. It also suspended all North Carolina offshore leases. After the Panel made its report, the Interior Secretary made the requisite certification to Congress but stated that he would not consider the Plan until he received further studies recommended by the Panel. North Carolina objected to the CZMA certification, and the Commerce Secretary rejected Mobil's override request. Before the Commerce Secretary issued his rejection, the companies joined a breach of contract lawsuit in the Court of Federal Claims. That court granted them summary judgment, finding that

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*Together with No. 99–253, *Marathon Oil Co.* v. *United States*, also on certiorari to the same court.

the Government had broken its contractual promise to follow OCSLA, that the Government thereby repudiated the contracts, and that that repudiation entitled the companies to restitution of their payments. In reversing, the Federal Circuit held that the Government's refusal to consider Mobil's Plan was not the operative cause of any failure to carry out the contracts' terms because the State's objection to the CZMA certification would have prevented the exploration.

Held: The Government broke its promise, repudiated the contracts, and must give the companies their money back. Pp. 614–624.

(a) A contracting party is entitled to restitution if the other party "substantially" breached a contract or communicated its intent to do so. Here, the Government breached the contracts and communicated such intent. None of the provisions incorporated into the contracts granted Interior the legal authority to refuse to approve the companies' Plan, while suspending the lease instead. First, such authority does not arise from the OCSLA provision, 43 U. S. C. § 1334(a)(1)(A), that permits the Secretary to promulgate regulations providing for suspension of an operation or activity only upon "the request of a lessee." Second, the contracts say that they are subject to then-existing regulations and future regulations issued under OCSLA and certain Department of Energy Organization Act provisions. This explicit reference to future regulations makes it clear that the contracts' catchall provisions referencing "all other applicable . . . regulations" must include only statutes and regulations already existing at the time of the contracts. Thus, the contracts are not subject to future regulations promulgated under other statutes, such as OBPA. Third, an OCSLA provision authorizing suspensions in light of a threat of serious harm to the human environment did not authorize the delay, for Interior explained that the Plan fully complied with current legal requirements and cited OBPA to explain the delay. Insofar as the Government means to suggest that OBPA changed the relevant OCSLA standard, it must mean that OBPA in effect created a new requirement. Such a requirement would not be incorporated into the contracts. Finally, when imposing the delay, Interior did not rely upon any of the regulations to which the Government now refers. OBPA required Interior to impose the contract-violating delay and changed pre-existing contract-incorporated requirements in several ways. By communicating its intent to follow OBPA, the Government was communicating its intent to violate the contracts. Pp. 614–620.

(b) The Government's contract breach was substantial, for it deprived the companies of the benefit of their bargain. Under the contracts, the incorporated procedures and standards amounted to a gateway to

the companies' enjoyment of their rights to explore and develop oil. Timely and fair consideration of a submitted Plan was a material condition of the contracts, yet the Government announced an OBPA-required delay of 13 months minimum, and the delay turned out to be at least four years. This modification of the procedures was not technical or insubstantial, and it amounted to a repudiation of the contracts. Pp. 620–621.

(c) Although acceptance of a once-repudiated contract can constitute a waiver of the restitution right that repudiation would otherwise create, none of the events that the Government points to—that the companies submitted the Plan to Interior two days after OBPA became law, that the companies subsequently asked the Commerce Secretary to override North Carolina's objection to the CZMA certification, and that the companies received suspensions of their leases pending OBPA-mandated approval delays—amounts to significant postrepudiation performance. Pp. 621–623.

(d) Finally, the Government's argument that OBPA caused the companies no injury because they could not have met the CZMA consistency requirements misses the point: The companies seek not damages for breach of contract but restitution of their initial payments. Because the Government repudiated the contracts, the law entitles the companies to that restitution whether the contracts would, or would not, ultimately have produced a financial gain or led them to obtain a definite right to explore. Pp. 623–624.

177 F. 3d 1331, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 624.

Carter G. Phillips argued the cause for petitioners in both cases. With him on the briefs for petitioner Marathon Oil Co. were *Richard D. Bernstein*, *Griffith L. Green*, *Michael S. Lee*, and *Richard L. Horstman.* *E. Edward Bruce* and *Steven J. Rosenbaum* filed briefs for petitioner Mobil Oil Exploration & Producing Southeast, Inc.

Kent L. Jones argued the cause for the United States in both cases. With him on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Ogden*, *Dep-*

uty Solicitor General Wallace, *David M. Cohen*, *Douglas N. Letter*, *Thomas M. Bondy*, and *Mark A. Melnick*.†

JUSTICE BREYER delivered the opinion of the Court.

Two oil companies, petitioners here, seek restitution of $156 million they paid the Government in return for lease contracts giving them rights to explore for and develop oil off the North Carolina coast. The rights were not absolute, but were conditioned on the companies' obtaining a set of further governmental permissions. The companies claim that the Government repudiated the contracts when it denied them certain elements of the permission-seeking opportunities that the contracts had promised. We agree that the Government broke its promise; it repudiated the contracts; and it must give the companies their money back.

I

A

A description at the outset of the few basic contract law principles applicable to this action will help the reader understand the significance of the complex factual circumstances that follow. "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *United States* v. *Winstar Corp.*, 518 U. S. 839,

†*J. Berry St. John*, *Craig Wyman*, *G. William Frick*, *David T. Deal*, and *Douglas Morris* filed a brief for the American Petroleum Institute as *amicus curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Richard M. Frank*, Chief Assistant Attorney General, *J. Matthew Rodriquez*, Senior Assistant Attorney General, and *John A. Saurenman*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Michael F. Easley* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Charlie Condon* of South Carolina, and *Christine O. Gregoire* of Washington.

895 (1996) (plurality opinion) (internal quotation marks omitted). The Restatement of Contracts reflects many of the principles of contract law that are applicable to this action. As set forth in the Restatement of Contracts, the relevant principles specify that, when one party to a contract repudiates that contract, the other party "is entitled to restitution for any benefit that he has conferred on" the repudiating party "by way of part performance or reliance." Restatement (Second) of Contracts § 373 (1979) (hereinafter Restatement). The Restatement explains that "repudiation" is a "statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach." *Id.,* § 250. And "total breach" is a breach that "so substantially impairs the value of the contract to the injured party at the time of the breach that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance." *Id.,* § 243.

As applied to this action, these principles amount to the following: If the Government said it would break, or did break, an important contractual promise, thereby "substantially impair[ing] the value of the contract[s]" to the companies, *ibid.*, then (unless the companies waived their rights to restitution) the Government must give the companies their money back. And it must do so whether the contracts would, or would not, ultimately have proved financially beneficial to the companies. The Restatement illustrates this point as follows:

> "A contracts to sell a tract of land to B for $100,000. After B has made a part payment of $20,000, A wrongfully refuses to transfer title. B can recover the $20,000 in restitution. The result is the same even if the market price of the land is only $70,000, so that performance would have been disadvantageous to B." *Id.,* § 373, Comment *a,* Illustration 1.

B

In 1981, in return for up-front "bonus" payments to the United States of about $156 million (plus annual rental payments), the companies received 10-year renewable lease contracts with the United States. In these contracts, the United States promised the companies, among other things, that they could explore for oil off the North Carolina coast and develop any oil that they found (subject to further royalty payments) provided that the companies received exploration and development permissions in accordance with various statutes and regulations to which the lease contracts were made "subject." App. to Pet. for Cert. in No. 99–253, pp. 174a–185a.

The statutes and regulations, the terms of which in effect were incorporated into the contracts, made clear that obtaining the necessary permissions might not be an easy matter. In particular, the Outer Continental Shelf Lands Act (OCSLA), 67 Stat. 462, as amended, 43 U. S. C. § 1331 *et seq.* (1994 ed. and Supp. III), and the Coastal Zone Management Act of 1972 (CZMA), 86 Stat. 1280, 16 U. S. C. § 1451 *et seq.*, specify that leaseholding companies wishing to explore and drill must successfully complete the following four procedures.

First, a company must prepare and obtain Department of the Interior approval for a Plan of Exploration (Exploration Plan or Plan). 43 U. S. C. § 1340(c). Interior must approve a submitted Exploration Plan unless it finds, after "consider[ing] available relevant environmental information," § 1346(d), that the proposed exploration

> "would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral . . . , to the national security or defense, or to the marine, coastal, or human environment." § 1334(a)(2)(A)(i).

Where approval is warranted, Interior must act quickly—within "thirty days" of the company's submission of a proposed Plan. § 1340(c)(1).

Second, the company must obtain an exploratory well drilling permit. To do so, it must certify (under CZMA) that its Exploration Plan is consistent with the coastal zone management program of each affected State. 16 U. S. C. § 1456(c)(3). If a State objects, the certification fails, unless the Secretary of Commerce overrides the State's objection. If Commerce rules against the State, then Interior may grant the permit. § 1456(c)(3)(A).

Third, where waste discharge into ocean waters is at issue, the company must obtain a National Pollutant Discharge Elimination System permit from the Environmental Protection Agency. 33 U. S. C. §§ 1311(a), 1342(a). It can obtain this permit only if affected States agree that its Exploration Plan is consistent with the state coastal zone management programs or (as just explained) the Secretary of Commerce overrides the state objections. 16 U. S. C. § 1456.

Fourth, if exploration is successful, the company must prepare, and obtain Interior approval for, a Development and Production Plan—a Plan that describes the proposed drilling and related environmental safeguards. 43 U. S. C. § 1351. Again, Interior's approval is conditioned upon certification that the Plan is consistent with state coastal zone management plans—a certification to which States can object, subject to Commerce Department override. § 1351(a)(3).

C

The events at issue here concern the first two steps of the process just described—Interior's consideration of a submitted Exploration Plan and the companies' submission of the CZMA "consistency certification" necessary to obtain an exploratory well drilling permit. The relevant circumstances are the following:

1. In 1981, the companies and the Government entered into the lease contracts. The companies paid the Government $156 million in up-front cash "bonus" payments.

2. In 1989, the companies, Interior, and North Carolina entered into a memorandum of understanding. In that memorandum, the companies promised that they would submit an initial draft Exploration Plan to North Carolina before they submitted their final Exploration Plan to Interior. Interior promised that it would prepare an environmental report on the initial draft. It also agreed to suspend the companies' annual lease payments (about $250,000 per year) while the companies prepared the initial draft and while any state objections to the companies' CZMA consistency certifications were being worked out, with the life of each lease being extended accordingly.

3. In September 1989, the companies submitted their initial draft Exploration Plan to North Carolina. Ten months later, Interior issued the promised ("informal" presubmission) environmental report, after a review which all parties concede was "extensive and intensive." App. 179 (deposition of David Courtland O'Neal, former Assistant Secretary of the Interior) (agreeing that the review was "the most extensive and intensive" ever "afforded an exploration well in the outer continental shelf (OCS) program"). Interior concluded that the proposed exploration would not "significantly affec[t]" the marine environment or "the quality of the human environment." *Id.*, at 138–140 (U. S. Dept. of Interior Minerals Management Service, Environmental Assessment of Exploration Plan for Manteo Area Block 467 (Sept. 1990)).

4. On August 20, 1990, the companies submitted both their final Exploration Plan and their CZMA "consistency certification" to Interior.

5. Just two days earlier, on August 18, 1990, a new law, the Outer Banks Protection Act (OBPA), § 6003, 104 Stat. 555, had come into effect. That law prohibited the Secre-

tary of the Interior from approving any Exploration Plan or Development and Production Plan or to award any drilling permit until (a) a new OBPA-created Environmental Sciences Review Panel had reported to the Secretary, (b) the Secretary had certified to Congress that he had sufficient information to make these OCSLA-required approval decisions, and (c) Congress had been in session an additional 45 days, but (d) in no event could he issue an approval or permit for the next 13 months (until October 1991). § 6003(c)(3). OBPA also required the Secretary, in his certification, to explain and justify in detail any differences between his own certified conclusions and the new Panel's recommendations. § 6003(c)(3)(A)(ii)(II).

6. About five weeks later, and in light of the new statute, Interior wrote a letter to the Governor of North Carolina with a copy to petitioner Mobil. It said that the final submitted Exploration Plan "is deemed to be approvable in all respects." It added:

> "[W]e are required to approve an Exploration Plan unless it is inconsistent with applicable law or because it would result in serious harm to the environment. Because we have found that Mobil's Plan fully complies with the law and will have only negligible effect on the environment, we are not authorized to disapprove the Plan or require its modification." App. to Pet. for Cert. in No. 99–253, p. 194a (letter from Regional Director Bruce Weetman to the Honorable James G. Martin, Governor of North Carolina, dated Sept. 28, 1996).

But, it noted, the new law, the "Outer Banks Protection Act (OBPA) of 1990 . . . prohibits the approval of any Exploration Plan at this time." It concluded, "because we are currently prohibited from approving it, the Plan will remain on file until the requirements of the OBPA are met." In the meantime a "suspension has been granted to all leases offshore

the State of North Carolina." *Ibid.* *S*ee also App. 129–131 (letter from Lawrence H. Ake, Minerals Management Service, to William C. Whittemore, Mobil Exploration & Producing U. S. Inc., dated Sept. 21, 1990 (notice of suspension of leases, citing 30 CFR §250.10(b)(7) (1990) as the basis for the suspensions)).

About 18 months later, the Secretary of the Interior, after receiving the new Panel's report, certified to Congress that he had enough information to consider the companies' Exploration Plan. He added, however, that he would not consider the Plan until he received certain further studies that the new Panel had recommended.

7. In November 1990, North Carolina objected to the companies' CZMA consistency certification on the ground that Mobil had not provided sufficient information about possible environmental impact. A month later, the companies asked the Secretary of Commerce to override North Carolina's objection.

8. In 1994, the Secretary of Commerce rejected the companies' override request, relying in large part on the fact that the new Panel had found a lack of adequate information in respect to certain environmental issues.

9. In 1996, Congress repealed OBPA. §109, 110 Stat. 1321–177.

D

In October 1992, after all but the two last-mentioned events had taken place, petitioners joined a breach-of-contract lawsuit brought in the Court of Federal Claims. On motions for summary judgment, the court found that the United States had broken its contractual promise to follow OCSLA's provisions, in particular the provision requiring Interior to approve an Exploration Plan that satisfied OCSLA's requirements within 30 days of its submission to Interior. The United States thereby repudiated the contracts. And that repudiation entitled the companies to restitution of the

up-front cash "bonus" payments they had made. *Conoco Inc.* v. *United States*, 35 Fed. Cl. 309 (1996).

A panel of the Court of Appeals for the Federal Circuit reversed, one judge dissenting. The panel held that the Government's refusal to consider the companies' final Exploration Plan was not the "operative cause" of any failure to carry out the contracts' terms because the State's objection to the companies' CZMA "consistency statement" would have prevented the companies from exploring regardless. 177 F. 3d 1331 (1999).

We granted certiorari to review the Federal Circuit's decision.

II

The record makes clear (1) that OCSLA required Interior to approve "within thirty days" a submitted Exploration Plan that satisfies OCSLA's requirements, (2) that Interior told Mobil the companies' submitted Plan met those requirements, (3) that Interior told Mobil it would not approve the companies' submitted Plan for at least 13 months, and likely longer, and (4) that Interior did not approve (or disapprove) the Plan, ever. The Government does not deny that the contracts, made "pursuant to" and "subject to" OCSLA, incorporated OCSLA provisions as promises. The Government further concedes, as it must, that relevant contract law entitles a contracting party to restitution if the other party "substantially" breached a contract or communicated its intent to do so. See Restatement § 373(1); 11 W. Jaeger, Williston on Contracts § 1312, p. 109 (3d ed. 1968) (hereinafter Williston); 5 A. Corbin, Contracts § 1104, p. 560 (1964); see also *Ankeny* v. *Clark*, 148 U. S. 345, 353 (1893). Yet the Government denies that it must refund the companies' money.

This is because, in the Government's view, it did not breach the contracts or communicate its intent to do so; any breach was not "substantial"; and the companies waived their rights to restitution regardless. We shall consider each of these arguments in turn.

A

The Government's "no breach" arguments depend upon the contract provisions that "subject" the contracts to various statutes and regulations. Those provisions state that the contracts are "subject to" (1) OCSLA, (2) "Sections 302 and 303 of the Department of Energy Organization Act," (3) "all regulations issued pursuant to such statutes and in existence upon the effective date of" the contracts, (4) "all regulations issued pursuant to such statutes in the future which provide for the prevention of waste and the conservation" of Outer Continental Shelf resources, and (5) "all other applicable statutes and regulations." App. to Pet. for Cert. in No. 99–253, at 175a. The Government says that these provisions incorporate into the contracts, not only the OCSLA provisions we have mentioned, but also certain other statutory provisions and regulations that, in the Government's view, granted Interior the legal authority to refuse to approve the submitted Exploration Plan, while suspending the leases instead.

First, the Government refers to 43 U. S. C. § 1334(a)(1)(A), an OCSLA provision that authorizes the Secretary to promulgate regulations providing for "the suspension . . . of any operation or activity . . . *at the request of a lessee*, in the national interest, to facilitate proper development of a lease." (Emphasis added.) This provision, as the emphasized terms show, requires "the request of a lessee," *i. e.*, the companies. The Government does not explain how this requirement was satisfied here. Hence, the Government cannot rely upon the provision.

Second, the Government refers to 30 CFR § 250.110(b)(4) (1999), formerly codified at 30 CFR § 250.10(b)(4) (1997), a regulation stating that "[t]he Regional Supervisor may . . . direct . . . a suspension of any operation or activity . . . [when the] suspension is necessary for the implementation of the requirements of the National Environmental Policy Act or to conduct an environmental analysis." The Government says

that this regulation permitted the Secretary of the Interior to suspend the companies' leases because that suspension was "necessary . . . to conduct an environmental analysis," namely, the analysis demanded by the new statute, OBPA.

The "environmental analysis" referred to, however, is an analysis the need for which was created by OBPA, a later enacted statute. The lease contracts say that they are subject to then-existing regulations and to certain future regulations, those issued pursuant to OCSLA and §§ 302 and 303 of the Department of Energy Organization Act. This explicit reference to future regulations makes it clear that the catchall provision that references "all other applicable . . . regulations," *supra*, at 615, must include only statutes and regulations already existing at the time of the contract, see 35 Fed. Cl., at 322–323, a conclusion not questioned here by the Government. Hence, these provisions mean that the contracts are not subject to future regulations promulgated under other statutes, such as new statutes like OBPA. Without some such contractual provision limiting the Government's power to impose new and different requirements, the companies would have spent $156 million to buy next to nothing. In any event, the Court of Claims so interpreted the lease; the Federal Circuit did not disagree with that interpretation; nor does the Government here dispute it.

Instead, the Government points out that the regulation in question—the regulation authorizing a governmental suspension in order to conduct "an environmental analysis"—was not itself a *future* regulation. Rather, a similar regulation existed at the time the parties signed the contracts, 30 CFR § 250.12(a)(iv) (1981), and, in any event, it was promulgated under OCSLA, a statute exempted from the contracts' temporal restriction. But that fact, while true, is not sufficient to produce the incorporation of future statutory requirements, which is what the Government needs to prevail. If the pre-existing regulation's words, "an environmental analysis," were to apply to analyses mandated by *future*

statutes, then they would make the companies subject to the same unknown future requirements that the contracts' specific temporal restrictions were intended to avoid. Consequently, whatever the regulation's words might mean in other contexts, we believe the contracts before us must be interpreted as excluding the words "environmental analysis" *insofar as* those words would incorporate the requirements of future statutes and future regulations excluded by the contracts' provisions. Hence, they would not incorporate into the contracts requirements imposed by a new statute such as OBPA.

Third, the Government refers to OCSLA, 43 U. S. C. § 1334(a)(1), which, after granting Interior rulemaking authority, says that Interior's

> "regulations . . . shall include . . . provisions . . . for the suspension . . . of any operation . . . pursuant to any lease . . . *if there is a threat of serious*, irreparable, or immediate *harm* or damage to life . . . , to property, to any mineral deposits . . . , or to the marine, coastal, or *human environment*." (Emphasis added.)

The Government points to the OBPA Conference Report, which says that any OBPA-caused delay is "related to . . . environmental protection" and to the need "for the collection and analysis of crucial oceanographic, ecological, and socioeconomic data," to "prevent a public harm." H. R. Conf. Rep. No. 101–653, p. 163 (1990); see also Brief for United States 32. At oral argument, the Government noted that the OBPA mentions "tourism" in North Carolina as a "major industry . . . which is subject to potentially significant disruption by offshore oil or gas development." § 6003(b)(3). From this, the Government infers that the pre-existing OCSLA provision authorized the suspension in light of a "threat of . . . serious harm" to a "human environment."

The fatal flaw in this argument, however, arises out of the Interior Department's own statement—a statement made

when citing OBPA to explain its approval delay. Interior then said that the Exploration Plan "fully complies" with current legal requirements. And the OCSLA statutory provision quoted above was the most pertinent of those current requirements. *Supra*, at 609. The Government did not deny the accuracy of Interior's statement, either in its brief filed here or its brief filed in the Court of Appeals. Insofar as the Government means to suggest that the new statute, OBPA, *changed* the relevant OCSLA standard (or that OBPA language and history somehow constitute findings Interior must incorporate by reference), it must mean that OBPA in effect created a *new* requirement. For the reasons set out *supra*, at 616, however, any such new requirement would not be incorporated into the contracts.

Finally, we note that Interior itself, when imposing the lengthy approval delay, did not rely upon any of the regulations to which the Government now refers. Rather, it relied upon, and cited, a different regulation, 30 CFR § 250.110(b)(7) (1999), which gives Interior the power to suspend leases when "necessary to comply with judicial decrees prohibiting production or any other operation or activity." The Government concedes that no judicial decree was involved in this action and does not rely upon this regulation here.

We conclude, for these reasons, that the Government violated the contracts. Indeed, as Interior pointed out in its letter to North Carolina, the new statute, OBPA, *required* Interior to impose the contract-violating delay. See App. 129 ("The [OBPA] contains provisions that specifically prohibit the Minerals Management Service from approving any Exploration Plan, approving any Application for Permit to Drill, or permitting any drilling offshore the State of North Carolina until at least October 1, 1991"). It therefore made clear to Interior and to the companies that the United States had to violate the contracts' terms and would continue to do so.

Moreover, OBPA changed pre-existing contract-incorporated requirements in several ways. It delayed approval, not only of an Exploration Plan but also of Development and Production Plans; and it delayed the issuance of drilling permits as well. It created a new type of Interior Department environmental review that had not previously existed, conducted by the newly created Environmental Sciences Review Panel; and, by insisting that the Secretary explain in detail any differences between the Secretary's findings and those of the Panel, it created a kind of presumption in favor of the new Panel's findings.

The dissent argues that only the statements contained in the letter from Interior to the companies may constitute a repudiation because "the enactment of legislation is not typically conceived of as a 'statement' of anything to any one party in particular," and a repudiation requires a "statement by the obligor to the obligee indicating that the obligor will commit a breach." *Post*, at 630–631, n. 4 (opinion of STEVENS, J.) (quoting Restatement § 250). But if legislation passed by Congress and signed by the President is not a "statement by the obligor," it is difficult to imagine what would constitute such a statement. In this action, it was the United States who was the "obligor" to the contract. See App. to Pet. for Cert. in No. 99–253, at 174a (lease, identifying "the United States of America" as the "Lessor"). Although the dissent points out that legislation is "addressed to the public at large," *post*, at 631, n. 4, that "public" includes those to whom the United States had contractual obligations. If the dissent means to invoke a special exception such as the "sovereign acts" doctrine, which treats certain laws as if they simply created conditions of impossibility, see *Winstar*, 518 U. S., at 891–899 (principal opinion of SOUTER, J.); *id.*, at 923–924 (SCALIA, J., concurring in judgment), it cannot do so here. The Court of Federal Claims rejected the application of that doctrine to this action, see

35 Fed. Cl., at 334–336, and the Government has not contested that determination here. Hence, under these circumstances, the fact that Interior's repudiation rested upon the enactment of a new statute makes no significant difference.

We do not say that the changes made by the statute were unjustified. We say only that they were changes of a kind that the contracts did not foresee. They were changes in those approval procedures and standards that the contracts had incorporated through cross-reference. The Government has not convinced us that Interior's actions were authorized by any other contractually cross-referenced provision. Hence, in communicating to the companies its intent to follow OBPA, the United States was communicating its intent to violate the contracts.

B

The Government next argues that any violation of the contracts' terms was not significant; hence there was no "substantial" or "material" breach that could have amounted to a "repudiation." In particular, it says that OCSLA's 30-day approval period "does not function as the 'essence' of these agreements." Brief for United States 37. The Court of Claims concluded, however, that timely and fair consideration of a submitted Exploration Plan was a "necessary reciprocal obligation," indeed, that any "contrary interpretation would render the bargain illusory." 35 Fed. Cl., at 327. We agree.

We recognize that the lease contracts gave the companies more than rights to obtain approvals. They also gave the companies rights to explore for, and to develop, oil. But the need to obtain Government approvals so qualified the likely future enjoyment of the exploration and development rights that the contract, in practice, amounted primarily to an *opportunity* to try to obtain exploration and development rights in accordance with the procedures and under the standards specified in the cross-referenced statutes and regulations. Under these circumstances, if the companies did

not at least buy a promise that the Government would not deviate significantly from those procedures and standards, then what did they buy? Cf. *id.*, at 324 (the companies bought exclusive rights to explore and develop oil "*if they met*" OCSLA requirements (emphasis added)).

The Government's modification of the contract-incorporated processes was not technical or insubstantial. It did not announce an (OBPA-required) approval delay of a few days or weeks, but of 13 months minimum, and likely much longer. The delay turned out to be at least four years. And lengthy delays matter, particularly where several successive agency approvals are at stake. Whether an applicant approaches Commerce with an Interior Department approval already in hand can make a difference (as can failure to have obtained that earlier approval). Moreover, as we have pointed out, OBPA changed the contract-referenced procedures in several other ways as well. *Supra*, at 619.

The upshot is that, under the contracts, the incorporated procedures and standards amounted to a gateway to the companies' enjoyment of all other rights. To significantly narrow that gateway violated material conditions in the contracts. The breach was "substantia[l]," depriving the companies of the benefit of their bargain. Restatement § 243. And the Government's communication of its intent to commit that breach amounted to a repudiation of the contracts.

C

The Government argues that the companies waived their rights to restitution. It does not deny that the United States repudiated the contracts *if* (as we have found) OBPA's changes amounted to a substantial breach. The Government does not claim that the United States retracted its repudiation. Cf. *id.*, § 256 (retraction will nullify the effects of repudiation if done before the other party either changes position in reliance on the retraction or communicates that it considers the repudiation to be final). It cannot claim that

the companies waived their rights simply by urging performance. *Id.*, § 257 (the injured party "does not change the effect of a repudiation by urging the repudiator to perform in spite of his repudiation"); see also 11 Williston § 1334, at 177–178. Nor has the Government convinced us that the companies' continued actions under the contracts amount to anything more than this urging of performance. See 2 E. Farnsworth, Contracts § 8.22, p. 544 (2d ed. 1998) (citing *United Cal. Bank* v. *Prudential Ins. Co.,* 140 Ariz. 238, 282–283, 681 P. 2d 390, 433–434 (App. 1983) (urging performance and making "efforts of its own to fulfill the conditions" of the contract come to the same thing)); cf. 11 Williston § 1337, at 186–187. Consequently the Government's waiver claim must come down to a claim that the companies *received* at least partial performance. Indeed, acceptance of performance under a once-repudiated contract can constitute a waiver of the right to restitution that repudiation would otherwise create. Restatement § 373, Comment *a;* cf. Restatement of Restitution § 68, Comment *b* (1936).

The United States points to three events that, in its view, amount to continued performance of the contracts. But it does not persuade us. First, the oil companies submitted their Exploration Plan to Interior two days *after* OBPA became law. *Supra,* at 611. The performance question, however, is not just about what the oil companies did or requested, but also about what they actually received from the Government. And, in respect to the Exploration Plan, the companies received nothing.

Second, the companies subsequently asked the Secretary of Commerce to overturn North Carolina's objection to the companies' CZMA consistency certification. And, although the Secretary's eventual response was negative, the companies did at least receive that reply. *Supra,* at 613. The Secretary did not base his reply, however, upon application of the contracts' standards, but instead relied in large part on the findings of the new, OBPA-created, Environmental

Sciences Review Panel. See App. 224, 227, n. 35, 232–233, 239, 244 (citing the Panel's report). Consequently, we cannot say that the companies received from Commerce the kind of consideration for which their contracts called.

Third, the oil companies received suspensions of their leases (suspending annual rents and extending lease terms) pending the OBPA-mandated approval delays. *Supra*, at 612–613. However, a separate contract—the 1989 memorandum of understanding—entitled the companies to receive these suspensions. See App. to Brief for United States 2a (letter from Toni D. Hennike, Counsel, Mobil Exploration & Producing U. S. Inc., to Ralph Melancon, Regional Supervisor, U. S. Dept. of Interior Minerals Management Service, dated Feb. 21, 1995 (quoting the memorandum as a basis for the requested suspensions)). And the Government has provided no convincing reason why we should consider the suspensions to amount to significant performance of the lease contracts in question.

We conclude that the companies did not receive significant postrepudiation performance. We consequently find that they did not waive their right to restitution.

D

Finally, the Government argues that repudiation could not have hurt the companies. Since the companies could not have met the CZMA consistency requirements, they could not have explored (or ultimately drilled) for oil in any event. Hence, OBPA caused them no damage. As the Government puts it, the companies have already received "such damages as were actually caused by the [Exploration Plan approval] delay," namely, none. Brief for United States 43–44; see also 177 F. 3d, at 1340. This argument, however, misses the basic legal point. The oil companies do not seek damages for breach of contract. They seek restitution of their initial payments. Because the Government repudiated the lease contracts, the law entitles the companies to that restitution

whether the contracts would, or would not, ultimately have produced a financial gain or led them to obtain a definite right to explore. See *supra*, at 608. If a lottery operator fails to deliver a purchased ticket, the purchaser can get his money back—whether or not he eventually would have won the lottery. And if one party to a contract, whether oil company or ordinary citizen, advances the other party money, principles of restitution normally require the latter, upon repudiation, to refund that money. Restatement § 373.

III

Contract law expresses no view about the wisdom of OBPA. We have examined only that statute's consistency with the promises that the earlier contracts contained. We find that the oil companies gave the United States $156 million in return for a contractual promise to follow the terms of pre-existing statutes and regulations. The new statute prevented the Government from keeping that promise. The breach "substantially impair[ed] the value of the contract[s]." *Id.*, § 243. And therefore the Government must give the companies their money back.

For these reasons, the judgment of the Federal Circuit is reversed. We remand the cases for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, dissenting.

Since the 1953 passage of the Outer Continental Shelf Lands Act (OCSLA), 43 U. S. C. § 1331 *et seq.*, the United States Government has conducted more than a hundred lease sales of the type at stake today, and bidders have paid the United States more than $55 billion for the opportunity to develop the mineral resources made available under those leases.[1] The United States, as lessor, and petitioners, as les-

[1] *Conoco, Inc.* v. *United States*, 35 Fed. Cl. 309, 315, n. 2 (1996); see also U. S. Dept. of Interior, Minerals Management Service, Mineral Revenues 1999, Report on Receipts From Federal and American Indian Leases 35

sees, clearly had a mutual interest in the successful exploration, development, and production of oil in the Manteo Unit pursuant to the leases executed in 1981. If production were achieved, the United States would benefit both from the substantial royalties it would receive and from the significant addition to the Nation's energy supply. Self-interest, as well as its duties under the leases, thus led the Government to expend substantial resources over the course of 19 years in the hope of seeing this project realized.

From the outset, however, it was apparent that the Outer Banks project might not succeed for a variety of reasons. Among those was the risk that the State of North Carolina would exercise its right to object to the completion of the project. That was a risk that the parties knowingly assumed. They did not, however, assume the risk that Congress would enact additional legislation that would delay the completion of what would obviously be a lengthy project in any event. I therefore agree with the Court that the Government did breach its contract with petitioners in failing to approve, within 30 days of its receipt, the plan of exploration petitioners submitted. As the Court describes, *ante,* at 609–610, the leases incorporate the provisions of the OCSLA into their terms, and the OCSLA, correspondingly, sets down this 30-day requirement in plain language. 43 U. S. C. § 1340(c).

I do not, however, believe that the appropriate remedy for the Government's breach is for petitioners to recover their full initial investment. When the entire relationship between the parties is considered, with particular reference to the impact of North Carolina's foreseeable exercise of its right to object to the project, it is clear that the remedy ordered by the Court is excessive. I would hold that petitioners are entitled at best to damages resulting from the delay caused by the Government's failure to approve the plan within the requisite time.

(reporting more than $64 billion in royalties from federal offshore mineral leases from 1953–1999).

I

To understand the nature of the breach, and the appropriate remedy for it, it is necessary to supplement the Court's chronological account. From the time petitioners began discussing their interest in drilling an exploratory well 45 miles off the coast from Cape Hatteras in the fall of 1988, until (and even after) the enactment of the Outer Banks Protection Act (OBPA), § 6003, on August 18, 1990, their exploration proposal was fraught with problems. It was clear to petitioners as early as October 6, 1988 (and almost certainly before), that the State of North Carolina, whose approval petitioners knew they had to have under their lease terms in order to obtain the requisite permits from the Department of the Interior (DOI), was not going to go along readily. App. 61–63 (letter from North Carolina Governor James G. Martin to Ralph Ainger, Acting Regional Manager, Minerals Management Service (MMS) (a division of the DOI)). As the Court explains, *ante,* at 610, without the State's approval pursuant to the Coastal Zone Management Act (CZMA), 16 U. S. C. § 1451 *et seq.*, incorporated into the OCSLA by multiple references, no DOI licensing, permitting, or lessee exploration of any kind could ensue, 43 U. S. C. § 1340(c).

That is why petitioners pursued multiparty negotiations with the Federal Government and the State to help facilitate the eventual approval of their proposal. As part of these negotiations, petitioners entered into a memorandum of understanding with North Carolina and the Federal Government, and, according to the terms of that agreement, submitted a draft plan of exploration (POE) to DOI and to the State. App. 79–85. The Government also agreed to prepare draft and final environmental impact reports on petitioners' draft POE and to participate in public meetings and hearings regarding the draft POE and the Government's findings about its environmental impact. *Id.*, at 81–82. Among other things, this agreement resulted in the Government's preparation in 1990 of a three-volume, 2,000-page special environ-

mental report on the proposed project, released on June 1 of that year.

Although the State thereafter continued to express its dissatisfaction with the prospect of exploration and development, voicing its displeasure with the Government's draft environmental findings, *id.*, at 86–95, and rejecting petitioners' application for a separate required permit, *id.*, at 96–97,[2] petitioners nonetheless submitted a final POE to DOI on August 20, 1990, pursuant to the lease contract terms. This final plan, it must be noted, was submitted by petitioners two days *after* the enactment of the OBPA—the event petitioners claim amounted to (either) an anticipatory repudiation of the lease contracts, or a total breach, Brief for Petitioner in No. 99–244, p. 19 ("[I]n enacting the OBPA, the Government anticipatorily repudiated its obligations under the leases . . ."); Brief for Petitioner in No. 99–253, p. 21 ("The enactment of the OBPA placed the United States in total breach of the petitioners' leases").

Following petitioners' submission of the final POE, DOI then had a duty, under the terms of the OCSLA as incorporated into the lease contract, to approve that plan "within thirty days of its submission." 43 U. S. C. § 1340(c)(1). In other words, DOI had until September 19, 1990, to consider the submitted plan and, provided that the plan was complete and otherwise satisfied the OCSLA criteria, to issue its statement of approval. (Issuing its "approval," of course, is different from granting petitioners any "license or permit for

[2] The Federal Water Pollution Control Act, 86 Stat. 816, 33 U. S. C. § 1251 *et seq.*, requires lessees to obtain a National Pollutant Discharge Elimination System (NPDES) permit from the Environmental Protection Agency (EPA) before lessees may move forward with any exploration plan that includes discharging pollutants into the ocean, §§ 1311(a), 1342(a). The EPA cannot issue an NPDES permit, however, before the lessee has certified to the State's satisfaction that the discharge would comply with the State's CZMA requirements. Unless the Secretary of Commerce overrides any state objection arising during this process, 16 U. S. C. § 1456(c)(3), lessees will not receive the necessary permit.

any activity described in detail in an exploration plan and affecting any land use or water use" in a State's coastal zone, § 1340(c)(2); actual permission to proceed had to wait for the State's CZMA certification.) Despite this hard deadline, September 19 came and went without DOI's issuance of approval.

DOI's explanation came two days later, on September 21, 1990, in a letter to Mobil Oil from the MMS's Acting Regional Supervisor for Field Operations, Lawrence Ake. Without commenting on DOI's substantive assessment of the POE, the Ake letter stated that the OBPA "specifically prohibit[s]" the MMS from approving any POE "until at least October 1, 1991." App. 129. "Consequently," Mr. Ake explained, the MMS was suspending operation on the Manteo Unit leases "in accordance with 30 CFR § 250.10(b)(7)," *ibid.*, a regulation issued pursuant to the OCSLA and, of course, incorporated thereby into the parties' lease agreement. One week after that, on September 28, 1990, the MMS's Regional Director, Bruce Weetman, sent a letter to Governor Martin of North Carolina, elaborating on MMS's actions upon receipt of the August 20 POE. App. to Pet. for Cert. in No. 99–253, pp. 193a–195a. According to Weetman, the POE "was deemed complete on August 30, and transmitted to other Federal Agencies and the State of North Carolina on that date. Timely comments were received from the State of North Carolina and the U. S. Coast Guard. An analysis of the potential environmental [e]ffects associated with the Plan was conducted, an Environmental Assessment (EA) was prepared, and a Finding of No Significant Impact (FONSI) was made." *Id.*, at 193a. Based on these steps taken by the MMS, it concluded that the POE was "approvable" but that the MMS was "currently prohibited from approving it." Thus, the letter concluded, the POE would "remain on file" pending the resolution of the OBPA requirements, and the lease suspensions would continue in force in the interim. *Id.*, at 194a.

II

In my judgment, the Government's failure to meet the required 30-day deadline on September 19, 1990, despite the fact that the POE was in a form that merited approval, was a breach of its contractual obligation to the contrary.[3] After this, its statement in the September 21 Ake letter that the OBPA prohibited approval until at least October 1991 must also be seen as a signal of its intent to remain in breach of the 30-day deadline requirement for the coming year. The question with which the Court is faced, however, is not whether the United States was in breach, but whether, in light of the Government's actions, petitioners are entitled to restitution rather than damages, the usual remedy for a breach of contract.

As the Court explains, *ante*, at 608, an injured party may seek restitution as an alternative remedy only "on a breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation." Restatement (Second) of Contracts § 373 (1979) (hereinafter Restatement (Second)). Whether one describes the suspect action as "repudiation" (which itself is defined in terms of total breach, see *ante*, at 608) or simply "total breach," the injured party may obtain restitution only if the action "so substantially impairs the value of the contract to the injured party . . . that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance." Restatement (Second) § 243. Although the language varies to some small degree, every major statement of contract law includes the same admonition. See, *e. g.*, 5 A. Corbin, Contracts § 1104, pp. 558, 562 (1964) ("Restitution is an available remedy only

[3] It is incorrect, in my view, to assert that the Government failed to give the proposal "timely and fair consideration," *ante*, at 620, because, as the Weetman letter establishes, the Government did engage in such an evaluation process even after the enactment of the OBPA. It was in failing to issue the approval on the heels of that evaluation that the Government ran afoul of its obligations.

when the breach is of vital importance. . . . In the case of a breach by non-performance, . . . [t]he injured party, however, can not maintain an action for restitution of what he has given the defendant unless the defendant's non-performance is so material that it is held to go to the 'essence'; it must be such a breach as would discharge the injured party from any further contractual duty on his own part"). In short, there is only repudiation if there is an action that would amount to a total breach, and there is only such a breach if the suspect action destroys the essential object of the contract. It is thus necessary to assess the significance or "materiality" of the Government's breach.

Beyond this, it is important to underscore as well that restitution is appropriate only when it is "just in the circumstances." Restatement (Second) § 243. This requires us to look not only to the circumstances of the breach itself, but to the equities of the situation as a whole. Finally, even if a defendant's actions do not satisfy the foregoing requirements, an injured party presumably still has available the standard contract remedy for breach—the *damages* petitioners suffered as a result.

III

Given these requirements, I am not persuaded that the actions by the Government amounted either to a repudiation of the contracts altogether, or to a total breach by way of its neglect of an "essential" contractual provision.

I would, at the outset, reject the suggestion that there was a repudiation here, anticipatory or otherwise, for two reasons. First, and most basic, the Government continued to perform under the contractual terms as best it could even after the OBPA's passage.[4] Second, the breach-by-delay

[4] My rejection of the repudiation theory, of course, encompasses a rejection of the notion that the very enactment of the OBPA itself constituted an anticipatory repudiation of the parties' contract. Brief for Petitioner in No. 99–244, p. 19. Repudiation, as the Court explains, is in the first instance a "'statement by the obligor to the obligee indicating that the

forecast in the Ake letter was not "of sufficient gravity that, if the breach actually occurred, it would of itself give the obligee a claim for damages for total breach." Restatement (Second) § 250, and Comment *d;* see also 11 W. Jaeger, Williston on Contracts § 1312 (3d ed. 1968).

While acknowledging the OBPA's temporary moratorium on plan approvals, the Ake letter to petitioner Mobil states that the Government is imposing a lease *suspension*—rather than a cancellation or recision—and even references an existing OCSLA regulatory obligation pursuant to which it is attempting to act. The Weetman letter explains in detail the actions the MMS took in carefully considering petitioners' POE submission; it evaluated the plan for its compliance with the OCSLA's provisions, transmitted it to other agencies and the State for their consideration, took the comments of those entities into account, conducted the requisite analyses, and prepared the requisite findings—all subsequent to the OBPA's enactment. It cannot be doubted that the Government intended to continue performing the contract to the extent it thought legally permissible post-OBPA.

Indeed, petitioners' own conduct is inconsistent with the contention that the Government had, as of August 18, 1990,

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obligor will commit a breach.'" *Ante*, at 608 (quoting Restatement (Second) § 250). Except in some abstract sense, the enactment of legislation is not typically conceived of as a "statement" of anything to any one party in particular, for it is, by its nature, addressed to the public at large. To the extent this legislation was directed to anyone in particular, it was to the Secretary of the Interior, directing him to take or not take certain actions, not to particular lessees. Finally, while it surely imposed upon the Secretary obligations inconsistent with the Secretary's existing duties under the leases, the OBPA itself contemplated that the parties to the lease contracts would continue, after a delay, to operate under the OCSLA-based contractual scheme. The Secretary was, within the confines of the newly enacted requirements, to continue to take steps to "carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in subsection (c)(1) [(*i. e.*, approve exploration, development and production plans for lessees, or grant an application for permit to drill; permit drilling)]." § 6003(d), 104 Stat. 557.

or indeed as of September 19, 1990, fully repudiated its obligations under the parties' contracts. As I have mentioned, it was *after* the enactment of the OBPA that petitioners submitted their final plan to the DOI—just as if they understood there still to be an existing set of contractual conditions to be fulfilled and expected to fulfill them. Petitioners, moreover, accepted the Government's proffered lease suspensions, and indeed, themselves subsequently requested that the suspensions remain in effect "from June 8, 1992 forward" under 30 CFR §250.10(b)(6) (1990), an OCSLA regulation providing for continued lease suspension at the lessee's request "to allow for inordinate delays encountered by the lessee in obtaining required permits or consents, including administrative or judicial challenges or appeals."[5]

After the State of North Carolina filed its formal CZMA objections on November 19, 1990 (indicating that the State believed a contract still existed), petitioners promptly sought in December 1990—again under statutory terms incorporated into the contracts—to have the Secretary of Commerce override the objections, 43 U. S. C. §1340(c)(1), to make it possible for the exploration permits to issue. In a response explainable solely on the basis that the Government still believed itself to be performing contractually obligatory terms, the Secretary of Commerce undertook to evaluate petitioners' request that the Secretary override the State's CZMA objections. This administrative review process has, I do not doubt, required a substantial expenditure of the time and resources of the Departments of Commerce and Interior, along with the 12 other administrative agencies whose comments the Secretary of Commerce solicited in evaluating the request to override and in issuing, on September 2, 1994,

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[5] See App. 170–171 (letter from Leslie Burton, Senior Counsel for Mobil Oil, to Bruce Weetman, Regional Director, MMS, Sept. 23, 1992); see also App. to Brief for United States 1a (letter from Toni Hennike, Counsel, Mobil Oil, to Ralph Melancon, Regional Supervisor, MMS, Feb. 21, 1995) (requesting reinstatement of lease suspensions).

a lengthy "Decision and Findings" in which he declined to do so.

And petitioners were not finished with the leases yet. After petitioners received this adverse judgment from Commerce, they sought the additional lease suspensions described, see App. to Brief for United States 1a (letter from Toni Hennike, Counsel, Mobil Oil, to Ralph Melancon, Regional Supervisor, MMS, Feb. 21, 1995), insisting that "the time period to seek judicial review of the Secretary's decisions had not expired when the MMS terminated the [preexisting] suspensions," and that "[s]ince the Secretary's decision is being challenged, it is not a final decision and will not be until it is upheld by a final nonappealable judgment issued from a court with competent jurisdiction," *id.*, at 2a. Indeed, petitioners have pending in the United States District Court for the District of Columbia at this very moment their appeal from the Secretary of Commerce's denial of petitioners' override request of North Carolina's CZMA objections. *Mobil Oil Exploration & Producing Southeast, Inc.* v. *Daley*, No. 95–93 SSH (filed Mar. 8, 2000).

Absent, then, any repudiation, we are left with the possibility that the nature of the Government's breach was so "essential" or "total" in the scope of the parties' contractual relationship as to justify the remedy of restitution. As above, I would reject the suggestion that the OBPA somehow acted *ex proprio vigore* to render a total breach of the parties' contracts. See *ante*, at 621 ("OBPA changed the contract-referenced procedures in several other ways as well"); Brief for Petitioner in No. 99–253, at 21. The OBPA was not passed as an amendment to statutes that the leases by their terms incorporated, nor did the OBPA state that its terms were to be considered incorporated into then-existing leases; it was, rather, an action external to the contract, capable of affecting the parties' actions but not of itself changing the contract terms. The OBPA did, of course, impose a legal duty upon the Secretary of the Interior to take actions

(and to refrain from taking actions) inconsistent with the Government's existing legal obligations to the lessees. Had the Secretary chosen, despite the OBPA, to issue the required approval, he presumably could have been haled into court and compelled to rescind the approval in compliance with the OBPA requirement.[6] But that this possibility remained after the passage of the OBPA reinforces the conclusion that it was not until the Secretary actually took action inconsistent with his contractual obligations that the Government came into breach.

In rejecting the Government's argument that the breach was insufficiently material, the Court's reliance on the danger of rendering the parties' bargain illusory, see *ante*, at 620, is simply misplaced. I do not contest that the Government was contractually obliged to give petitioners' POE prompt consideration and to approve the POE if, after that consideration, it satisfied existing OCSLA demands; nor would I suggest that petitioners did not receive as part of their bargain a promise that the Government would comply with the procedural mechanisms established at the time of contracting. But that is all quite beside the point; the question is not whether this approval requirement was part of the bargain but whether it was so "essential" to the bargain in the scope of this continuing contract as to constitute a total breach.

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[6] The result of such a proceeding may well have been the issuance of a judicial decree enjoining the Secretary's actions. Ironically, the Secretary would then have been authorized under the regulatory provisions expressly incorporated into the parties' contracts to suspend the leases. 30 CFR § 250.10(b)(7) (1990) ("The Regional Supervisor may also direct . . . suspension of any operation or activity, including production, because . . . (7) [t]he suspension is necessary to comply with judicial decrees prohibiting production or any other operation or activity, or the permitting of those activities . . ."). Indeed, this was the very provision the DOI relied on in explaining why it was suspending petitioners' leases. App. 129–130.

Whether the breach was sufficiently "substantial" or material to justify restitution depends on what impact, if any, the breach had at the time the breach occurred on the successful completion of the project. See E. Farnsworth, Contracts § 8.16 (3d ed. 1999) ("The time for determining materiality is the time of the breach and not the time that the contract was made. . . . Most significant is the extent to which the breach will deprive the injured party of the benefit that it justifiably expected"). In this action the answer must be close to none. Sixty days after the Government entered into breach—from September 19, 1990, to November 19, 1990—the State of North Carolina filed its formal objection to CZMA certification with the United States. App. 141–148. As the OCSLA makes clear, "The Secretary *shall not grant any license or permit for any activity described* in detail in an exploration plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program . . . unless the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan . . . , or the Secretary of Commerce makes the finding [overriding the State's objection]." 43 U. S. C. § 1340(c)(2) (emphasis added); see also § 1351(d). While this objection remained in effect, the project could not go forward unless the objection was set aside by the Secretary of Commerce. Thus, the Government's breach effectively delayed matters during the period between September 19, 1990, and November 19, 1990. Thereafter, implementation was contractually precluded by North Carolina.

This fact does not, of course, relieve the Government of liability for breach. It does, however, make it inappropriate to conclude that the Government's pre-November 19 actions in breach were sufficiently "material" to the successful completion of the parties' project to justify giving petitioners all of their money back. At the time of the Government's breach, petitioners had no reasonable expectation under the lease contract terms that the venture would come to fruition

in the near future. Petitioners had known since 1988 that the State of North Carolina had substantial concerns about petitioners' proposed exploration; North Carolina had already officially objected to petitioners' NPDES submission—a required step itself dependent on the State's CZMA approval. App. 106–111. At the same time, the Federal Government's own substantial investments of time and resources, as well as its extensive good-faith efforts both before and after the OBPA was passed to preserve the arrangement, gave petitioners the reasonable expectation that the Government would continue trying to make the contract work. And indeed, both parties continued to behave consistently with that expectation.

While apparently recognizing that the substantiality of the Government's breach is a relevant question, see *ante,* at 608, the Court spends almost no time at all concluding that the breach was substantial enough to award petitioners a $156 million refund, *ante,* at 620–621. In a single brief paragraph of explanation, the Court first posits that the Government "did not announce an . . . approval delay of a few days or weeks, but of 13 months minimum and likely much longer." *Ante,* at 621. The Court here is presumably referring to the Ake letter to Mobil written a few days after the expiration of the 30-day deadline. But the Government's "statement" to this effect could matter only in the context of evaluating an intended *repudiation;* because, as I have explained, that "announcement" cannot be seen as a repudiation of the contract, I do not see how the statement itself exacerbates the effect of the Government's breach. What matters in evaluating a breach, of course, is not what the Government said, but what the Government did. And what the Government did was, as I have explained, continue to perform in every other way possible—evaluating the August 20 POE; suspending the leases, including suspensions in response to petitioners' express requests (suspensions that continue in effect

to this day); and responding over years to petitioners' appeal from the State's CZMA objection.[7]

The Court also asserts, without support, that "[w]hether an applicant approaches Commerce with an Interior Department approval already in hand can make a difference (as can failure to have obtained that earlier approval)." *Ibid.* Although the Court thereby implies that the Secretary of Commerce's handling of petitioners' CZMA override request was somehow tied to the DOI's failure to issue the required approval, there is record evidence that petitioners' CZMA appeals were not "suspended, impeded, or otherwise delayed by enactment or implementation of the . . . OBPA . . . ." App. 187 (declaration of Margo E. Jackson, *Conoco Inc.* v. *United States,* No. 92–331–C (Fed. Cl., Apr. 6, 1994) (Commerce Department supervisor in charge of handling Mobil's appeals)). Whether or not the Secretary's decision was in-

[7] The Court's cursory efforts to discount this evidence of continued performance fall far short. In light of the Weetman letter's detailed description of the Government's efforts to evaluate the POE as submitted, the Court's assertion that "in respect to the exploration plan, the companies received nothing," *ante,* at 622, cannot be correct. The Court itself insists on making an indispensable part of the parties' contract mutual promises to follow certain procedures, *ante,* at 620; if that is the case, we must credit the Government's efforts to follow those procedures as performance of that promise, and that performance was "received" by petitioners.

The Court also suggests that the Government was obligated to extend the lease suspensions to petitioners under the terms of the parties' separately adopted memorandum of understanding; the Government should therefore, by the Court's logic, receive no credit under the lease contracts for continuing to perform. *Ante,* at 623. Whether or not the Government was separately obligated to extend the suspensions it did (and of course the memorandum agreement only exists because of and as part of the parties' efforts to fulfill the lease contract terms), both the Government in extending the initial suspensions, and petitioners, in requesting additional suspensions, expressly relied upon regulations incorporated into the OCSLA lease contracts, see *supra,* at 631–632. The Court must stretch to avoid crediting the Government's performance.

fluenced by OBPA-required findings is, of course, a question of fact that, despite the Court's assertion, *ante*, at 622–623, none of the lower courts in this action decided. Regardless, there is certainly no *contractual* basis for the proposition that DOI's approval is a condition precedent or in any respect material to overcoming a state-filed CZMA objection. That objection, petitioners most certainly knew, was coming whether or not DOI approved the submitted POE.

In the end, the Court's central reason for finding the breach "not technical or insubstantial" is that "lengthy delays matter." *Ante*, at 621. I certainly agree with that statement as a general principle. But in this action, that principle does not justify petitioners' request for restitution. On its face, petitioners' contention that time was "of the essence" in this bargain is difficult to accept; petitioners themselves waited seven years into the renewable 10-year lease term before even floating the Outer Banks proposal, and waited another two years after the OBPA was passed before filing this lawsuit. After then accepting a full 10 years of the Government's above-and-beyond-the-call performance, time is now suddenly of the essence? As with any venture of this magnitude, this undertaking was rife with possibilities for "lengthy delays," indeed "inordinate delays encountered by the lessee in obtaining required permits or consents, including administrative or judicial challenges or appeals," 30 CFR § 250.10(b)(6) (1990). The OBPA was not, to be sure, a cause for delay that petitioners may have anticipated in signing onto the lease. But the State's CZMA and NPDES objections, and the subsequent "inordinate delays" for appeals, certainly were. The Secretary's approval was indeed "a gateway to the companies' enjoyment of all other rights," but the critical word here is "a"; approval was only one gateway of many that the petitioners knew they had to get through in order to reap the benefit of the OCSLA leases, and even that gate was not closed completely, but only "narrow[ed]," *ante*, at 621. Any long-term venture of this com-

plexity and significance is bound to be a gamble. The fact that North Carolina was holding all the aces should not give petitioners the right now to play with an entirely new deck of cards.

IV

The risk that North Carolina would frustrate performance of the leases executed in 1981 was foreseeable from the date the leases were signed. It seems clear to me that the State's objections, rather than the enactment of OBPA, is the primary explanation for petitioners' decision to take steps to avoid suffering the consequences of the bargain they made. As a result of the Court's action today, petitioners will enjoy a windfall reprieve that Congress foolishly provided them in its decision to pass legislation that, while validly responding to a political constituency that opposed the development of the Outer Banks, caused the Government to breach its own contract. Viewed in the context of the entire transaction, petitioners may well be entitled to a modest damages recovery for the *two months* of delay attributable to the Government's breach. But restitution is not a default remedy; it is available only when a court deems it, in all of the circumstances, just. A breach that itself caused at most a delay of two months in a protracted enterprise of this magnitude does not justify the $156 million draconian remedy that the Court delivers.

Accordingly, I respectfully dissent.

Syllabus

BOY SCOUTS OF AMERICA ET AL. *v.* DALE

CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

No. 99–699. Argued April 26, 2000—Decided June 28, 2000

Petitioners are the Boy Scouts of America and its Monmouth Council (collectively, Boy Scouts). The Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people. It asserts that homosexual conduct is inconsistent with those values. Respondent Dale is an adult whose position as assistant scoutmaster of a New Jersey troop was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist. He filed suit in the New Jersey Superior Court, alleging, *inter alia*, that the Boy Scouts had violated the state statute prohibiting discrimination on the basis of sexual orientation in places of public accommodation. That court's Chancery Division granted summary judgment for the Boy Scouts, but its Appellate Division reversed in pertinent part and remanded. The State Supreme Court affirmed, holding, *inter alia*, that the Boy Scouts violated the State's public accommodations law by revoking Dale's membership based on his avowed homosexuality. Among other rulings, the court held that application of that law did not violate the Boy Scouts' First Amendment right of expressive association because Dale's inclusion would not significantly affect members' ability to carry out their purposes; determined that New Jersey has a compelling interest in eliminating the destructive consequences of discrimination from society, and that its public accommodations law abridges no more speech than is necessary to accomplish its purpose; and distinguished *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, on the ground that Dale's reinstatement did not compel the Boy Scouts to express any message.

Held: Applying New Jersey's public accommodations law to require the Boy Scouts to readmit Dale violates the Boy Scouts' First Amendment right of expressive association. Government actions that unconstitutionally burden that right may take many forms, one of which is intrusion into a group's internal affairs by forcing it to accept a member it does not desire. *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623. Such forced membership is unconstitutional if the person's presence affects in a significant way the group's ability to advocate public or private viewpoints. *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 13. However, the freedom of expressive association is not absolute; it can be overridden by regulations adopted to serve compelling

state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. *Roberts*, 468 U. S., at 623. To determine whether a group is protected, this Court must determine whether the group engages in "expressive association." The record clearly reveals that the Boy Scouts does so when its adult leaders inculcate its youth members with its value system. See *id.*, at 636. Thus, the Court must determine whether the forced inclusion of Dale would significantly affect the Boy Scouts' ability to advocate public or private viewpoints. The Court first must inquire, to a limited extent, into the nature of the Boy Scouts' viewpoints. The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly those represented by the terms "morally straight" and "clean," and that the organization does not want to promote homosexual conduct as a legitimate form of behavior. The Court gives deference to the Boy Scouts' assertions regarding the nature of its expression, see *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 123–124. The Court then inquires whether Dale's presence as an assistant scoutmaster would significantly burden the expression of those viewpoints. Dale, by his own admission, is one of a group of gay Scouts who have become community leaders and are open and honest about their sexual orientation. His presence as an assistant scoutmaster would interfere with the Scouts' choice not to propound a point of view contrary to its beliefs. See *Hurley*, 515 U. S., at 576–577. This Court disagrees with the New Jersey Supreme Court's determination that the Boy Scouts' ability to disseminate its message would not be significantly affected by the forced inclusion of Dale. First, contrary to the state court's view, an association need not associate for the purpose of disseminating a certain message in order to be protected, but must merely engage in expressive activity that could be impaired. Second, even if the Boy Scouts discourages Scout leaders from disseminating views on sexual issues, its method of expression is protected. Third, the First Amendment does not require that every member of a group agree on every issue in order for the group's policy to be "expressive association." Given that the Boy Scouts' expression would be burdened, the Court must inquire whether the application of New Jersey's public accommodations law here runs afoul of the Scouts' freedom of expressive association, and concludes that it does. Such a law is within a State's power to enact when the legislature has reason to believe that a given group is the target of discrimination and the law does not violate the First Amendment. See, *e. g., id.*, at 572. The Court rejects Dale's contention that the intermediate standard of review enunciated in *United States* v. *O'Brien*, 391 U. S. 367, should be applied here to evaluate the

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competing interests of the Boy Scouts and the State. Rather, the Court applies an analysis similar to the traditional First Amendment analysis it applied in *Hurley.* A state requirement that the Boy Scouts retain Dale would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the freedom of expressive association. In so ruling, the Court is not guided by its view of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of an organization's expression does not justify the State's effort to compel the organization to accept members in derogation of the organization's expressive message. While the law may promote all sorts of conduct in place of harmful behavior, it may not interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may seem. *Hurley, supra,* at 579. Pp. 647–661.

160 N. J. 562, 734 A. 2d 1196, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post,* p. 663. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post,* p. 700.

George A. Davidson argued the cause for petitioners. With him on the briefs were *Carla A. Kerr, David K. Park, Michael W. McConnell,* and *Sanford D. Brown.*

Evan Wolfson argued the cause for respondent. With him on the brief were *Ruth E. Harlow, David Buckel, Jon W. Davidson, Beatrice Dohrn, Patricia M. Logue, Thomas J. Moloney, Allyson W. Haynes,* and *Lewis H. Robertson.**

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*Briefs of *amici curiae* urging reversal were filed for Agudath Israel of America by *David Zwiebel;* for the American Center for Law and Justice et al. by *Jay Alan Sekulow, Vincent McCarthy, John P. Tuskey,* and *Laura B. Hernandez;* for the American Civil Rights Union by *Peter J. Ferrara;* for the Becket Fund for Religious Liberty by *Kevin J. Hasson* and *Eric W. Treene;* for the California State Club Association et al. by *William I. Edlund;* for the Center for the Original Intent of the Constitution by *Michael P. Farris;* for the Christian Legal Society et al. by *Kimberlee Wood Colby* and *Carl H. Esbeck;* for the Claremont Institute Center

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners are the Boy Scouts of America and the Monmouth Council, a division of the Boy Scouts of America (col-

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for Constitutional Jurisprudence by *Edwin Meese III;* for the Eagle Forum Education & Legal Defense Fund et al. by *Erik S. Jaffe;* for the Family Defense Council et al. by *William E. Fay III;* for the Family Research Council by *Janet M. LaRue;* for Gays and Lesbians for Individual Liberty by *William H. Mellor*, *Clint Bolick*, and *Scott G. Bullock;* for the Individual Rights Foundation by *Paul A. Hoffman* and *Patrick J. Manshardt;* for the Institute for Public Affairs of the Union of Orthodox Jewish Congregations of America by *Nathan J. Diament;* for the Liberty Legal Institute by *Kelly Shackelford* and *George B. Flint;* for the National Catholic Committee on Scouting et al. by *Von G. Keetch;* for the National Legal Foundation by *Barry C. Hodge;* for the Pacific Legal Foundation by *John H. Findley;* for Public Advocate of the United States et al. by *William J. Olson* and *John S. Miles;* for the United States Catholic Conference et al. by *Mark E. Chopko* and *Jeffrey Hunter Moon;* and for John J. Hurley et al. by *Chester Darling*, *Michael Williams*, and *Dwight G. Duncan.*

Briefs of *amici curiae* urging affirmance were filed for the State of New Jersey by *John J. Farmer, Jr.*, Attorney General, *Jeffrey Burstein*, Senior Deputy Attorney General, and *Charles S. Cohen*, Deputy Attorney General; for the State of New York et al. by *Eliot Spitzer*, Attorney General of New York, *Preeta D. Bansal*, Solicitor General, and *Adam L. Aronson*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Bill Lockyer* of California, *Earl I. Anzai* of Hawaii, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Philip T. McLaughlin* of New Hampshire, *W. A. Drew Edmondson* of Oklahoma; *Hardy Myers* of Oregon, *William H. Sorrell* of Vermont, and *Christine O. Gregoire* of Washington; for the city of Atlanta et al. by *Peter T. Barbur*, *Sara M. Darehshori*, *James K. Hahn*, *David I. Schulman*, *Jeffrey L. Rogers*, *Madelyn F. Wessel*, *Thomas J. Berning*, *Lawrence E. Rosenthal*, *Benna Ruth Solomon*, *Michael D. Hess*, *Leonard J. Koerner*, *Florence A. Hutner*, and *Louise Renne;* for the American Association of School Administrators et al. by *Mitchell A. Karlan;* for the American Bar Association by *William G. Paul* and *Robert H. Murphy;* for the American Civil Liberties Union et al. by *Matthew A. Coles*, *Steven R. Shapiro*, *Sara L. Mandelbaum*, and *Lenora M. Lapidus;* for the American Jewish Congress by *Marc D. Stern;* for the American Psychological Association by *Paul M. Smith*, *Nory Miller*, *James L. McHugh*, and *Nathalie F. P. Gil-*

lectively, Boy Scouts). The Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people. The Boy Scouts asserts that homosexual conduct is inconsistent with the values it seeks to instill. Respondent is James Dale, a former Eagle Scout whose adult membership in the Boy Scouts was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist. The New Jersey Supreme Court held that New Jersey's public accommodations law requires that the Boy Scouts readmit Dale. This case presents the question whether applying New Jersey's public accommodations law in this way violates the Boy Scouts' First Amendment right of expressive association. We hold that it does.

I

James Dale entered Scouting in 1978 at the age of eight by joining Monmouth Council's Cub Scout Pack 142. Dale became a Boy Scout in 1981 and remained a Scout until he turned 18. By all accounts, Dale was an exemplary Scout. In 1988, he achieved the rank of Eagle Scout, one of Scouting's highest honors.

Dale applied for adult membership in the Boy Scouts in 1989. The Boy Scouts approved his application for the position of assistant scoutmaster of Troop 73. Around the same time, Dale left home to attend Rutgers University. After arriving at Rutgers, Dale first acknowledged to himself and

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foyle; for the American Public Health Association et al. by *Marvin E. Frankel, Jeffrey S. Trachtman,* and *Kerri Ann Law;* for Bay Area Lawyers for Individual Freedom et al. by *Edward W. Swanson* and *Paula A. Brantner;* for Deans of Divinity Schools and Rabbinical Institutions by *David A. Schulz;* for the National Association for the Advancement of Colored People by *Dennis C. Hayes* and *David T. Goldberg;* for Parents, Families, and Friends of Lesbians and Gays, Inc., et al. by *John H. Pickering, Daniel H. Squire,* and *Carol J. Banta;* for the Society of American Law Teachers by *Nan D. Hunter* and *David Cole;* and for Roland Pool et al. by *David M. Gische* and *Merril Hirsh.*

Michael D. Silverman filed a brief for the General Board of Church and Society of the United Methodist Church et al.

others that he is gay. He quickly became involved with, and eventually became the copresident of, the Rutgers University Lesbian/Gay Alliance. In 1990, Dale attended a seminar addressing the psychological and health needs of lesbian and gay teenagers. A newspaper covering the event interviewed Dale about his advocacy of homosexual teenagers' need for gay role models. In early July 1990, the newspaper published the interview and Dale's photograph over a caption identifying him as the copresident of the Lesbian/Gay Alliance.

Later that month, Dale received a letter from Monmouth Council Executive James Kay revoking his adult membership. Dale wrote to Kay requesting the reason for Monmouth Council's decision. Kay responded by letter that the Boy Scouts "specifically forbid membership to homosexuals." App. 137.

In 1992, Dale filed a complaint against the Boy Scouts in the New Jersey Superior Court. The complaint alleged that the Boy Scouts had violated New Jersey's public accommodations statute and its common law by revoking Dale's membership based solely on his sexual orientation. New Jersey's public accommodations statute prohibits, among other things, discrimination on the basis of sexual orientation in places of public accommodation. N. J. Stat. Ann. §§ 10:5–4 and 10:5–5 (West Supp. 2000); see Appendix, *infra*, at 661–663.

The New Jersey Superior Court's Chancery Division granted summary judgment in favor of the Boy Scouts. The court held that New Jersey's public accommodations law was inapplicable because the Boy Scouts was not a place of public accommodation, and that, alternatively, the Boy Scouts is a distinctly private group exempted from coverage under New Jersey's law. The court rejected Dale's common-law claim, holding that New Jersey's policy is embodied in the public accommodations law. The court also concluded that the Boy Scouts' position in respect of active homosexuality was clear

and held that the First Amendment freedom of expressive association prevented the government from forcing the Boy Scouts to accept Dale as an adult leader.

The New Jersey Superior Court's Appellate Division affirmed the dismissal of Dale's common-law claim, but otherwise reversed and remanded for further proceedings. 308 N. J. Super. 516, 706 A. 2d 270 (1998). It held that New Jersey's public accommodations law applied to the Boy Scouts and that the Boy Scouts violated it. The Appellate Division rejected the Boy Scouts' federal constitutional claims.

The New Jersey Supreme Court affirmed the judgment of the Appellate Division. It held that the Boy Scouts was a place of public accommodation subject to the public accommodations law, that the organization was not exempt from the law under any of its express exceptions, and that the Boy Scouts violated the law by revoking Dale's membership based on his avowed homosexuality. After considering the state-law issues, the court addressed the Boy Scouts' claims that application of the public accommodations law in this case violated its federal constitutional rights "'to enter into and maintain . . . intimate or private relationships . . . [and] to associate for the purpose of engaging in protected speech.'" 160 N. J. 562, 605, 734 A. 2d 1196, 1219 (1999) (quoting *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U. S. 537, 544 (1987)). With respect to the right to intimate association, the court concluded that the Boy Scouts' "large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association." 160 N. J., at 608–609, 734 A. 2d, at 1221 (quoting *Duarte*, *supra*, at 546). With respect to the right of expressive association, the court "agree[d] that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development

of its members." 160 N. J., at 613, 734 A. 2d, at 1223. But the court concluded that it was "not persuaded . . . that a shared goal of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral." *Ibid.*, 734 A. 2d, at 1223–1224 (internal quotation marks omitted). Accordingly, the court held "that Dale's membership does not violate the Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [the Boy Scouts'] existing members' ability to carry out their various purposes.'" *Id.*, at 615, 734 A. 2d, at 1225 (quoting *Duarte*, *supra*, at 548). The court also determined that New Jersey has a compelling interest in eliminating "the destructive consequences of discrimination from our society," and that its public accommodations law abridges no more speech than is necessary to accomplish its purpose. 160 N. J., at 619–620, 734 A. 2d, at 1227–1228. Finally, the court addressed the Boy Scouts' reliance on *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995), in support of its claimed First Amendment right to exclude Dale. The court determined that *Hurley* did not require deciding the case in favor of the Boy Scouts because "the reinstatement of Dale does not compel Boy Scouts to express any message." 160 N. J., at 624, 734 A. 2d, at 1229.

We granted the Boy Scouts' petition for certiorari to determine whether the application of New Jersey's public accommodations law violated the First Amendment. 528 U. S. 1109 (2000).

II

In *Roberts* v. *United States Jaycees*, 468 U. S. 609, 622 (1984), we observed that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." This right is crucial in preventing the majority from imposing its views on groups that would

rather express other, perhaps unpopular, ideas. See *ibid.* (stating that protection of the right to expressive association is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority"). Government actions that may unconstitutionally burden this freedom may take many forms, one of which is "intrusion into the internal structure or affairs of an association" like a "regulation that forces the group to accept members it does not desire." *Id.*, at 623. Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Ibid.*

The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 13 (1988). But the freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, *supra*, at 623.

To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in "expressive association." The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.

Because this is a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obligated to independently review the

factual record to ensure that the state court's judgment does not unlawfully intrude on free expression. See *Hurley*, *supra*, at 567–568. The record reveals the following. The Boy Scouts is a private, nonprofit organization. According to its mission statement:

> "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.
>
> "The values we strive to instill are based on those found in the Scout Oath and Law:
>
> "Scout Oath
>
> "On my honor I will do my best
> "To do my duty to God and my country
> "and to obey the Scout Law;
> "To help other people at all times;
> "To keep myself physically strong,
> "mentally awake, and morally straight.
>
> "Scout Law
>
> "A Scout is:
>
"Trustworthy	Obedient
"Loyal	Cheerful
"Helpful	Thrifty
"Friendly	Brave
"Courteous	Clean
"Kind	Reverent." App. 184.

Thus, the general mission of the Boy Scouts is clear: "[T]o instill values in young people." *Ibid.* The Boy Scouts seeks to instill these values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy

Scouts' values—both expressly and by example. It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity. See *Roberts*, *supra*, at 636 (O'CONNOR, J., concurring) ("Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement").

Given that the Boy Scouts engages in expressive activity, we must determine whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints. This inquiry necessarily requires us first to explore, to a limited extent, the nature of the Boy Scouts' view of homosexuality.

The values the Boy Scouts seeks to instill are "based on" those listed in the Scout Oath and Law. App. 184. The Boy Scouts explains that the Scout Oath and Law provide "a positive moral code for living; they are a list of 'do's' rather than 'don'ts.'" Brief for Petitioners 3. The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms "morally straight" and "clean."

Obviously, the Scout Oath and Law do not expressly mention sexuality or sexual orientation. See *supra*, at 649. And the terms "morally straight" and "clean" are by no means self-defining. Different people would attribute to those terms very different meanings. For example, some people may believe that engaging in homosexual conduct is not at odds with being "morally straight" and "clean." And others may believe that engaging in homosexual conduct is contrary to being "morally straight" and "clean." The Boy Scouts says it falls within the latter category.

The New Jersey Supreme Court analyzed the Boy Scouts' beliefs and found that the "exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy

Scouts' commitment to a diverse and 'representative' membership . . . [and] contradicts Boy Scouts' overarching objective to reach 'all eligible youth.'" 160 N. J., at 618, 734 A. 2d, at 1226. The court concluded that the exclusion of members like Dale "appears antithetical to the organization's goals and philosophy." *Ibid.* But our cases reject this sort of inquiry; it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent. See *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 124 (1981) ("[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational"); see also *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

The Boy Scouts asserts that it "teach[es] that homosexual conduct is not morally straight," Brief for Petitioners 39, and that it does "not want to promote homosexual conduct as a legitimate form of behavior," Reply Brief for Petitioners 5. We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality. But because the record before us contains written evidence of the Boy Scouts' viewpoint, we look to it as instructive, if only on the question of the sincerity of the professed beliefs.

A 1978 position statement to the Boy Scouts' Executive Committee, signed by Downing B. Jenks, the President of the Boy Scouts, and Harvey L. Price, the Chief Scout Executive, expresses the Boy Scouts' "official position" with regard to "homosexuality and Scouting":

> "Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?

> "A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership." App. 453–454.

Thus, at least as of 1978—the year James Dale entered Scouting—the official position of the Boy Scouts was that avowed homosexuals were not to be Scout leaders.

A position statement promulgated by the Boy Scouts in 1991 (after Dale's membership was revoked but before this litigation was filed) also supports its current view:

> "We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts." *Id.*, at 457.

This position statement was redrafted numerous times but its core message remained consistent. For example, a 1993 position statement, the most recent in the record, reads, in part:

> "The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization. We do not believe that homosexuals provide a role model consistent with these expectations. Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA." *Id.*, at 461.

The Boy Scouts publicly expressed its views with respect to homosexual conduct by its assertions in prior litigation. For example, throughout a California case with similar facts filed in the early 1980's, the Boy Scouts consistently asserted the same position with respect to homosexuality that it asserts today. See *Curran* v. *Mount Diablo Council of Boy*

Scouts of America, No. C–365529 (Cal. Super. Ct., July 25, 1991); 48 Cal. App. 4th 670, 29 Cal. Rptr. 2d 580 (1994); 17 Cal. 4th 670, 952 P. 2d 218 (1998). We cannot doubt that the Boy Scouts sincerely holds this view.

We must then determine whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not "promote homosexual conduct as a legitimate form of behavior." Reply Brief for Petitioners 5. As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression. See, *e. g.*, *La Follette*, *supra*, at 123–124 (considering whether a Wisconsin law burdened the National Party's associational rights and stating that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party"). That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have "become leaders in their community and are open and honest about their sexual orientation." App. 11. Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist. Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.

Hurley is illustrative on this point. There we considered whether the application of Massachusetts' public accommodations law to require the organizers of a private St. Patrick's Day parade to include among the marchers an Irish-American gay, lesbian, and bisexual group, GLIB, violated the parade organizers' First Amendment rights. We noted that the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner. We observed:

> "[A] contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals . . . . The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." 515 U. S., at 574–575.

Here, we have found that the Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members; it will not "promote homosexual conduct as a legitimate form of behavior." Reply Brief for Petitioners 5. As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout's choice not to propound a point of view contrary to its beliefs.

The New Jersey Supreme Court determined that the Boy Scouts' ability to disseminate its message was not significantly affected by the forced inclusion of Dale as an assistant scoutmaster because of the following findings:

> "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views

> in respect of homosexuality." 160 N. J., at 612, 734 A. 2d, at 1223.

We disagree with the New Jersey Supreme Court's conclusion drawn from these findings.

First, associations do not have to associate for the "purpose" of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection. For example, the purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless.

Second, even if the Boy Scouts discourages Scout leaders from disseminating views on sexual issues—a fact that the Boy Scouts disputes with contrary evidence—the First Amendment protects the Boy Scouts' method of expression. If the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach only by example, this fact does not negate the sincerity of its belief discussed above.

Third, the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be "expressive association." The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes. In this same vein, Dale makes much of the claim that the Boy Scouts does not revoke the membership of heterosexual Scout leaders that openly disagree with the Boy Scouts' policy on sexual orientation. But if this is true, it is irrelevant.[1] The presence of an avowed homosexual and gay

[1] The record evidence sheds doubt on Dale's assertion. For example, the National Director of the Boy Scouts certified that "*any* persons who advocate to Scouting youth that homosexual conduct is" consistent with Scouting values will not be registered as adult leaders. App. 746 (emphasis added). And the Monmouth Council Scout Executive testified that the

rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other. The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.

Having determined that the Boy Scouts is an expressive association and that the forced inclusion of Dale would significantly affect its expression, we inquire whether the application of New Jersey's public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association. We conclude that it does.

State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation—like inns and trains. See, *e. g.*, *Hurley*, *supra*, at 571–572 (explaining the history of Massachusetts' public accommodations law); *Romer* v. *Evans*, 517 U. S. 620, 627–629 (1996) (describing the evolution of public accommodations laws). Over time, the public accommodations laws have expanded to cover more places.[2] New Jersey's statu-

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advocacy of the morality of homosexuality to youth members by any adult member is grounds for revocation of the adult's membership. *Id.*, at 761.

[2] Public accommodations laws have also broadened in scope to cover more groups; they have expanded beyond those groups that have been given heightened equal protection scrutiny under our cases. See *Romer*, 517 U. S., at 629. Some municipal ordinances have even expanded to cover criteria such as prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology. See 1 Boston, Mass., Ordinance No. § 12–9.7 (1999) (ex-offender, prior psychiatric treatment, and military status); D. C. Code Ann. § 1–2519 (1999) (personal appearance, source of income, place of residence); Seattle, Wash., Municipal Code § 14.08.090 (1999) (political ideology).

tory definition of "'[a] place of public accommodation'" is extremely broad. The term is said to "include, but not be limited to," a list of over 50 types of places. N. J. Stat. Ann. § 10:5–5(*l*) (West Supp. 2000); see Appendix, *infra*, at 661–663. Many on the list are what one would expect to be places where the public is invited. For example, the statute includes as places of public accommodation taverns, restaurants, retail shops, and public libraries. But the statute also includes places that often may not carry with them open invitations to the public, like summer camps and roof gardens. In this case, the New Jersey Supreme Court went a step further and applied its public accommodations law to a private entity without even attempting to tie the term "place" to a physical location.[3] As the definition of "public accommodation" has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.

We recognized in cases such as *Roberts* and *Duarte* that States have a compelling interest in eliminating discrimination against women in public accommodations. But in each of these cases we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express. In *Roberts*, we said "[i]ndeed, the Jaycees has failed to demonstrate . . .

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[3] Four State Supreme Courts and one United States Court of Appeals have ruled that the Boy Scouts is not a place of public accommodation. *Welsh* v. *Boy Scouts of America*, 993 F. 2d 1267 (CA7), cert. denied, 510 U. S. 1012 (1993); *Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P. 2d 218 (1998); *Seabourn* v. *Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P. 2d 385 (1995); *Quinnipiac Council, Boy Scouts of America, Inc.* v. *Comm'n on Human Rights & Opportunities*, 204 Conn. 287, 528 A. 2d 352 (1987); *Schwenk* v. *Boy Scouts of America*, 275 Ore. 327, 551 P. 2d 465 (1976). No federal appellate court or state supreme court—except the New Jersey Supreme Court in this case—has reached a contrary result.

any serious burdens on the male members' freedom of expressive association." 468 U. S., at 626. In *Duarte*, we said:

> "[I]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment. In this case, however, the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes." 481 U. S., at 548 (internal quotation marks and citations omitted).

We thereupon concluded in each of these cases that the organizations' First Amendment rights were not violated by the application of the States' public accommodations laws.

In *Hurley*, we said that public accommodations laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." 515 U. S., at 572. But we went on to note that in that case "the Massachusetts [public accommodations] law has been applied in a peculiar way" because "any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own." *Id.*, at 572–573. And in the associational freedom cases such as *Roberts*, *Duarte*, and *New York State Club Assn.*, after finding a compelling state interest, the Court went on to examine whether or not the application of the state law would impose any "serious burden" on the organization's rights of expressive association. So in these cases, the associational interest in freedom of expression has

been set on one side of the scale, and the State's interest on the other.

Dale contends that we should apply the intermediate standard of review enunciated in *United States* v. *O'Brien*, 391 U. S. 367 (1968), to evaluate the competing interests. There the Court enunciated a four-part test for review of a governmental regulation that has only an incidental effect on protected speech—in that case the symbolic burning of a draft card. A law prohibiting the destruction of draft cards only incidentally affects the free speech rights of those who happen to use a violation of that law as a symbol of protest. But New Jersey's public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection. Thus, *O'Brien* is inapplicable.

In *Hurley*, we applied traditional First Amendment analysis to hold that the application of the Massachusetts public accommodations law to a parade violated the First Amendment rights of the parade organizers. Although we did not explicitly deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here. We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.[4]

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[4] We anticipated this result in *Hurley* when we illustrated the reasons for our holding in that case by likening the parade to a private membership organization. 515 U. S., at 580. We stated: "Assuming the parade

JUSTICE STEVENS' dissent makes much of its observation that the public perception of homosexuality in this country has changed. See *post*, at 699–700. Indeed, it appears that homosexuality has gained greater societal acceptance. See *ibid.* But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views. The First Amendment protects expression, be it of the popular variety or not. See, *e. g.*, *Texas* v. *Johnson*, 491 U. S. 397 (1989) (holding that Johnson's conviction for burning the American flag violates the First Amendment); *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) *(per curiam)* (holding that a Ku Klux Klan leader's conviction for advocating unlawfulness as a means of political reform violates the First Amendment). And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.

JUSTICE STEVENS' extolling of Justice Brandeis' comments in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (dissenting opinion); see *post*, at 664, 700, confuses two entirely different principles. In *New State Ice*, the Court struck down an Oklahoma regulation prohibiting the manufacture, sale, and distribution of ice without a license. Justice Brandeis, a champion of state experimentation in the economic realm, dissented. But Justice Brandeis was never a champion of state experimentation in the suppression of free speech. To the contrary, his First Amendment commentary provides compelling support for the Court's opinion in this case. In speaking of the Founders of this Nation, Justice Brandeis emphasized that they "believed that free-

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to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision, GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.*, at 580–581.

dom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (concurring opinion). He continued:

> "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." *Id.*, at 375–376.

We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U. S., at 579.

The judgment of the New Jersey Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

N. J. Stat. Ann. § 10:5–4 (West Supp. 2000). "Obtaining employment, accommodations and privileges without discrimination; civil right

"All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommoda-

tion, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right."

N. J. Stat. Ann. § 10:5–5 (West Supp. 2000). "Definitions

"As used in this act, unless a different meaning clearly appears from the context:

. . . . .

"*l.* 'A place of public accommodation' shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey.

Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post secondary school from using in good faith criteria other than race, creed, color, national origin, ancestry or affectional or sexual orientation in the admission of students."

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

New Jersey "prides itself on judging each individual by his or her merits" and on being "in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society." *Peper* v. *Princeton Univ. Bd. of Trustees*, 77 N. J. 55, 80, 389 A. 2d 465, 478 (1978). Since 1945, it has had a law against discrimination. The law broadly protects the opportunity of all persons to obtain the advantages and privileges "of any place of public accommodation." N. J. Stat. Ann. § 10:5–4 (West Supp. 2000). The New Jersey Supreme Court's construction of the statutory definition of a "place of public accommodation" has given its statute a more expansive coverage than most similar state statutes. And as amended in 1991, the law prohibits discrimination on the basis of nine different traits including an individual's "sexual orientation."[1] The question in this case is whether that ex-

[1] In 1992, the statute was again amended to add "familial status" as a tenth protected class. It now provides:

"10:5–4 Obtaining employment, accommodations and privileges without discrimination; civil right

"All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any

pansive construction trenches on the federal constitutional rights of the Boy Scouts of America (BSA).

Because every state law prohibiting discrimination is designed to replace prejudice with principle, Justice Brandeis' comment on the States' right to experiment with "things social" is directly applicable to this case.

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (dissenting opinion).

In its "exercise of this high power" today, the Court does not accord this "courageous State" the respect that is its due.

The majority holds that New Jersey's law violates BSA's right to associate and its right to free speech. But that law

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place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right."

does not "impos[e] any serious burdens" on BSA's "collective effort on behalf of [its] shared goals," *Roberts* v. *United States Jaycees*, 468 U. S. 609, 622, 626–627 (1984), nor does it force BSA to communicate any message that it does not wish to endorse. New Jersey's law, therefore, abridges no constitutional right of BSA.

I

James Dale joined BSA as a Cub Scout in 1978, when he was eight years old. Three years later he became a Boy Scout, and he remained a member until his 18th birthday. Along the way, he earned 25 merit badges, was admitted into the prestigious Order of the Arrow, and was awarded the rank of Eagle Scout—an honor given to only three percent of all Scouts. In 1989, BSA approved his application to be an Assistant Scoutmaster.

On July 19, 1990, after more than 12 years of active and honored participation, the BSA sent Dale a letter advising him of the revocation of his membership. The letter stated that membership in BSA "is a privilege" that may be denied "whenever there is a concern that an individual may not meet the high standards of membership which the BSA seeks to provide for American youth." App. 135. Expressing surprise at his sudden expulsion, Dale sent a letter requesting an explanation of the decision. *Id.*, at 136. In response, BSA sent him a second letter stating that the grounds for the decision "are the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals." *Id.*, at 137. At that time, no such standard had been publicly expressed by BSA.

In this case, BSA contends that it teaches the young boys who are Scouts that homosexuality is immoral. Consequently, it argues, it would violate its right to associate to force it to admit homosexuals as members, as doing so would be at odds with its own shared goals and values. This contention, quite plainly, requires us to look at what, exactly, are the values that BSA actually teaches.

BSA's mission statement reads as follows: "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential." *Id.*, at 184. Its federal charter declares its purpose is "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred values, using the methods which were in common use by Boy Scouts on June 15, 1916." 36 U. S. C. § 23; see also App. 315–316. BSA describes itself as having a "representative membership," which it defines as "boy membership [that] reflects proportionately the characteristics of the boy population of its service area." *Id.*, at 65. In particular, the group emphasizes that "[n]either the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy. . . . To meet these responsibilities we have made a commitment that our membership shall be representative of *all* the population in every community, district, and council." *Id.*, at 66–67 (emphasis in original).

To instill its shared values, BSA has adopted a "Scout Oath" and a "Scout Law" setting forth its central tenets. For example, the Scout Law requires a member to promise, among other things, that he will be "obedient." Accompanying definitions for the terms found in the Oath and Law are provided in the Boy Scout Handbook and the Scoutmaster Handbook. For instance, the Boy Scout Handbook defines "obedient" as follows:

> "A Scout is OBEDIENT. A Scout follows the rules of his family, school, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them." *Id.*, at 188 (emphasis deleted).

To bolster its claim that its shared goals include teaching that homosexuality is wrong, BSA directs our attention to two terms appearing in the Scout Oath and Law. The first is the phrase "morally straight," which appears in the Oath ("On my honor I will do my best . . . To keep myself . . . morally straight"); the second term is the word "clean," which appears in a list of 12 characteristics together constituting the Scout Law.

The Boy Scout Handbook defines "morally straight," as such:

> "To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant." *Id.*, at 218 (emphasis deleted).

The Scoutmaster Handbook emphasizes these points about being "morally straight":

> "In any consideration of moral fitness, a key word has to be 'courage.' A boy's courage to do what his head and his heart tell him is right. And the courage to refuse to do what his heart and his head say is wrong. Moral fitness, like emotional fitness, will clearly present opportunities for wise guidance by an alert Scoutmaster." *Id.*, at 239–240.

As for the term "clean," the Boy Scout Handbook offers the following:

> "A Scout is CLEAN. *A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean.*
>
> "You never need to be ashamed of dirt that will wash off. If you play hard and work hard you can't help get-

> ting dirty. But when the game is over or the work is done, that kind of dirt disappears with soap and water.
>
> "There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts.
>
> "Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults." *Id.*, at 225–226 (emphasis in original); see also *id.*, at 189.[2]

It is plain as the light of day that neither one of these principles—"morally straight" and "clean"—says the slightest thing about homosexuality. Indeed, neither term in the Boy

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[2] Scoutmasters are instructed to teach what it means to be "clean" using the following lesson:

"(Hold up two cooking pots, one shiny bright on the inside but sooty outside, the other shiny outside but dirty inside.) Scouts, which of these pots would you rather have your food cooked in? Did I hear somebody say, 'Neither one?'

"That's not a bad answer. We wouldn't have much confidence in a patrol cook who didn't have his pots shiny both inside and out.

"But if we had to make a choice, we would tell the cook to use the pot that's clean inside. The same idea applies to people.

"Most people keep themselves clean outside. But how about the inside? Do we try to keep our minds and our language clean? I think that's even more important than keeping the outside clean.

"A Scout, of course, should be clean inside and out. Water, soap, and a toothbrush tak[e] care of the outside. Only your determination will keep the inside clean. You can do it by following the Scout Law and the example of people you respect—your parents, your teachers, your clergyman, or a good buddy who is trying to do the same thing." App. 289–290.

Scouts' Law and Oath expresses any position whatsoever on sexual matters.

BSA's published guidance on that topic underscores this point. Scouts, for example, are directed to receive their sex education at home or in school, but not from the organization: "Your parents or guardian or a sex education teacher should give you the facts about sex that you must know." Boy Scout Handbook (1992) (reprinted in App. 211). To be sure, Scouts are not forbidden from asking their Scoutmaster about issues of a sexual nature, but Scoutmasters are, literally, the last person Scouts are encouraged to ask: "If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your parents, religious leaders, teachers, or Scoutmaster." *Ibid.* Moreover, Scoutmasters are specifically directed to steer curious adolescents to other sources of information:

> "If Scouts ask for information regarding . . . sexual activity, answer honestly and factually, but stay within your realm of expertise and comfort. If a Scout has serious concerns that you cannot answer, refer him to his family, religious leader, doctor, or other professional." Scoutmaster Handbook (1990) (reprinted in App. 264).

More specifically, BSA has set forth a number of rules for Scoutmasters when these types of issues come up:

> "You may have boys asking you for information or advice about sexual matters. . . .
>
> "How should you handle such matters?
>
> "Rule number 1: *You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper area,* and that you are probably not well qualified to do this.
>
> "Rule number 2: If Scouts come to you to ask questions or to seek advice, you would give it within your compe-

> tence. A boy who appears to be asking about sexual intercourse, however, may really only be worried about his pimples, so it is well to find out just what information is needed.
>
> "Rule number 3: You should refer boys with sexual problems to persons better qualified than you [are] to handle them. If the boy has a spiritual leader or a doctor who can deal with them, he should go there. If such persons are not available, you may just have to do the best you can. But don't try to play a highly professional role. And at the other extreme, avoid passing the buck." Scoutmaster Handbook (1972) (reprinted in App. 546–547) (emphasis added).

In light of BSA's self-proclaimed ecumenism, furthermore, it is even more difficult to discern any shared goals or common moral stance on homosexuality. Insofar as religious matters are concerned, BSA's bylaws state that it is "absolutely nonsectarian in its attitude toward . . . religious training." *Id.*, at 362. "The BSA does not define what constitutes duty to God or the practice of religion. This is the responsibility of parents and religious leaders." *Id.*, at 76. In fact, many diverse religious organizations sponsor local Boy Scout troops. Brief for Petitioners 3. Because a number of religious groups do not view homosexuality as immoral or wrong and reject discrimination against homosexuals,[3] it is exceedingly difficult to believe that BSA none-

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[3] See, *e. g.*, Brief for Deans of Divinity Schools and Rabbinical Institutions as *Amicus Curiae* 8 ("The diverse religi[ous] traditions of this country present no coherent moral message that excludes gays and lesbians from participating as full and equal members of those institutions. Indeed, the movement among a number of the nation's major religious institutions for many decades has been toward public recognition of gays and lesbians as full members of moral communities, and acceptance of gays and lesbians as religious leaders, elders and clergy"); Brief for General Board of Church and Society of the United Methodist Church et al. as

theless adopts a single particular religious or moral philosophy when it comes to sexual orientation. This is especially so in light of the fact that Scouts are advised to seek guidance on sexual matters from their religious leaders (and Scoutmasters are told to refer Scouts to them);[4] BSA surely is aware that some religions do not teach that homosexuality is wrong.

II

The Court seeks to fill the void by pointing to a statement of "policies and procedures relating to homosexuality and Scouting," App. 453, signed by BSA's President and Chief Scout Executive in 1978 and addressed to the members of the Executive Committee of the national organization. *Ante*, at 651–652. The letter says that the BSA does "not believe that homosexuality and leadership in Scouting are appropriate." App. 454. But when the *entire* 1978 letter is read, BSA's position is far more equivocal:

> "4. Q. May an individual who openly declares himself to be a homosexual be employed by the Boy Scouts of America as a professional or non-professional?
>
> "A. Boy Scouts of America does not knowingly employ homosexuals as professionals or non-professionals. We are unaware of any present laws which would prohibit this policy.

Amicus Curiae 3 (describing views of the United Methodist Church, the Episcopal Church, the Religious Action Center of Reform Judaism, the United Church Board for Homeland Ministries, and the Unitarian Universalist Association, all of whom reject discrimination on the basis of sexual orientation).

[4] See *supra*, at 667 ("Be . . . faithful in your religious beliefs"); *supra*, at 668, n. 2 ("by following . . . the example of . . . your clergyman"); *supra*, at 669 ("If you have questions about . . . sex, . . . [t]alk with your . . . religious leade[r]"); *ibid.* ("If Scouts ask for information regarding . . . sexual activity . . . refer him to his . . . religious leader"); *supra*, at 670 ("You should refer boys with sexual problems to [their] spiritual leader").

"5. Q. Should a professional or non-professional individual who openly declares himself to be a homosexual be terminated?

"A. Yes, *in the absence of any law to the contrary.* At the present time we are unaware of any statute or ordinance in the United States which prohibits discrimination against individual's employment upon the basis of homosexuality. *In the event that such a law was applicable, it would be necessary for the Boy Scouts of America to obey it, in this case as in Paragraph 4 above.* It is our position, however, that homosexuality and professional or non-professional employment in Scouting are not appropriate." *Id.*, at 454–455 (emphasis added).

Four aspects of the 1978 policy statement are relevant to the proper disposition of this case. First, at most this letter simply adopts an exclusionary membership policy. But simply adopting such a policy has never been considered sufficient, by itself, to prevail on a right to associate claim. See *infra*, at 678–685.

Second, the 1978 policy was never publicly expressed—unlike, for example, the Scout's duty to be "obedient." It was an internal memorandum, never circulated beyond the few members of BSA's Executive Committee. It remained, in effect, a secret Boy Scouts policy. Far from claiming any intent to express an idea that would be burdened by the presence of homosexuals, BSA's *public* posture—to the world and to the Scouts themselves—remained what it had always been: one of tolerance, welcoming all classes of boys and young men. In this respect, BSA's claim is even weaker than those we have rejected in the past. See *ibid.*

Third, it is apparent that the draftsmen of the policy statement foresaw the possibility that laws against discrimination might one day be amended to protect homosexuals from employment discrimination. Their statement clearly provided that, in the event such a law conflicted with their policy, a Scout's duty to be "obedient" and "obe[y] the laws," even if "he thinks [the laws] are unfair," would prevail in such a

contingency. See *supra*, at 666. In 1978, however, BSA apparently did not consider it to be a serious possibility that a State might one day characterize the Scouts as a "place of public accommodation" with a duty to open its membership to all qualified individuals. The portions of the statement dealing with membership simply assume that membership in the Scouts is a "privilege" that BSA is free to grant or to withhold. The statement does not address the question whether the publicly proclaimed duty to obey the law should prevail over the private discriminatory policy if, and when, a conflict between the two should arise—as it now has in New Jersey. At the very least, then, the statement reflects no unequivocal view on homosexuality. Indeed, the statement suggests that an appropriate way for BSA to preserve its unpublished exclusionary policy would include an open and forthright attempt to seek an amendment of New Jersey's statute. ("If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.")

Fourth, the 1978 statement simply says that homosexuality is not "appropriate." It makes no effort to connect that statement to a shared goal or expressive activity of the Boy Scouts. Whatever values BSA seeks to instill in Scouts, the idea that homosexuality is not "appropriate" appears entirely unconnected to, and is mentioned nowhere in, the myriad of publicly declared values and creeds of the BSA. That idea does not appear to be among any of the principles actually taught to Scouts. Rather, the 1978 policy appears to be no more than a private statement of a few BSA executives that the organization wishes to exclude gays—and that wish has nothing to do with any expression BSA actually engages in.

The majority also relies on four other policy statements that were issued between 1991 and 1993.[5] All of them were

[5] The authorship and distribution of these statements remain obscure. Unlike the 1978 policy—which clearly identifies the authors as the President and the Chief Scout Executive of BSA—these later policies are unsigned. Two of them are initialed (one is labeled "JCK"; the other says

written and issued *after* BSA revoked Dale's membership. Accordingly, they have little, if any, relevance to the legal question before this Court.[6] In any event, they do not bolster BSA's claim.

In 1991, BSA issued two statements both stating: "We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts." App. 457–458. A third statement issued in 1992 was substantially the same. *Id.*, at 459. By 1993, however, the policy had changed:

> "BSA Position
>
> "The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization.
>
> "We do not believe that homosexuals provide a role model consistent with these expectations.
>
> "Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA." *Id.*, at 461.

Aside from the fact that these statements were all issued after Dale's membership was revoked, there are four important points relevant to them. First, while the 1991 and 1992

"js"), but BSA never tells us to whom these initials belong. Nor do we know how widely these statements were distributed. From the record evidence we have, it appears that they were not as readily available as the Boy Scout and Scoutmaster Handbooks; indeed, they appear to be quite difficult to get a hold of. See App. 662, 668–669.

[6] Dale's complaint requested three forms of relief: (1) a declaration that his rights under the New Jersey statute had been violated when his membership was revoked; (2) an order reinstating his membership; and (3) compensatory and punitive damages. *Id.*, at 27. Nothing that BSA could have done after the revocation of his membership could affect Dale's first request for relief, though perhaps some possible postrevocation action could have influenced the other two requests for relief.

statements tried to tie BSA's exclusionary policy to the meaning of the Scout Oath and Law, the 1993 statement abandoned that effort. Rather, BSA's 1993 homosexual exclusion policy was based on its view that including gays would be contrary to "the expectations that Scouting families have had for the organization." *Ibid.* Instead of linking its policy to its central tenets or shared goals—to teach certain definitions of what it means to be "morally straight" and "clean"—BSA chose instead to justify its policy on the "expectatio[n]" that its members preferred to exclude homosexuals. The 1993 policy statement, in other words, was *not* based on any expressive activity or on any moral view about homosexuality. It was simply an exclusionary membership policy, similar to those we have held insufficient in the past. See *infra*, at 678–685.

Second, even during the brief period in 1991 and 1992, when BSA tried to connect its exclusion of homosexuals to its definition of terms found in the Oath and Law, there is no evidence that Scouts were actually taught anything about homosexuality's alleged inconsistency with those principles. Beyond the single sentence in these policy statements, there is no indication of any shared goal of teaching that homosexuality is incompatible with being "morally straight" and "clean." Neither BSA's mission statement nor its official membership policy was altered; no Boy Scout or Scoutmaster Handbook was amended to reflect the policy statement; no lessons were imparted to Scouts; no change was made to BSA's policy on limiting discussion of sexual matters; and no effort was made to restrict acceptable religious affiliations to those that condemn homosexuality. In short, there is no evidence that this view was part of any collective effort to foster beliefs about homosexuality.[7]

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[7] Indeed, the record evidence is to the contrary. See, *e. g.*, App. 666–669 (affidavit of former Boy Scout whose young children were Scouts, and was himself an assistant scoutmaster and Merit Badge counselor) ("I never heard and am not aware of any discussion about homosexuality that oc-

Third, BSA never took any clear and unequivocal position on homosexuality. Though the 1991 and 1992 policies state one interpretation of "morally straight" and "clean," the group's published definitions appearing in the Boy Scout and Scoutmaster Handbooks take quite another view. And BSA's broad religious tolerance combined with its declaration that sexual matters are not its "proper area" render its views on the issue equivocal at best and incoherent at worst. We have never held, however, that a group can throw together any mixture of contradictory positions and then invoke the right to associate to defend any one of those views. At a minimum, a group seeking to prevail over an antidiscrimination law must adhere to a clear and unequivocal view.

Fourth, at most the 1991 and 1992 statements declare only that BSA believed "homosexual *conduct* is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed." App. 457 (emphasis added). But New Jersey's law prohibits discrimination on the basis of sexual *orientation.* And when Dale was expelled from the Boy Scouts, BSA said it did so because of his sexual orientation, not because of his sexual conduct.[8]

It is clear, then, that nothing in these policy statements supports BSA's claim. The only policy written before the revocation of Dale's membership was an equivocal, undisclosed statement that evidences no connection between the group's discriminatory intentions and its expressive interests. The later policies demonstrate a brief—though ulti-

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curred during any Scouting meeting or function . . . . Prior to September 1991, I never heard any mention whatsoever of homosexuality during any Scouting function").

[8] At oral argument, BSA's counsel was asked: "[W]hat if someone is homosexual in the sense of having a sexual orientation in that direction but does not engage in any homosexual conduct?" Counsel answered: "[I]f that person also were to take the view that the reason they didn't engage in that conduct [was because] it would be morally wrong . . . that person would not be excluded." Tr. of Oral Arg. 8.

mately abandoned—attempt to tie BSA's exclusion to its expression, but other than a single sentence, BSA fails to show that it ever taught Scouts that homosexuality is not "morally straight" or "clean," or that such a view was part of the group's collective efforts to foster a belief. Furthermore, BSA's policy statements fail to establish any clear, consistent, and unequivocal position on homosexuality. Nor did BSA have any reason to think Dale's sexual *conduct*, as opposed to his orientation, was contrary to the group's values.

BSA's inability to make its position clear and its failure to connect its alleged policy to its expressive activities is highly significant. By the time Dale was expelled from the Boy Scouts in 1990, BSA had already been engaged in several suits under a variety of state antidiscrimination public accommodation laws challenging various aspects of its membership policy.[9] Indeed, BSA had filed *amicus* briefs before this Court in two earlier right to associate cases (*Roberts* v. *United States Jaycees*, 468 U. S. 609 (1984), and *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U. S. 537 (1987)) pointing to these very cases; it was clearly on notice by 1990 that it might well be subjected to state public accommodation antidiscrimination laws, and that a court might one day reject its claimed right to associate. Yet it took no steps prior to Dale's expulsion to clarify how its exclusivity was connected to its expression. It speaks volumes about the credibility of BSA's claim to a shared goal that homosexuality is incompatible with Scouting that since at least 1984 it had been aware of this issue—indeed, concerned enough to twice file *amicus* briefs before this

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[9] See, *e. g.*, *Quinnipiac Council, Boy Scouts of America* v. *Commission on Human Rights and Opportunities*, 204 Conn. 287, 528 A. 2d 352 (1987) (challenge to BSA's exclusion of girls); *Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983) (challenge to BSA's denial of membership to homosexuals; rejecting BSA's claimed right of association), overruled on other grounds, 17 Cal. 4th 670, 952 P. 2d 218 (1998).

Court—yet it did nothing in the intervening six years (or even in the years after Dale's explusion) to explain clearly and openly why the presence of homosexuals would affect its expressive activities, or to make the view of "morally straight" and "clean" taken in its 1991 and 1992 policies a part of the values actually instilled in Scouts through the Handbook, lessons, or otherwise.

III

BSA's claim finds no support in our cases. We have recognized "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U. S., at 618. And we have acknowledged that "when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association . . . may be implicated." *Ibid.* But "[t]he right to associate for expressive purposes is not . . . absolute"; rather, "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which . . . the constitutionally protected liberty is at stake in a given case." *Id.*, at 623, 618. Indeed, the right to associate does not mean "that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 13 (1988). For example, we have routinely and easily rejected assertions of this right by expressive organizations with discriminatory membership policies, such as private schools,[10] law

[10] *Runyon* v. *McCrary*, 427 U. S. 160, 175–176 (1976) ("[T]he Court has recognized a First Amendment right 'to engage in association for the advancement of beliefs and ideas . . . .' From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such insti-

firms,[11] and labor organizations.[12] In fact, until today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law. To the contrary, we have squarely held that a State's antidiscrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary membership policy.

In *Roberts* v. *United States Jaycees*, 468 U. S. 609 (1984), we addressed just such a conflict. The Jaycees was a nonprofit membership organization "'designed to inculcate in the individual membership . . . a spirit of genuine Americanism and civic interest, and . . . to provide . . . an avenue for intelligent participation by young men in the affairs of their community.'" *Id.*, at 612–613. The organization was divided into local chapters, described as "'young men's organization[s],'" in which regular membership was restricted to males between the ages of 18 and 35. *Id.*, at 613. But Minnesota's Human Rights Act, which applied to the Jaycees, made it unlawful to "'deny any person the full and equal

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tutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle" (citation omitted)).

[11] *Hishon* v. *King & Spalding*, 467 U. S. 69, 78 (1984) ("[R]espondent argues that application of Title VII in this case would infringe constitutional rights of . . . association. Although we have recognized that the activities of lawyers may make a 'distinctive contribution . . . to the ideas and beliefs of our society,' respondent has not shown how its ability to fulfill such a function would be inhibited by a requirement that it consider petitioner for partnership on her merits. Moreover, as we have held in another context, '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections'" (citations omitted)).

[12] *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 93–94 (1945) ("Appellant first contends that [the law prohibiting racial discrimination by labor organizations] interfere[s] with its right of selection to membership . . . . We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race").

enjoyment of . . . a place of public accommodation because of . . . sex.' " *Id.*, at 615. The Jaycees, however, claimed that applying the law to it violated its right to associate—in particular its right to maintain its selective membership policy.

We rejected that claim. Cautioning that the right to associate is not "absolute," we held that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*, at 623. We found the State's purpose of eliminating discrimination is a compelling state interest that is unrelated to the suppression of ideas. *Id.*, at 623–626. We also held that Minnesota's law is the least restrictive means of achieving that interest. The Jaycees had "failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." *Id.*, at 626. Though the Jaycees had "taken public positions on a number of diverse issues, [and] . . . regularly engage in a variety of . . . activities worthy of constitutional protection under the First Amendment," there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." *Id.*, at 626–627. "The Act," we held, "requires no change in the Jaycees' creed of promoting the interest of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Id.*, at 627.

We took a similar approach in *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U. S. 537 (1987). Rotary International, a nonprofit corporation, was founded as " 'an organization of business and professional men united worldwide who provide humanitarian service, encourage high ethical standards in all vocations, and help build good-

will and peace in the world.'" *Id.*, at 539. It admitted a cross section of worthy business and community leaders, *id.*, at 540, but refused membership to women. "[T]he exclusion of women," explained the group's General Secretary, "results in an 'aspect of fellowship . . . that is enjoyed by the present male membership.'" *Id.*, at 541. That policy also allowed the organization "to operate effectively in foreign countries with varied cultures and social mores." *Ibid.* Though California's Civil Rights Act, which applied to Rotary International, prohibited discrimination on the basis of sex, *id.*, at 541–542, n. 2, the organization claimed a right to associate, including the right to select its members.

As in *Jaycees*, we rejected the claim, holding that "the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes." 481 U. S., at 548. "To be sure," we continued, "Rotary Clubs engage in a variety of commendable service activities that are protected by the First Amendment. But [California's Civil Rights Act] does not require the clubs to abandon or alter any of these activities. It does not require them to abandon their basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace. Nor does it require them to abandon their classification system or admit members who do not reflect a cross section of the community." *Ibid.* Finally, even if California's law worked a "slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women." *Id.*, at 549.[13]

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[13] BSA urged on brief that under the New Jersey Supreme Court's reading of the State's antidiscrimination law, "Boy Scout Troops would be forced to admit girls as members" and "Girl Scout Troops would be forced to admit boys." Brief for Petitioners 37. The New Jersey Supreme Court had no occasion to address that question, and no such issue is tendered for our decision. I note, however, the State of New Jersey's obser-

Several principles are made perfectly clear by *Jaycees* and *Rotary Club*. First, to prevail on a claim of expressive association in the face of a State's antidiscrimination law, it is not enough simply to engage in *some kind* of expressive activity. Both the Jaycees and the Rotary Club engaged in expressive activity protected by the First Amendment,[14] yet that fact was not dispositive. Second, it is not enough to adopt an openly avowed exclusionary membership policy. Both the Jaycees and the Rotary Club did that as well.[15] Third, it is not sufficient merely to articulate *some* connection between the group's expressive activities and its exclusionary policy. The Rotary Club, for example, justified its male-only membership policy by pointing to the "'aspect of fellowship . . . that is enjoyed by the [exclusively] male membership'" and by claiming that only with an exclusively male membership

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vation that BSA ignores the exemption contained in New Jersey's law for "'any place of public accommodation which is in its nature reasonably restricted exclusively to one sex,'" including, but not limited to, "'any summer camp, day camp, or resort camp, bathhouse, dressing room, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital, or school or educational institution which is restricted exclusively to individuals of one sex.'" See Brief for State of New Jersey as *Amicus Curiae* 12–13, n. 2 (citing N. J. Stat. Ann. § 10:5–12(f) (West 1993)).

[14] See *Roberts* v. *United States Jaycees*, 468 U. S. 609, 626–627 (1984) ("[T]he organization [has] taken public positions on a number of diverse issues . . . worthy of constitutional protection under the First Amendment" (citations omitted)); *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U. S. 537, 548 (1987) ("To be sure, Rotary Clubs engage in a variety of commendable service activities that are protected by the First Amendment").

[15] The Jaycees openly stated that it was an organization designed to serve the interests of "young men"; its local chapters were described as "'young men's organization[s]'"; and its membership policy contained an express provision reserving regular membership to young men. *Jaycees*, 468 U. S., at 612–613. Likewise, Rotary International expressed its preference for male-only membership: It proclaimed that it was "'an organization of business and professional *men*'" and its membership policy expressly excluded women. *Rotary Club*, 481 U. S., at 539, 541 (emphasis added).

could it "operate effectively" in foreign countries. *Rotary Club*, 481 U. S., at 541.

Rather, in *Jaycees*, we asked whether Minnesota's Human Rights Law requiring the admission of women "impose[d] any *serious burdens*" on the group's "collective effort on behalf of [its] *shared goals*." 468 U. S., at 622, 626–627 (emphases added). Notwithstanding the group's obvious publicly stated exclusionary policy, we did not view the inclusion of women as a "serious burden" on the Jaycees' ability to engage in the protected speech of its choice. Similarly, in *Rotary Club*, we asked whether California's law would "affect in any *significant way* the existing members' ability" to engage in their protected speech, or whether the law would require the clubs "to abandon their *basic goals*." 481 U. S., at 548 (emphases added); see also *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 581 (1995) ("[A] private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members"); *New York State Club Assn.*, 487 U. S., at 13 (to prevail on a right to associate claim, the group must "be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion"); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 462–463 (1958) (asking whether law "entail[ed] the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association" and whether law is "likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs"). The relevant question is whether the mere inclusion of the person at issue would "impose any serious burden," "affect in any significant way," or be "a substantial restraint upon" the organization's "shared goals," "basic goals," or "collective effort to foster beliefs." Accordingly, it is necessary to examine what, exactly, are

BSA's shared goals and the degree to which its expressive activities would be burdened, affected, or restrained by including homosexuals.

The evidence before this Court makes it exceptionally clear that BSA has, at most, simply adopted an exclusionary membership policy and has no shared goal of disapproving of homosexuality. BSA's mission statement and federal charter say nothing on the matter; its official membership policy is silent; its Scout Oath and Law—and accompanying definitions—are devoid of any view on the topic; its guidance for Scouts and Scoutmasters on sexuality declare that such matters are "not construed to be Scouting's proper area," but are the province of a Scout's parents and pastor; and BSA's posture respecting religion tolerates a wide variety of views on the issue of homosexuality. Moreover, there is simply no evidence that BSA otherwise teaches anything in this area, or that it instructs Scouts on matters involving homosexuality in ways not conveyed in the Boy Scout or Scoutmaster Handbooks. In short, Boy Scouts of America is simply silent on homosexuality. There is no shared goal or collective effort to foster a belief about homosexuality at all—let alone one that is significantly burdened by admitting homosexuals.

As in *Jaycees*, there is "no basis in the record for concluding that admission of [homosexuals] will impede the [Boy Scouts'] ability to engage in [its] protected activities or to disseminate its preferred views" and New Jersey's law "requires no change in [BSA's] creed." 468 U. S., at 626–627. And like *Rotary Club*, New Jersey's law "does not require [BSA] to abandon or alter any of" its activities. 481 U. S., at 548. The evidence relied on by the Court is not to the contrary. The undisclosed 1978 policy certainly adds nothing to the actual views disseminated to the Scouts. It simply says that homosexuality is not "appropriate." There is no reason to give that policy statement more weight than Rotary International's assertion that all-male membership

fosters the group's "fellowship" and was the only way it could "operate effectively." As for BSA's postrevocation statements, at most they simply adopt a policy of discrimination, which is no more dispositive than the openly discriminatory policies held insufficient in *Jaycees* and *Rotary Club;* there is no evidence here that BSA's policy was necessary to—or even a part of—BSA's expressive activities or was ever taught to Scouts.

Equally important is BSA's failure to adopt any clear position on homosexuality. BSA's temporary, though ultimately abandoned, view that homosexuality is incompatible with being "morally straight" and "clean" is a far cry from the clear, unequivocal statement necessary to prevail on its claim. Despite the solitary sentences in the 1991 and 1992 policies, the group continued to disclaim any single religious or moral position as a general matter and actively eschewed teaching any lesson on sexuality. It also continued to define "morally straight" and "clean" in the Boy Scout and Scoutmaster Handbooks without any reference to homosexuality. As noted earlier, nothing in our cases suggests that a group can prevail on a right to expressive association if it, effectively, speaks out of both sides of its mouth. A State's antidiscrimination law does not impose a "serious burden" or a "substantial restraint" upon the group's "shared goals" if the group itself is unable to identify its own stance with any clarity.

IV

The majority pretermits this entire analysis. It finds that BSA in fact "'teach[es] that homosexual conduct is not morally straight.'" *Ante,* at 651. This conclusion, remarkably, rests entirely on statements in BSA's briefs. See *ibid.* (citing Brief for Petitioners 39; Reply Brief for Petitioners 5). Moreover, the majority insists that we must "give deference to an association's assertions regarding the nature of its expression" and "we must also give deference to an association's view of what would impair its expression." *Ante,* at

653. So long as the record "contains written evidence" to support a group's bare assertion, "[w]e need not inquire further." *Ante,* at 651. Once the organization "asserts" that it engages in particular expression, *ibid.*, "[w]e cannot doubt" the truth of that assertion, *ante,* at 653.

This is an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further. It is even more astonishing in the First Amendment area, because, as the majority itself acknowledges, "we are obligated to independently review the factual record." *Ante,* at 648–649. It is an odd form of independent review that consists of deferring entirely to whatever a litigant claims. But the majority insists that our inquiry must be "limited," *ante,* at 650, because "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent," *ante,* at 651. See also Brief for Petitioners 25 ("[T]he Constitution protects [BSA's] ability to control its own message").

But nothing in our cases calls for this Court to do any such thing. An organization can adopt the message of its choice, and it is not this Court's place to disagree with it. But we must inquire whether the group is, in fact, expressing a message (whatever it may be) and whether that message (if one is expressed) is significantly affected by a State's antidiscrimination law. More critically, that inquiry requires our *independent* analysis, rather than deference to a group's litigating posture. Reflection on the subject dictates that such an inquiry is required.

Surely there are instances in which an organization that truly aims to foster a belief at odds with the purposes of a State's antidiscrimination laws will have a First Amendment right to association that precludes forced compliance with those laws. But that right is not a freedom to discriminate at will, nor is it a right to maintain an exclusionary member-

ship policy simply out of fear of what the public reaction would be if the group's membership were opened up. It is an implicit right designed to protect the enumerated rights of the First Amendment, not a license to act on any discriminatory impulse. To prevail in asserting a right of expressive association as a defense to a charge of violating an antidiscrimination law, the organization must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude. If this Court were to defer to whatever position an organization is prepared to assert in its briefs, there would be no way to mark the proper boundary between genuine exercises of the right to associate, on the one hand, and sham claims that are simply attempts to insulate nonexpressive private discrimination, on the other hand. Shielding a litigant's claim from judicial scrutiny would, in turn, render civil rights legislation a nullity, and turn this important constitutional right into a farce. Accordingly, the Court's prescription of total deference will not do. In this respect, Justice Frankfurter's words seem particularly apt:

> "Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance. Of course a State may leave abstention from such discriminations to the conscience of individuals. On the other hand, a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts." *Railway*

Mail Assn. v. *Corsi*, 326 U. S. 88, 98 (1945) (concurring opinion).

There is, of course, a valid concern that a court's independent review may run the risk of paying too little heed to an organization's sincerely held views. But unless one is prepared to turn the right to associate into a free pass out of antidiscrimination laws, an independent inquiry is a necessity. Though the group must show that its expressive activities will be substantially burdened by the State's law, if that law truly has a significant effect on a group's speech, even the subtle speaker will be able to identify that impact.

In this case, no such concern is warranted. It is entirely clear that BSA in fact expresses no clear, unequivocal message burdened by New Jersey's law.

V

Even if BSA's right to associate argument fails, it nonetheless might have a First Amendment right to refrain from including debate and dialogue about homosexuality as part of its mission to instill values in Scouts. It can, for example, advise Scouts who are entering adulthood and have questions about sex to talk "with your parents, religious leaders, teachers, or Scoutmaster," and, in turn, it can direct Scoutmasters who are asked such questions "not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life" because "it is not construed to be Scouting's proper area." See *supra*, at 669–670. Dale's right to advocate certain beliefs in a public forum or in a private debate does not include a right to advocate these ideas when he is working as a Scoutmaster. And BSA cannot be compelled to include a message about homosexuality among the values it actually chooses to teach its Scouts, if it would prefer to remain silent on that subject.

In *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), we recognized that the government may not "requir[e] affirmation of a belief and an attitude of mind," nor

"force an American citizen publicly to profess any statement of belief," even if doing so does not require the person to "forego any contrary convictions of their own." *Id.*, at 633–634. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley*, 515 U. S., at 573. Though the majority mistakenly treats this statement as going to the right to associate, it actually refers to a free speech claim. See *id.*, at 564–565, 580–581 (noting distinction between free speech and right to associate claims). As with the right to associate claim, though, the court is obligated to engage in an independent inquiry into whether the mere inclusion of homosexuals would actually force BSA to proclaim a message it does not want to send. *Id.*, at 567.

In its briefs, BSA implies, even if it does not directly argue, that Dale would use his Scoutmaster position as a "bully pulpit" to convey immoral messages to his troop, and therefore his inclusion in the group would compel BSA to include a message it does not want to impart. Brief for Petitioners 21–22. Even though the majority does not endorse that argument, I think it is important to explain why it lacks merit, before considering the argument the majority does accept.

BSA has not contended, nor does the record support, that Dale had ever advocated a view on homosexuality to his troop before his membership was revoked. Accordingly, BSA's revocation could only have been based on an assumption that he would do so in the future. But the only information BSA had at the time it revoked Dale's membership was a newspaper article describing a seminar at Rutgers University on the topic of homosexual teenagers that Dale attended. The relevant passage reads:

> "James Dale, 19, co-president of the Rutgers University Lesbian Gay Alliance with Sharice Richardson, also 19, said he lived a double life while in high school, pretending to be straight while attending a military academy.

> "He remembers dating girls and even laughing at homophobic jokes while at school, only admitting his homosexuality during his second year at Rutgers.
>
> "'I was looking for a role model, someone who was gay and accepting of me,' Dale said, adding he wasn't just seeking sexual experiences, but a community that would take him in and provide him with a support network and friends." App. 517.

Nothing in that article, however, even remotely suggests that Dale would advocate any views on homosexuality to his troop. The Scoutmaster Handbook instructs Dale, like all Scoutmasters, that sexual issues are not their "proper area," and there is no evidence that Dale had any intention of violating this rule. Indeed, from all accounts Dale was a model Boy Scout and Assistant Scoutmaster up until the day his membership was revoked, and there is no reason to believe that he would suddenly disobey the directives of BSA because of anything he said in the newspaper article.

To be sure, the article did say that Dale was co-president of the Lesbian/Gay Alliance at Rutgers University, and that group presumably engages in advocacy regarding homosexual issues. But surely many members of BSA engage in expressive activities outside of their troop, and surely BSA does not want all of that expression to be carried on inside the troop. For example, a Scoutmaster may be a member of a religious group that encourages its followers to convert others to its faith. Or a Scoutmaster may belong to a political party that encourages its members to advance its views among family and friends.[16] Yet BSA does not think it is appropriate for Scoutmasters to proselytize a particular faith to unwilling Scouts or to attempt to convert them from one

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[16] Scoutmaster Handbook (1990) (reprinted in App. 273) ("Scouts and Scouters are encouraged to take active part in political matters *as individuals*" (emphasis added)).

religion to another.[17] Nor does BSA think it appropriate for Scouts or Scoutmasters to bring politics into the troop.[18] From all accounts, then, BSA does not discourage or forbid outside expressive activity, but relies on compliance with its policies and trusts Scouts and Scoutmasters alike not to bring unwanted views into the organization. Of course, a disobedient member who flouts BSA's policy may be expelled. But there is no basis for BSA to presume that a homosexual will be unable to comply with BSA's policy not to discuss sexual matters any more than it would presume that politically or religiously active members could not resist the urge to proselytize or politicize during troop meetings.[19] As BSA itself puts it, its rights are "not implicated *unless* a prospective leader *presents himself* as a role model incon-

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[17] Bylaws of the Boy Scouts of America, Art. IX, § 1, cl. 3 (reprinted in App. 363) ("In no case where a unit is connected with a church or other distinctively religious organization shall members of other denominations or faith be required, because of their membership in the unit, to take part in or observe a religious ceremony distinctly unique to that organization or church").

[18] Rules and Regulations of the Boy Scouts of America, Art. IX, § 2, cl. 6 (reprinted in App. 407) ("The Boy Scouts of America shall not, through its governing body or through any of its officers, its chartered councils, or members, involve the Scouting movement in any question of a political character").

[19] Consider, in this regard, that a heterosexual, as well as a homosexual, could advocate to the Scouts the view that homosexuality is not immoral. BSA acknowledges as much by stating that a heterosexual who advocates that view to Scouts would be expelled as well. *Id.*, at 746 ("*[A]ny* persons who advocate to Scouting youth that homosexual conduct is 'morally straight' under the Scout Oath, or 'clean' under the Scout Law will not be registered as adult leaders" (emphasis added)) (certification of BSA's National Director of Program). But BSA does not expel heterosexual members who take that view *outside* of their participation in Scouting, as long as they do not advocate that position to the Scouts. Tr. of Oral Arg. 6. And if there is no reason to presume that such a heterosexual will openly violate BSA's desire to express no view on the subject, what reason—other than blatant stereotyping—could justify a contrary presumption for homosexuals?

sistent with Boy Scouting's understanding of the Scout Oath and Law." Brief for Petitioners 6 (emphases added).[20]

The majority, though, does not rest its conclusion on the claim that Dale will use his position as a bully pulpit. Rather, it contends that Dale's mere presence among the Boy Scouts will itself force the group to convey a message about homosexuality—even if Dale has no intention of doing so. The majority holds that "[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinc[t] . . . message," and, accordingly, BSA is entitled to exclude that message. *Ante*, at 655–656. In particular, "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of be-

[20] BSA cites three media interviews and Dale's affidavit to argue that he will openly advance a pro-gay agenda while being a Scoutmaster. None of those statements even remotely supports that conclusion. And *all* of them were made *after* Dale's membership was revoked and *after* this litigation commenced; therefore, they could not have affected BSA's revocation decision.

In a New York Times interview, Dale said "'I owe it *to the organization* to point out *to them* how bad and wrong this policy is.'" App. 513 (emphases added). This statement merely demonstrates that Dale wants to use *this litigation*—not his Assistant Scoutmaster position—to make a point, and that he wants to make the point to the BSA organization, not to the boys in his troop. At oral argument, BSA conceded that would not be grounds for membership revocation. Tr. of Oral Arg. 13. In a Seattle Times interview, Dale said Scouting is "'about giving adolescent boys a role model.'" App. 549. He did not say it was about giving them a role model who advocated a position on homosexuality. In a television interview, Dale also said "I am gay, and I'm very proud of who I am . . . . I stand up for what I believe in . . . . I'm not hiding anything." *Id.*, at 470. Nothing in that statement says anything about an intention to stand up for homosexual rights in any context other than in this litigation. Lastly, Dale said in his affidavit that he is "open and honest about [his] sexual orientation." *Id.*, at 133. Once again, like someone who is open and honest about his political affiliation, there is no evidence in that statement that Dale will not comply with BSA's policy when acting as a Scoutmaster.

havior." *Ante*, at 653; see also Brief for Petitioners 24 ("By donning the uniform of an adult leader in Scouting, he would 'celebrate [his] identity' as an openly gay Scout leader").

The majority's argument relies exclusively on *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995). In that case, petitioners John Hurley and the South Boston Allied War Veterans Council ran a privately operated St. Patrick's Day parade. Respondent, an organization known as "GLIB," represented a contingent of gays, lesbians, and bisexuals who sought to march in the petitioners' parade "as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals." *Id.*, at 561. When the parade organizers refused GLIB's admission, GLIB brought suit under Massachusetts' antidiscrimination law. That statute, like New Jersey's law, prohibited discrimination on account of sexual orientation in any place of public accommodation, which the state courts interpreted to include the parade. Petitioners argued that forcing them to include GLIB in their parade would violate their free speech rights.

We agreed. We first pointed out that the St. Patrick's Day parade—like most every parade—is an inherently expressive undertaking. *Id.*, at 568–570. Next, we reaffirmed that the government may not compel anyone to proclaim a belief with which he or she disagrees. *Id.*, at 573–574. We then found that GLIB's marching in the parade would be an expressive act suggesting the view "that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals." *Id.*, at 574. Finally, we held that GLIB's participation in the parade "would likely be perceived" as the parade organizers' own speech—or at least as a view which they approved—because of a parade organizer's customary control over who marches in the parade. *Id.*, at 575. Though *Hurley* has a superficial similarity to the present case, a close inspection reveals a wide gulf between that case and the one before us today.

First, it was critical to our analysis that GLIB was actually conveying a message by participating in the parade—otherwise, the parade organizers could hardly claim that they were being forced to include any unwanted message at all. Our conclusion that GLIB was conveying a message was inextricably tied to the fact that GLIB wanted to march in a parade, as well as the manner in which it intended to march. We noted the "inherent expressiveness of marching [in a parade] to make a point," *id.*, at 568, and in particular that GLIB was formed for the purpose of making a particular point about gay pride, *id.*, at 561, 570. More specifically, GLIB "distributed a fact sheet describing the members' intentions" and, in a previous parade, had "marched behind a shamrock-strewn banner with the simple inscription 'Irish American Gay, Lesbian and Bisexual Group of Boston.'" *Id.*, at 570. "[A] contingent marching behind the organization's banner," we said, would clearly convey a message. *Id.*, at 574. Indeed, we expressly distinguished between the members of GLIB, who marched as a unit to express their views about their own sexual orientation, on the one hand, and homosexuals who might participate as individuals in the parade without intending to express anything about their sexuality by doing so. *Id.*, at 572–573.

Second, we found it relevant that GLIB's message "would likely be perceived" as the parade organizers' own speech. *Id.*, at 575. That was so because "[p]arades and demonstrations . . . are not understood to be so neutrally presented or selectively viewed" as, say, a broadcast by a cable operator, who is usually considered to be "merely 'a conduit' for the speech" produced by others. *Id.*, at 575–576. Rather, parade organizers are usually understood to make the "customary determination about a unit admitted to the parade." *Id.*, at 575.

Dale's inclusion in the Boy Scouts is nothing like the case in *Hurley*. His participation sends no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not

carry a banner or a sign; he did not distribute any factsheet; and he expressed no intent to send any message. If there is any kind of message being sent, then, it is by the mere act of joining the Boy Scouts. Such an act does not constitute an instance of symbolic speech under the First Amendment.[21]

It is true, of course, that some acts are so imbued with symbolic meaning that they qualify as "speech" under the First Amendment. See *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968). At the same time, however, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Ibid.* Though participating in the Scouts could itself conceivably send a message on some level, it is not the kind of act that we have recognized as speech. See *Dallas* v. *Stanglin*, 490 U. S. 19, 24–25 (1989).[22] Indeed, if merely joining a group did constitute symbolic speech; and such speech were attributable to the group being joined; and that group has the right to exclude that speech (and hence, the right to exclude that person from joining), then the right of free speech effectively becomes a limitless right to exclude for every organization, whether or not it engages in *any* expressive activities. That cannot be, and never has been, the law.

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[21] The majority might have argued (but it did not) that Dale had become so publicly and pervasively identified with a position advocating the moral legitimacy of homosexuality (as opposed to just being an individual who openly stated he is gay) that his leadership position in BSA would necessarily amount to using the organization as a conduit for publicizing his position. But as already noted, when BSA expelled Dale, it had nothing to go on beyond the one newspaper article quoted above, and one newspaper article does not convert Dale into a public symbol for a message. BSA simply has not provided a record that establishes the factual premise for this argument.

[22] This is not to say that Scouts do not engage in expressive activity. It is only to say that the simple act of joining the Scouts—unlike joining a parade—is not inherently expressive.

The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual's—should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label "homosexual." That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority.[23] As counsel for BSA remarked, Dale "put a banner around his neck when he . . . got himself into the newspaper. . . . He created a reputation. . . . He can't take that banner off. He put it on himself and, indeed, he has continued to put it on himself." See Tr. of Oral Arg. 25.

Another difference between this case and *Hurley* lies in the fact that *Hurley* involved the parade organizers' claim to determine the content of the message they wish to give at a particular time and place. The standards governing such a claim are simply different from the standards that govern BSA's claim of a right of expressive association. Generally, a private person or a private organization has a right to refuse to broadcast a message with which it disagrees, and a right to refuse to contradict or garble its own specific statement at any given place or time by including the messages of others. An expressive association claim, however, normally involves the avowal and advocacy of a consistent position on some issue over time. This is why a different kind of scrutiny must be given to an expressive association claim, lest the right of expressive association simply turn into a right to discriminate whenever some group can think of an expressive object that would seem to be inconsistent with the ad-

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[23] See Yoshino, Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays, 96 Colum. L. Rev. 1753, 1781–1783 (1996).

mission of some person as a member or at odds with the appointment of a person to a leadership position in the group.

Furthermore, it is not likely that BSA would be understood to send any message, either to Scouts or to the world, simply by admitting someone as a member. Over the years, BSA has generously welcomed over 87 million young Americans into its ranks. In 1992 over one million adults were active BSA members. 160 N. J. 562, 571, 734 A. 2d 1196, 1200 (1999). The notion that an organization of that size and enormous prestige implicitly endorses the views that each of those adults may express in a non-Scouting context is simply mind boggling. Indeed, in this case there is no evidence that the young Scouts in Dale's troop, or members of their families, were even aware of his sexual orientation, either before or after his public statements at Rutgers University.[24] It is equally farfetched to assert that Dale's open declaration of his homosexuality, reported in a local newspaper, will effectively force BSA to send a message to anyone simply because it allows Dale to be an Assistant Scoutmaster. For an Olympic gold medal winner or a Wimbledon tennis champion, being "openly gay" perhaps communicates a message—for example, that openness about one's sexual orientation is more virtuous than concealment; that a homosexual person can be a capable and virtuous person who should be judged like anyone else; and that homosexuality is not immoral—but it certainly does not follow that they necessarily send a message on behalf of the organizations that sponsor the activities in which they excel. The fact that such persons participate in these organizations is not usually construed to convey a message on behalf of those organizations any more than does the inclusion of women, African-Americans, reli-

[24] For John Doe to make a public statement of his sexual orientation to the newspapers may, of course, be a matter of great importance to John Doe. Richard Roe, however, may be much more interested in the weekend weather forecast. Before Dale made his statement at Rutgers, the Scoutmaster of his troop did not know that he was gay. App. 465.

gious minorities, or any other discrete group.[25] Surely the organizations are not forced by antidiscrimination laws to take any position on the legitimacy of any individual's private beliefs or private conduct.

The State of New Jersey has decided that people who are open and frank about their sexual orientation are entitled to equal access to employment as schoolteachers, police officers, librarians, athletic coaches, and a host of other jobs filled by citizens who serve as role models for children and adults alike. Dozens of Scout units throughout the State are sponsored by public agencies, such as schools and fire departments, that employ such role models. BSA's affiliation with numerous public agencies that comply with New Jersey's law against discrimination cannot be understood to convey any particular message endorsing or condoning the activities of all these people.[26]

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[25] The majority simply announces, without analysis, that Dale's participation alone would "force the organization to send a message." *Ante*, at 653. "But . . . these are merely conclusory words, barren of analysis. . . . For First Amendment principles to be implicated, the State must place the citizen in the position of either apparently or actually 'asserting as true' the message." *Wooley* v. *Maynard*, 430 U. S. 705, 721 (1977) (REHNQUIST, J., dissenting).

[26] BSA also argues that New Jersey's law violates its right to "intimate association." Brief for Petitioners 39–47. Our cases recognize a substantive due process right "to enter into and carry on certain intimate or private relationships." *Rotary Club*, 481 U. S., at 545. As with the First Amendment right to associate, the State may not interfere with the selection of individuals in such relationships. *Jaycees*, 468 U. S., at 618. Though the precise scope of the right to intimate association is unclear, "we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship" to determine whether a group is sufficiently personal to warrant this type of constitutional protection. *Rotary Club*, 481 U. S., at 546. Considering BSA's size, see *supra*, at 697, its broad purposes, and its nonselectivity, see *supra*, at 666, it is impossible to conclude that being a member of the Boy Scouts ranks among those intimate relationships falling within this right, such as marriage, bearing children, rearing children, and cohabitation with relatives. *Rotary Club*, 481 U. S., at 545.

VI

Unfavorable opinions about homosexuals "have ancient roots." *Bowers* v. *Hardwick*, 478 U. S. 186, 192 (1986). Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine. *Id.*, at 196–197 (Burger, C. J., concurring); *Loving* v. *Virginia*, 388 U. S. 1, 3 (1967).[27] See also *Mathews* v. *Lucas*, 427 U. S. 495, 520 (1976) (STEVENS, J., dissenting) ("Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white"). Over the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified those opinions. A few examples: The American Psychiatric Association's and the American Psychological Association's removal of "homosexuality" from their lists of mental disorders;[28] a move toward greater understanding within some religious communities;[29] Justice Blackmun's classic opinion in *Bowers;*[30]

[27] In *Loving*, the trial judge gave this explanation of the rationale for Virginia's antimiscegenation statute: "'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'" 388 U. S., at 3.

[28] Brief for American Psychological Association as *Amicus Curiae* 8.

[29] See n. 3, *supra.*

[30] The significance of that opinion is magnified by comparing it with Justice Blackmun's vote 10 years earlier in *Doe* v. *Commonwealth's Attorney for City of Richmond*, 425 U. S. 901 (1976). In that case, six Justices—including Justice Blackmun—voted to summarily affirm the District Court's rejection of the same due process argument that was later rejected in *Bowers.* Two years later, furthermore, Justice Blackmun joined in a dissent in *University of Missouri* v. *Gay Lib*, 434 U. S. 1080 (1978). In that case, the university had denied recognition to a student gay rights organization. The student group argued that in doing so, the university had violated its free speech and free association rights. The Court of

Georgia's invalidation of the statute upheld in *Bowers;*[31] and New Jersey's enactment of the provision at issue in this case. Indeed, the past month alone has witnessed some remarkable changes in attitudes about homosexuals.[32]

That such prejudices are still prevalent and that they have caused serious and tangible harm to countless members of the class New Jersey seeks to protect are established matters of fact that neither the Boy Scouts nor the Court disputes. That harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers. As Justice Brandeis so wisely advised, "we must be ever on our guard, lest we erect our prejudices into legal principles."

If we would guide by the light of reason, we must let our minds be bold. I respectfully dissent.

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

I join JUSTICE STEVENS's dissent but add this further word on the significance of Part VI of his opinion. There, JUSTICE STEVENS describes the changing attitudes toward gay people and notes a parallel with the decline of stereotypical thinking about race and gender. The legitimacy of New

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Appeals agreed with that argument. A dissent from denial of certiorari, citing the university's argument, suggested that the proper analysis might well be as follows:

"[T]he question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measle sufferers be quarantined." *Id.,* at 1084 (REHNQUIST, J., dissenting).

[31] *Powell* v. *State,* 270 Ga. 327, 510 S. E. 2d 18 (1998).

[32] See, *e. g.,* Bradsher, Big Carmakers Extend Benefits to Gay Couples, New York Times, June 9, 2000, p. C1; Marquis, Gay Pride Day is Observed by About 60 C. I. A. Workers, New York Times, June 9, 2000, p. A26; Zernike, Gay Couples are Accepted as Role Models at Exeter, New York Times, June 12, 2000, p. A18.

Jersey's interest in forbidding discrimination on all these bases by those furnishing public accommodations is, as JUSTICE STEVENS indicates, acknowledged by many to be beyond question. The fact that we are cognizant of this laudable decline in stereotypical thinking on homosexuality should not, however, be taken to control the resolution of this case.

Boy Scouts of America (BSA) is entitled, consistently with its own tenets and the open doors of American courts, to raise a federal constitutional basis for resisting the application of New Jersey's law. BSA has done that and has chosen to defend against enforcement of the state public accommodations law on the ground that the First Amendment protects expressive association: individuals have a right to join together to advocate opinions free from government interference. See *Roberts* v. *United States Jaycees*, 468 U. S. 609, 622 (1984). BSA has disclaimed any argument that Dale's past or future actions, as distinct from his unapologetic declaration of sexual orientation, would justify his exclusion from BSA. See Tr. of Oral Arg. 12–13.

The right of expressive association does not, of course, turn on the popularity of the views advanced by a group that claims protection. Whether the group appears to this Court to be in the vanguard or rearguard of social thinking is irrelevant to the group's rights. I conclude that BSA has not made out an expressive association claim, therefore, not because of what BSA may espouse, but because of its failure to make sexual orientation the subject of any unequivocal advocacy, using the channels it customarily employs to state its message. As JUSTICE STEVENS explains, no group can claim a right of expressive association without identifying a clear position to be advocated over time in an unequivocal way. To require less, and to allow exemption from a public accommodations statute based on any individual's difference from an alleged group ideal, however expressed and however inconsistently claimed, would convert the right of expres-

sive association into an easy trump of any antidiscrimination law.*

If, on the other hand, an expressive association claim has met the conditions JUSTICE STEVENS describes as necessary, there may well be circumstances in which the antidiscrimination law must yield, as he says. It is certainly possible for an individual to become so identified with a position as to epitomize it publicly. When that position is at odds with a group's advocated position, applying an antidiscrimination statute to require the group's acceptance of the individual in a position of group leadership could so modify or muddle or frustrate the group's advocacy as to violate the expressive associational right. While it is not our business here to rule on any such hypothetical, it is at least clear that our estimate of the progressive character of the group's position will be irrelevant to the First Amendment analysis if such a case comes to us for decision.

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*An expressive association claim is in this respect unlike a basic free speech claim, as JUSTICE STEVENS points out; the latter claim, *i. e.*, the right to convey an individual's or group's position, if bona fide, may be taken at face value in applying the First Amendment. This case is thus unlike *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995).

Syllabus

HILL ET AL. *v.* COLORADO ET AL.

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 98–1856. Argued January 19, 2000—Decided June 28, 2000

Colorado Rev. Stat. § 18–9–122(3) makes it unlawful for any person within 100 feet of a health care facility's entrance to "knowingly approach" within 8 feet of another person, without that person's consent, in order to pass "a leaflet or handbill to, displa[y] a sign to, or engag[e] in oral protest, education, or counseling with [that] person . . . ." Claiming that the statute was facially invalid, petitioners sought to enjoin its enforcement in state court. In dismissing the complaint, the District Judge held that the statute imposed content-neutral time, place, and manner restrictions narrowly tailored to serve a significant government interest under *Ward* v. *Rock Against Racism*, 491 U. S. 781, in that Colorado had not "adopted a regulation of speech because of disagreement with the message it conveys," *id.*, at 791. The State Court of Appeals affirmed, and the State Supreme Court denied review. This Court vacated that judgment in light of its holding in *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, that an injunctive provision creating a speech-free floating buffer zone with a 15-foot radius violated the First Amendment. On remand, the Court of Appeals reinstated its judgment, and the State Supreme Court affirmed, distinguishing *Schenck*, concluding that the statute was narrowly drawn to further a significant government interest, rejecting petitioners' overbreadth challenge, and concluding that ample alternative channels of communication remained open to petitioners.

Held: Section 18–9–122(3)'s restrictions on speech-related conduct are constitutional. Pp. 714–735.

(a) Each side has legitimate and important concerns. Petitioners' First Amendment interests are clear and undisputed. On the other hand, the State's police powers allow it to protect its citizens' health and safety, and may justify a special focus on access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests. Moreover, rules providing specific guidance to enforcement authorities serve the interest in evenhanded application of the law. Also, the statute deals not with restricting a speaker's right to address a willing audience, but with protecting listeners from unwanted communication. Pp. 714–718.

(b) Section 18–9–122(3) passes the *Ward* content-neutrality test for three independent reasons. First, it is a regulation of places where

some speech may occur, not a "regulation of speech." Second, it was not adopted because of disagreement with the message of any speech. Most importantly, the State Supreme Court unequivocally held that the restrictions apply to all demonstrators, regardless of viewpoint, and the statute makes no reference to the content of speech. Third, the State's interests are unrelated to the content of the demonstrators' speech. Petitioners contend that insofar as the statute applies to persons who "knowingly approach" within eight feet of another to engage in "oral protest, education, or counseling," it is "content-based" under *Carey* v. *Brown*, 447 U. S. 455, 462, because it requires examination of the content of a speaker's comments. This Court, however, has never held that it is improper to look at a statement's content in order to determine whether a rule of law applies to a course of conduct. Here, it is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether sidewalk counselors are engaging in oral protest, education, or counseling rather than social or random conversation. The statute is easily distinguishable from the one in *Carey*, which prohibited all picketing except for picketing of a place of employment in a labor dispute, thereby according preferential treatment to expression concerning one particular subject. In contrast, § 18–9–122(3) merely places a minor place restriction on an extremely broad category of communications with unwilling listeners. Pp. 719–725.

(c) Section 18–9–122(3) is also a valid time, place, and manner regulation under *Ward*, for it is "narrowly tailored" to serve the State's significant and legitimate governmental interests and it leaves open ample alternative communication channels. When a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal. The 8-foot zone should not have any adverse impact on the readers' ability to read demonstrators' signs. That distance can make it more difficult for a speaker to be heard, but there is no limit on the number of speakers or the noise level. Nor does the statute suffer from the failings of the "floating buffer zone" rejected in *Schenck*. The zone here allows the speaker to communicate at a "normal conversational distance," 519 U. S., at 377, and to remain in one place while other individuals pass within eight feet. And the "knowing" requirement protects speakers who thought they were at the proscribed distance from inadvertently violating the statute. Whether the 8-foot interval is the best possible accommodation of the competing interests, deference must be accorded to the Colorado Legislature's judgment. The burden on the distribution of handbills is more serious, but the statute does not prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering the material, which pedestrians can accept or decline.

Syllabus

See *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640. Pp. 725–730.

(d) Section 18–9–122(3) is not overbroad. First, the argument that coverage is broader than the specific concern that led to the statute's enactment does not identify a constitutional defect. It is precisely because the state legislature made a general policy choice that the statute is assessed under *Ward* rather than a stricter standard. Second, the argument that the statute bans virtually the universe of protected expression is based on a misreading of the statute and an incorrect understanding of the overbreadth doctrine. The statute does not ban any forms of communication, but regulates the places where communications may occur; and petitioners have not, as the doctrine requires, persuaded the Court that the statute's impact on the conduct of other speakers will differ from its impact on their own sidewalk counseling, see *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612, 615. Pp. 730–732.

(e) Nor is § 18–9–122(3) unconstitutionally vague, either because it fails to provide people with ordinary intelligence a reasonable opportunity to understand what it says or because it authorizes or encourages arbitrary and discriminatory enforcement, *Chicago* v. *Morales*, 527 U. S. 41, 56–57. The first concern is ameliorated by § 18–9–122(3)'s scienter requirement. It is unlikely that anyone would not understand the common words used in the statute, and hypothetical situations not before the Court will not support a facial attack on a statute that is surely valid in the vast majority of its intended applications. The Court is likewise unpersuaded that inadequate direction is given to law enforcement authorities. Indeed, one of § 18–9–122(3)'s virtues is the specificity of the definitions of the zones. Pp. 732–733.

(f) Finally, § 18–9–122(3)'s consent requirement does not impose a prior restraint on speech. This argument was rejected in both *Schenck* and *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753. Furthermore, "prior restraint" concerns relate to restrictions imposed by official censorship, but the regulations here only apply if the pedestrian does not consent to the approach. Pp. 733–735.

973 P. 2d 1246, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, in which O'CONNOR, GINSBURG, and BREYER, JJ., joined, *post*, p. 735. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 741. KENNEDY, J., filed a dissenting opinion, *post*, p. 765.

Jay Alan Sekulow argued the cause for petitioners. With him on the briefs were *James M. Henderson, Sr.*, *Walter M.*

Weber, *Joel H. Thornton*, *Thomas P. Monaghan*, and *Roger W. Westlund.*

Michael E. McLachlan, Solicitor General of Colorado, argued the cause for respondents. With him on the brief were *Ken Salazar*, Attorney General, *Felicity Hannay*, Deputy Attorney General, *Carol D. Angel*, Senior Assistant Attorney General, and *Maureen Herr Juran.*

Deputy Solicitor General Underwood argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Lee*, *Beth S. Brinkmann*, *David K. Flynn*, and *Louis E. Peraertz.**

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union by *Steven R. Shapiro;* for Liberty Counsel by *Mathew D. Staver;* and for People for the Ethical Treatment of Animals by *David N. Ventker.*

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eliot Spitzer*, Attorney General of New York, *Preeta D. Bansal*, Solicitor General, *Carol Fischer*, Assistant Solicitor General, and *Jennifer K. Brown*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Janet Napolitano* of Arizona, *Bill Lockyer* of California, *Richard Blumenthal* of Connecticut, *Earl I. Anzai* of Hawaii, *Carla J. Stovall* of Kansas, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Patricia A. Madrid* of New Mexico, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Sheldon Whitehouse* of Rhode Island, *William H. Sorrell* of Vermont, and *Christine O. Gregoire* of Washington; for the City of Boulder et al. by *Daniel E. Muse* and *James C. Thomas;* for the American College of Obstetricians and Gynecologists et al. by *Carter G. Phillips*, *Mark E. Haddad*, *Ann E. Allen*, *Michael L. Ile*, and *Leonard A. Nelson;* and for the National Abortion and Reproductive Rights Action League et al. by *Lucinda M. Finley*, *Jennifer C. Jaff*, *Martha F. Davis*, *Roslyn Powell*, and *Yolanda S. Wu.*

Briefs of *amici curiae* were filed for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt* and *Laurence Gold;* and for the Life Legal Defense Foundation by *Andrew W. Zepeda.*

JUSTICE STEVENS delivered the opinion of the Court.

At issue is the constitutionality of a 1993 Colorado statute that regulates speech-related conduct within 100 feet of the entrance to any health care facility. The specific section of the statute that is challenged, Colo. Rev. Stat. § 18–9–122(3) (1999), makes it unlawful within the regulated areas for any person to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person . . . ."[1] Although the statute prohibits speakers from

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[1] The entire § 18–9–122 reads as follows:

"(1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.

"(2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility.

"(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

"(4) For the purposes of this section, 'health care facility' means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

"(5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the

approaching unwilling listeners, it does not require a standing speaker to move away from anyone passing by. Nor does it place any restriction on the content of any message that anyone may wish to communicate to anyone else, either inside or outside the regulated areas. It does, however, make it more difficult to give unwanted advice, particularly in the form of a handbill or leaflet, to persons entering or leaving medical facilities.

The question is whether the First Amendment rights of the speaker are abridged by the protection the statute provides for the unwilling listener.

I

Five months after the statute was enacted, petitioners filed a complaint in the District Court for Jefferson County, Colorado, praying for a declaration that § 18–9–122(3) was facially invalid and seeking an injunction against its enforcement. They stated that prior to the enactment of the statute, they had engaged in "sidewalk counseling" on the public ways and sidewalks within 100 feet of the entrances to facilities where human abortion is practiced or where medical personnel refer women to other facilities for abortions. "Sidewalk counseling" consists of efforts "to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal or written speech, including conversation and/or display of signs and/or distribution of literature."[2] They further alleged that such activities frequently entail being within eight feet of other persons and that their fear of prosecution under the new statute

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control of access to health care facilities that is no less restrictive than the provisions of this section.

"(6) In addition to, and not in lieu of, the penalties set forth in this section, a person who violates the provisions of this section shall be subject to civil liability, as provided in section 13–21–106.7, C. R. S."

[2] App. 17.

caused them "to be chilled in the exercise of fundamental constitutional rights."[3]

Count 5 of the complaint claimed violations of the right to free speech protected by the First Amendment to the Federal Constitution, and Count 6 alleged that the impairment of the right to distribute written materials was a violation of the right to a free press.[4] The complaint also argued that the statutory consent requirement was invalid as a prior restraint tantamount to a licensing requirement, that the statute was vague and overbroad, and that it was a content-based restriction that was not justified by a compelling state interest. Finally, petitioners contended that § 18–9–122(3) was content based for two reasons: The content of the speech must be examined to determine whether it "constitutes oral protest, counseling and education"; and that it is "viewpoint-based" because the statute "makes it likely that prosecution will occur based on displeasure with the position taken by the speaker."[5]

In their answers to the complaint, respondents admitted virtually all of the factual allegations. They filed a motion for summary judgment supported by affidavits, which included a transcript of the hearings that preceded the enactment of the statute. It is apparent from the testimony of both supporters and opponents of the statute that demonstrations in front of abortion clinics impeded access to those clinics and were often confrontational.[6] Indeed, it was a common practice to provide escorts for persons entering and leaving the clinics both to ensure their access and to provide

[3] *Id.*, at 18–19.

[4] Counts 1 through 4 alleged violations of the Colorado Constitution, Count 7 alleged a violation of the right to peaceable assembly, and Counts 8 and 9 alleged violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

[5] *Id.*, at 25–26.

[6] The legislature also heard testimony that other types of protests at medical facilities, such as those involving animal rights, create difficulties for persons attempting to enter the facility. App. to Pet. for Cert. 40a.

protection from aggressive counselors who sometimes used strong and abusive language in face-to-face encounters.[7] There was also evidence that emotional confrontations may adversely affect a patient's medical care.[8] There was no evidence, however, that the "sidewalk counseling" conducted by petitioners in this case was ever abusive or confrontational.

The District Judge granted respondents' motion and dismissed the complaint. Because the statute had not actually been enforced against petitioners, he found that they only raised a facial challenge.[9] He agreed with petitioners that their sidewalk counseling was conducted in a "quintessential" public forum, but held that the statute permissibly imposed content-neutral "time, place, and manner restrictions" that were narrowly tailored to serve a significant government interest, and left open ample alternative channels of communication.[10] Relying on *Ward* v. *Rock Against Rac-*

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[7] A nurse practitioner testified that some antiabortion protesters "'yell, thrust signs in faces, and generally try to upset the patient as much as possible, which makes it much more difficult for us to provide care in a scary situation anyway.'" *Hill* v. *Thomas*, 973 P. 2d 1246, 1250 (Colo. 1999). A volunteer who escorts patients into and out of clinics testified that the protesters "'are flashing their bloody fetus signs. They are yelling, "you are killing your baby." [T]hey are talking about fetuses and babies being dismembered, arms and legs torn off . . . a mother and her daughter . . . were immediately surrounded and yelled at and screamed at . . . .'" *Id.*, at 1250–1251.

[8] A witness representing the Colorado Coalition of Persons with Disabilities, who had had 35 separate surgeries in the preceding eight years, testified: "Each and every one is tough. And the night before and the morning of any medical procedure that's invasive is the toughest part of all. You don't need additional stressors *[sic]* placed on you while you're trying to do it. . . . We all know about our own personal faith. You don't need somebody standing in your face screaming at you when you are going in for what may be one of the most traumatic experiences of your life anyway. Why make it more traumatic?" App. 108.

[9] App. to Pet. for Cert. 31a.

[10] *Id.*, at 32a.

ism, 491 U. S. 781, 791 (1989), he noted that "'[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'" He found that the text of the statute "applies to all viewpoints, rather [than] only certain viewpoints," and that the legislative history made it clear that the State had not favored one viewpoint over another.[11] He concluded that the "free zone" created by the statute was narrowly tailored under the test announced in *Ward*, and that it left open ample alternative means of communication because signs and leaflets may be seen, and speech may be heard, at a distance of eight feet. Noting that petitioners had stated in their affidavits that they intended to "continue with their protected First Amendment activities," he rejected their overbreadth challenge because he believed "the statute will do little to deter protected speech."[12] Finally, he concluded that the statute was not vague and that the prior restraint doctrine was inapplicable because the "statute requires no license or permit scheme prior to speaking."[13]

The Colorado Court of Appeals affirmed for reasons similar to those given by the District Judge. It noted that even though only seven percent of the patients receiving services at one of the clinics were there to obtain abortion services, all 60,000 of that clinic's patients "were subjected to the same treatment by the protesters."[14] It also reviewed our then-recent decision in *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753 (1994), and concluded that *Madsen*'s reasoning supported the conclusion that the statute was content neutral.[15]

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[11] *Id.*, at 32a–33a.
[12] *Id.*, at 35a.
[13] *Id.*, at 36a.
[14] *Hill* v. *Lakewood*, 911 P. 2d 670, 672 (1995).
[15] *Id.*, at 673–674.

In 1996, the Supreme Court of Colorado denied review,[16] and petitioners sought a writ of certiorari from our Court. While their petition was pending, we decided *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357 (1997). Because we held in that case that an injunctive provision creating a speech-free "floating buffer zone" with a 15-foot radius violates the First Amendment, we granted certiorari, vacated the judgment of the Colorado Court of Appeals, and remanded the case to that court for further consideration in light of *Schenck*. 519 U. S. 1145 (1997).

On remand the Court of Appeals reinstated its judgment upholding the statute. It noted that in *Schenck* we had "expressly declined to hold that a valid governmental interest in ensuring ingress and egress to a medical clinic may never be sufficient to justify a zone of separation between individuals entering and leaving the premises and protesters" and that our opinion in *Ward* provided the standard for assessing the validity of a content-neutral, generally applicable statute. Under that standard, even though a 15-foot floating buffer might preclude protesters from expressing their views from a normal conversational distance, a lesser distance of eight feet was sufficient to protect such speech on a public sidewalk.[17]

The Colorado Supreme Court granted certiorari and affirmed the judgment of the Court of Appeals. In a thorough opinion, the court began by commenting on certain matters that were not in dispute. It reviewed the history of the statute in detail and concluded that it was intended to protect both the "citizen's 'right to protest' or counsel against certain medical procedures" and also to ensure "that government protects a 'person's right to obtain medical counseling and treatment.'"[18] It noted that both the trial court and the Court of Appeals had concluded that the statute was con-

[16] App. to Pet. for Cert. 46a.

[17] *Hill* v. *Lakewood*, 949 P. 2d 107, 109 (1997).

[18] 973 P. 2d, at 1249 (quoting § 18–9–122(1)).

tent neutral, that petitioners no longer contended otherwise, and that they agreed that the question for decision was whether the statute was a valid time, place, and manner restriction under the test announced in *Ward*.[19]

The court identified two important distinctions between this case and *Schenck*. First, *Schenck* involved a judicial decree and therefore, as explained in *Madsen*, posed "greater risks of censorship and discriminatory application than do general ordinances."[20] Second, unlike the floating buffer zone in *Schenck*, which would require a protester either to stop talking or to get off the sidewalk whenever a patient came within 15 feet, the "knowingly approaches" requirement in the Colorado statute allows a protester to stand still while a person moving toward or away from a health care facility walks past her.[21] Applying the test in *Ward*, the court concluded that the statute was narrowly drawn to further a significant government interest. It rejected petitioners' contention that it was not narrow enough because it applied to all health care facilities in the State. In the court's view, the comprehensive coverage of the statute was a factor that supported its content neutrality. Moreover, the fact that the statute was enacted, in part, because the General

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[19] "[P]etitioners concede that the test for a time, place, and manner restriction is the appropriate measure of this statute's constitutionality. *See* Tape Recording of Oral Argument, Oct. 19, 1998, statement of James M. Henderson, Esq. Petitioners argue that pursuant to the test announced in *Ward*, the 'floating buffer zone' created by section 18–9–122(3) is not narrowly tailored to serve a significant government interest and that section 18–9–122(3) does not provide for ample alternative channels of communication. We disagree." *Id.*, at 1251.

"We note that both the trial court and the court of appeals found that section 18–9–122(3) is content-neutral, and that petitioners do not contend otherwise in this appeal." *Id.*, at 1256.

[20] *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 764 (1994).

[21] 973 P. 2d, at 1257–1258 ("What renders this statute less restrictive than . . . the injunction in *Schenck* . . . is that under section 18–9–122(3), there is no duty to withdraw placed upon petitioners even within the eight-foot limited floating buffer zone").

Assembly "was concerned with the safety of individuals seeking wide-ranging health care services, not merely abortion counseling and procedures," added to the substantiality of the government interest that it served.[22] Finally, it concluded that ample alternative channels remain open because petitioners, and

> "indeed, everyone, are still able to protest, counsel, shout, implore, dissuade, persuade, educate, inform, and distribute literature regarding abortion. They just cannot knowingly approach within eight feet of an individual who is within 100 feet of a health care facility entrance without that individual's consent. As articulated so well . . . in *Ward*, ['the fact that § 18–9–122(3)] may reduce to some degree the potential audience for [petitioners'] speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate.'"[23]

Because of the importance of the case, we granted certiorari. 527 U. S. 1068 (1999). We now affirm.

II

Before confronting the question whether the Colorado statute reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners, it is appropriate to examine the competing interests at stake. A brief review of both sides of the dispute reveals that each has legitimate and important concerns.

The First Amendment interests of petitioners are clear and undisputed. As a preface to their legal challenge, petitioners emphasize three propositions. First, they accu-

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[22] *Id.*, at 1258.

[23] *Ibid.* (quoting *Ward* v. *Rock Against Racism*, 491 U. S. 781, 802 (1989)).

rately explain that the areas protected by the statute encompass all the public ways within 100 feet of every entrance to every health care facility everywhere in the State of Colorado. There is no disagreement on this point, even though the legislative history makes it clear that its enactment was primarily motivated by activities in the vicinity of abortion clinics. Second, they correctly state that their leafletting, sign displays, and oral communications are protected by the First Amendment. The fact that the messages conveyed by those communications may be offensive to their recipients does not deprive them of constitutional protection. Third, the public sidewalks, streets, and ways affected by the statute are "quintessential" public forums for free speech. Finally, although there is debate about the magnitude of the statutory impediment to their ability to communicate effectively with persons in the regulated zones, that ability, particularly the ability to distribute leaflets, is unquestionably lessened by this statute.

On the other hand, petitioners do not challenge the legitimacy of the state interests that the statute is intended to serve. It is a traditional exercise of the States' "police powers to protect the health and safety of their citizens." *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 475 (1996). That interest may justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests. See *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753 (1994); *NLRB* v. *Baptist Hospital, Inc.*, 442 U. S. 773 (1979). Moreover, as with every exercise of a State's police powers, rules that provide specific guidance to enforcement authorities serve the interest in evenhanded application of the law. Whether or not those interests justify the particular regulation at issue, they are unquestionably legitimate.

It is also important when conducting this interest analysis to recognize the significant difference between state restric-

tions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication. This statute deals only with the latter.

The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience. But the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it. *Frisby* v. *Schultz*, 487 U. S. 474, 487 (1988). Indeed, "[i]t may not be the content of the speech, as much as the deliberate 'verbal or visual assault,' that justifies proscription." *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 210–211, n. 6 (1975) (citation and brackets omitted). Even in a public forum, one of the reasons we tolerate a protester's right to wear a jacket expressing his opposition to government policy in vulgar language is because offended viewers can "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen* v. *California*, 403 U. S. 15, 21 (1971).

The recognizable privacy interest in avoiding unwanted communication varies widely in different settings. It is far less important when "strolling through Central Park" than when "in the confines of one's own home," or when persons are "powerless to avoid" it. *Id.*, at 21–22. But even the interest in preserving tranquility in "the Sheep Meadow" portion of Central Park may at times justify official restraints on offensive musical expression. *Ward*, 491 U. S., at 784, 792. More specific to the facts of this case, we have recognized that "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." *Madsen*, 512 U. S., at 772–773.

The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader "right to be let alone" that one

of our wisest Justices characterized as "the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).[24] The right to avoid unwelcome speech has special force in the privacy of the home, *Rowan* v. *Post Office Dept.*, 397 U. S. 728, 738 (1970), and its immediate surroundings, *Frisby* v. *Schultz*, 487 U. S., at 485, but can also be protected in confrontational settings. Thus, this comment on the right to free passage in going to and from work applies equally—or perhaps with greater force—to access to a medical facility:

> "How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free, and his employer has a right to have him free." *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 204 (1921).

We have since recognized that the "right to persuade" discussed in that case is protected by the First Amendment, *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), as well as by fed-

[24] This common-law "right" is more accurately characterized as an "interest" that States can choose to protect in certain situations. See *Katz* v. *United States*, 389 U. S. 347, 350–351 (1967).

eral statutes. Yet we have continued to maintain that "no one has a right to press even 'good' ideas on an unwilling recipient." *Rowan*, 397 U. S., at 738. None of our decisions has minimized the enduring importance of "a right to be free" from persistent "importunity, following and dogging" after an offer to communicate has been declined. While the freedom to communicate is substantial, "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Id.*, at 736. It is that right, as well as the right of "passage without obstruction," that the Colorado statute legitimately seeks to protect. The restrictions imposed by the Colorado statute only apply to communications that interfere with these rights rather than those that involve willing listeners.

The dissenters argue that we depart from precedent by recognizing a "right to avoid unpopular speech in a public forum," *post*, at 771 (opinion of KENNEDY, J.); see also *post*, at 749–754 (opinion of SCALIA, J.). We, of course, are not addressing whether there is such a "right." Rather, we are merely noting that our cases have repeatedly recognized the interests of unwilling listeners in situations where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. See *Lehman* v. [*Shaker Heights*, 418 U. S. 298 (1974)]." *Erznoznik*, 422 U. S., at 209. We explained in *Erznoznik* that "[t]his Court has considered analogous issues—pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors—in a variety of contexts. Such cases demand delicate balancing." *Id.*, at 208 (citations omitted). The dissenters, however, appear to consider recognizing any of the interests of unwilling listeners—let alone balancing those interests against the rights of speakers—to be unconstitutional. Our cases do not support this view.[25]

[25] Furthermore, whether there is a "right" to avoid unwelcome expression is not before us in this case. The purpose of the Colorado statute is not to protect a potential listener from hearing a particular message. It

III

All four of the state court opinions upholding the validity of this statute concluded that it is a content-neutral time, place, and manner regulation. Moreover, they all found support for their analysis in *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989).[26] It is therefore appropriate to comment on the "content neutrality" of the statute. As we explained in *Ward:*

> "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.*, at 791.

The Colorado statute passes that test for three independent reasons. First, it is not a "regulation of speech." Rather, it is a regulation of the places where some speech may occur. Second, it was not adopted "because of disagreement with the message it conveys." This conclusion is supported not just by the Colorado courts' interpretation of legislative history, but more importantly by the State Supreme Court's unequivocal holding that the statute's "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech."[27] Third, the State's interests in protecting

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is to protect those who seek medical treatment from the potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) by physically approaching an individual at close range, *i. e.*, within eight feet. In offering protection from that harm, while maintaining free access to health clinics, the State pursues interests constitutionally distinct from the freedom from unpopular speech to which JUSTICE KENNEDY refers.

[26] See App. to Pet. for Cert. 32a (Colo. Dist. Ct.); 911 P. 2d, at 673–674 (Colo. Ct. App.); 949 P. 2d, at 109 (Colo. Ct. App.); 973 P. 2d, at 1256 (Colo. Sup. Ct.).

[27] *Ibid.* This observation in *Madsen* is equally applicable here: "There is no suggestion in this record that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion;

access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech. As we have repeatedly explained, government regulation of expressive activity is "content neutral" if it is justified without reference to the content of regulated speech. See *ibid.* and cases cited.

Petitioners nevertheless argue that the statute is not content neutral insofar as it applies to some oral communication. The statute applies to all persons who "knowingly approach" within eight feet of another for the purpose of leafletting or displaying signs; for such persons, the content of their oral statements is irrelevant. With respect to persons who are neither leafletters nor sign carriers, however, the statute does not apply unless their approach is "for the purpose of . . . engaging in oral protest, education, or counseling." Petitioners contend that an individual near a health care facility who knowingly approaches a pedestrian to say "good morning" or to randomly recite lines from a novel would not be subject to the statute's restrictions.[28] Because the content of the oral statements made by an approaching speaker must sometimes be examined to determine whether the knowing approach is covered by the statute, petitioners argue that the law is "content-based" under our reasoning in *Carey* v. *Brown,* 447 U. S. 455, 462 (1980).

Although this theory was identified in the complaint, it is not mentioned in any of the four Colorado opinions, all of which concluded that the statute was content neutral. For that reason, it is likely that the argument has been waived. Additionally, the Colorado attorney general argues that we should assume that the state courts tacitly construed the terms "protest, education, or counseling" to encompass "all

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none of the restrictions imposed by the court were directed at the contents of petitioner's message." 512 U. S., at 762–763.

[28] See Brief for Petitioners 32, n. 23.

communication."[29] Instead of relying on those arguments, however, we shall explain why petitioners' contention is without merit and why their reliance on *Carey* v. *Brown* is misplaced.

It is common in the law to examine the content of a communication to determine the speaker's purpose. Whether a particular statement constitutes a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods often depends on the precise content of the statement. We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct. With respect to the conduct that is the focus of the Colorado statute, it is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether "sidewalk counselors" are engaging in "oral protest, education, or counseling" rather than pure social or random conversation.

Theoretically, of course, cases may arise in which it is necessary to review the content of the statements made by a person approaching within eight feet of an unwilling listener to determine whether the approach is covered by the statute. But that review need be no more extensive than a determination whether a general prohibition of "picketing" or "demonstrating" applies to innocuous speech. The regulation of such expressive activities, by definition, does not cover social, random, or other everyday communications. See Webster's Third New International Dictionary 600, 1710 (1993) (defining "demonstrate" as "to make a public display of sentiment for or against a person or cause" and "picket" as an

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[29] "The Colorado Supreme Court's ruling confirms that the statutory language should be interpreted to refer to approaches for all communication, as Colorado has argued since the beginning of this case." Brief for Respondents 21.

effort "to persuade or otherwise influence"). Nevertheless, we have never suggested that the kind of cursory examination that might be required to exclude casual conversation from the coverage of a regulation of picketing would be problematic.[30]

In *Carey* v. *Brown* we examined a general prohibition of peaceful picketing that contained an exemption for picketing a place of employment involved in a labor dispute. We concluded that this statute violated the Equal Protection Clause of the Fourteenth Amendment, because it discriminated between lawful and unlawful conduct based on the content of the picketers' messages. That discrimination was impermissible because it accorded preferential treatment to expression concerning one particular subject matter—labor disputes—while prohibiting discussion of all other issues. Although our opinion stressed that "it is the content of the speech that determines whether it is within or without the statute's blunt prohibition," 447 U. S., at 462, we appended a footnote to that sentence explaining that it was the fact that the statute placed a prohibition on discussion of particular topics, while others were allowed, that was constitutionally

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[30] In *United States* v. *Grace*, 461 U. S. 171 (1983), after examining a federal statute that was "[i]nterpreted and applied" as "prohibit[ing] picketing and leafletting, but not other expressive conduct" within the Supreme Court building and grounds, we concluded that "it is clear that the prohibition is facially content-neutral." *Id.*, at 181, n. 10. Similarly, we have recognized that statutes can equally restrict all "picketing." See, *e. g.*, *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 98 (1972) ("This is not to say that all picketing must always be allowed. We have continually recognized that reasonable 'time, place and manner' regulations of picketing may be necessary to further significant governmental interests"), and cases cited. See also *Frisby* v. *Schultz*, 487 U. S. 474 (1988) (upholding a general ban on residential picketing). And our decisions in *Schenck* and *Madsen* both upheld injunctions that also prohibited "demonstrating." *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 366–367, n. 3 (1997); *Madsen*, 512 U. S., at 759.

repugnant.[31] Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation. *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 538 (1980).

The Colorado statute's regulation of the location of protests, education, and counseling is easily distinguishable from *Carey*. It places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker. Rather, it simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners. Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries. Each can attempt to educate unwilling listeners on any subject, but without consent may not approach within eight feet to do so.

The dissenters, nonetheless, contend that the statute is not "content neutral." As JUSTICE SCALIA points out, the vice of content-based legislation in this context is that "it lends itself" to being "'used for invidious thought-control purposes.'" *Post*, at 743. But a statute that restricts certain categories of speech only lends itself to invidious use if there is a significant number of communications, raising the same problem that the statute was enacted to solve, that fall outside the statute's scope, while others fall inside. *E. g., Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972). Here,

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[31] "It is, of course, no answer to assert that the Illinois statute does not discriminate on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message. 'The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'" *Carey* v. *Brown*, 447 U. S. 455, 462, n. 6 (1980) (quoting *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537 (1980)).

the statute's restriction seeks to protect those who enter a health care facility from the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach within eight feet of a patient by a person wishing to argue vociferously face-to-face and perhaps thrust an undesired handbill upon her. The statutory phrases, "oral protest, education, or counseling," distinguish speech activities likely to have those consequences from speech activities (such as JUSTICE SCALIA's "happy speech," *post*, at 743) that are most unlikely to have those consequences. The statute does not distinguish among speech instances that are similarly likely to raise the legitimate concerns to which it responds. Hence, the statute cannot be struck down for failure to maintain "content neutrality," or for "underbreadth."

Also flawed is JUSTICE KENNEDY's theory that a statute restricting speech becomes unconstitutionally content based because of its application "to the specific locations where [that] discourse occurs," *post*, at 767. A statute prohibiting solicitation in airports that was motivated by the aggressive approaches of Hare Krishnas does not become content based solely because its application is confined to airports—"the specific locations where [that] discourse occurs." A statute making it a misdemeanor to sit at a lunch counter for an hour without ordering any food would also not be "content based" even if it were enacted by a racist legislature that hated civil rights protesters (although it might raise separate questions about the State's legitimate interest at issue). See *ibid.*

Similarly, the contention that a statute is "viewpoint based" simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support. *Post*, at 768–769 (KENNEDY, J., dissenting). The antipicketing ordinance upheld in *Frisby* v. *Schultz*, 487 U. S. 474 (1988), a decision in which both of today's dissenters

joined, was obviously enacted in response to the activities of antiabortion protesters who wanted to protest at the home of a particular doctor to persuade him and others that they viewed his practice of performing abortions to be murder. We nonetheless summarily concluded that the statute was content neutral. *Id.*, at 482.

JUSTICE KENNEDY further suggests that a speaker who approaches a patient and "chants in praise of the Supreme Court and its abortion decisions," or hands out a simple leaflet saying, "'We are for abortion rights,'" would not be subject to the statute. *Post,* at 769. But what reason is there to believe the statute would not apply to that individual? She would be engaged in "oral protest" and "education," just as the abortion opponent who expresses her view that the Supreme Court decisions were incorrect would be "protest[ing]" the decisions and "educat[ing]" the patient on the issue. The close approach of the latter, more hostile, demonstrator may be more likely to risk being perceived as a form of physical harassment; but the relevant First Amendment point is that the statute would prevent both speakers, unless welcome, from entering the 8-foot zone. The statute is not limited to those who oppose abortion. It applies to the demonstrator in JUSTICE KENNEDY's example. It applies to all "protest," to all "counseling," and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision. That is the level of neutrality that the Constitution demands.

The Colorado courts correctly concluded that § 18–9–122(3) is content neutral.

IV

We also agree with the state courts' conclusion that § 18–9–122(3) is a valid time, place, and manner regulation under the test applied in *Ward* because it is "narrowly tailored." We already have noted that the statute serves governmental interests that are significant and legitimate and that the re-

strictions are content neutral. We are likewise persuaded that the statute is "narrowly tailored" to serve those interests and that it leaves open ample alternative channels for communication. As we have emphasized on more than one occasion, when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal.[32]

The three types of communication regulated by § 18–9–122(3) are the display of signs, leafletting, and oral speech. The 8-foot separation between the speaker and the audience should not have any adverse impact on the readers' ability to read signs displayed by demonstrators. In fact, the separation might actually aid the pedestrians' ability to see the signs by preventing others from surrounding them and impeding their view. Furthermore, the statute places no limitations on the number, size, text, or images of the placards. And, as with all of the restrictions, the 8-foot zone does not affect demonstrators with signs who remain in place.

With respect to oral statements, the distance certainly can make it more difficult for a speaker to be heard, particularly if the level of background noise is high and other speakers are competing for the pedestrian's attention. Notably, the statute places no limitation on the number of speakers or the noise level, including the use of amplification equipment, although we have upheld such restrictions in past cases. See, *e. g.*, *Madsen*, 512 U. S., at 772–773. More significantly, this statute does not suffer from the failings that compelled us to reject the "floating buffer zone" in *Schenck*, 519 U. S., at 377. Unlike the 15-foot zone in *Schenck*, this 8-foot zone allows the speaker to communicate at a "normal conversa-

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[32] "Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." *Ward* v. *Rock Against Racism*, 491 U. S., at 798.

tional distance." *Ibid.* Additionally, the statute allows the speaker to remain in one place, and other individuals can pass within eight feet of the protester without causing the protester to violate the statute. Finally, here there is a "knowing" requirement that protects speakers "who thought they were keeping pace with the targeted individual" at the proscribed distance from inadvertently violating the statute. *Id.*, at 378, n. 9.

It is also not clear that the statute's restrictions will necessarily impede, rather than assist, the speakers' efforts to communicate their messages. The statute might encourage the most aggressive and vociferous protesters to moderate their confrontational and harassing conduct, and thereby make it easier for thoughtful and law-abiding sidewalk counselors like petitioners to make themselves heard. But whether or not the 8-foot interval is the best possible accommodation of the competing interests at stake, we must accord a measure of deference to the judgment of the Colorado Legislature. See *Madsen*, 512 U. S., at 769–770. Once again, it is worth reiterating that only attempts to address unwilling listeners are affected.

The burden on the ability to distribute handbills is more serious because it seems possible that an 8-foot interval could hinder the ability of a leafletter to deliver handbills to some unwilling recipients. The statute does not, however, prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians can easily accept.[33] And, as in all leafletting situations, pedestrians continue to be free to decline the tender. In *Heffron* v. *International Soc. for*

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[33] JUSTICE KENNEDY states that the statute "forecloses peaceful leafletting," *post*, at 780. This is not correct. All of the cases he cites in support of his argument involve a total ban on a medium of expression to both willing and unwilling recipients, see *post*, at 780–787. Nothing in this statute, however, prevents persons from proffering their literature; they simply cannot approach within eight feet of an unwilling recipient.

Krishna Consciousness, Inc., 452 U. S. 640 (1981), we upheld a state fair regulation that required a religious organization desiring to distribute literature to conduct that activity only at an assigned location—in that case booths. As in this case, the regulation primarily burdened the distributors' ability to communicate with unwilling readers. We concluded our opinion by emphasizing that the First Amendment protects the right of every citizen to "'reach the minds of willing listeners and to do so there must be opportunity to win their attention.' *Kovacs* v. *Cooper*, 336 U. S. 77, 87 (1949)." *Id.*, at 655. The Colorado statute adequately protects those rights.

Finally, in determining whether a statute is narrowly tailored, we have noted that "[w]e must, of course, take account of the place to which the regulations apply in determining whether these restrictions burden more speech than necessary." *Madsen*, 512 U. S., at 772. States and municipalities plainly have a substantial interest in controlling the activity around certain public and private places. For example, we have recognized the special governmental interests surrounding schools,[34] courthouses,[35] polling places,[36] and private homes.[37] Additionally, we previously have noted the unique concerns that surround health care facilities:

> "'Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and [her] family . . . need a restful, uncluttered, relaxing, and

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[34] See *Grayned* v. *City of Rockford*, 408 U. S. 104, 119 (1972).

[35] See *Cox* v. *Louisiana*, 379 U. S. 559, 562 (1965).

[36] See *Burson* v. *Freeman*, 504 U. S. 191, 206–208 (1992) (plurality opinion); *id.*, at 214–216 (SCALIA, J., concurring in judgment).

[37] See *Frisby* v. *Schultz*, 487 U. S., at 484–485.

helpful atmosphere.'" *Ibid.* (quoting *NLRB* v. *Baptist Hospital, Inc.*, 442 U. S., at 783–784, n. 12).

Persons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions. The State of Colorado has responded to its substantial and legitimate interest in protecting these persons from unwanted encounters, confrontations, and even assaults by enacting an exceedingly modest restriction on the speakers' ability to approach.

JUSTICE KENNEDY, however, argues that the statute leaves petitioners without adequate means of communication. *Post*, at 780. This is a considerable overstatement. The statute seeks to protect those who wish to enter health care facilities, many of whom may be under special physical or emotional stress, from close physical approaches by demonstrators. In doing so, the statute takes a prophylactic approach; it forbids all unwelcome demonstrators to come closer than eight feet. We recognize that by doing so, it will sometimes inhibit a demonstrator whose approach in fact would have proved harmless. But the statute's prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior, demanding in each case an accurate characterization (as harassing or not harassing) of each individual movement within the 8-foot boundary. Such individualized characterization of each individual movement is often difficult to make accurately. A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself.

As we explained above, the 8-foot restriction on an unwanted physical approach leaves ample room to communicate a message through speech. Signs, pictures, and voice itself can cross an 8-foot gap with ease. If the clinics in Colorado resemble those in *Schenck*, demonstrators with leaflets

might easily stand on the sidewalk at entrances (without blocking the entrance) and, without physically approaching those who are entering the clinic, peacefully hand them leaflets as they pass by.

Finally, the 8-foot restriction occurs only within 100 feet of a health care facility—the place where the restriction is most needed. The restriction interferes far less with a speaker's ability to communicate than did the total ban on picketing on the sidewalk outside a residence (upheld in *Frisby* v. *Schultz*, 487 U. S. 474 (1988)), the restriction of leafletting at a fairground to a booth (upheld in *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981)), or the "silence" often required outside a hospital. Special problems that may arise where clinics have particularly wide entrances or are situated within multipurpose office buildings may be worked out as the statute is applied.

This restriction is thus reasonable and narrowly tailored.

V

Petitioners argue that § 18–9–122(3) is invalid because it is "overbroad." There are two parts to petitioners' "overbreadth" argument. On the one hand, they argue that the statute is too broad because it protects too many people in too many places, rather than just the patients at the facilities where confrontational speech had occurred. Similarly, it burdens all speakers, rather than just persons with a history of bad conduct.[38] On the other hand, petitioners also contend that the statute is overbroad because it "bans virtually the universe of protected expression, including displays of signs, distribution of literature, and mere verbal statements."[39]

The first part of the argument does not identify a constitutional defect. The fact that the coverage of a statute is

[38] Brief for Petitioners 22–23.

[39] *Id.*, at 25.

broader than the specific concern that led to its enactment is of no constitutional significance. What is important is that all persons entering or leaving health care facilities share the interests served by the statute. It is precisely because the Colorado Legislature made a general policy choice that the statute is assessed under the constitutional standard set forth in *Ward*, 491 U. S., at 791, rather than a more strict standard. See *Madsen*, 512 U. S., at 764. The cases cited by petitioners are distinguishable from this statute. In those cases, the government attempted to regulate nonprotected activity, yet because the statute was overbroad, protected speech was also implicated. See *Houston* v. *Hill*, 482 U. S. 451 (1987); *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947 (1984). In this case, it is not disputed that the regulation affects protected speech activity; the question is thus whether it is a "reasonable restrictio[n] on the time, place, or manner of protected speech." *Ward*, 491 U. S., at 791. Here, the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive. As Justice Jackson observed, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 112 (1949) (concurring opinion).

The second part of the argument is based on a misreading of the statute and an incorrect understanding of the overbreadth doctrine. As we have already noted, § 18–9–122(3) simply does not "ban" any messages, and likewise it does not "ban" any signs, literature, or oral statements. It merely regulates the places where communications may occur. As we explained in *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973), the overbreadth doctrine enables litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or

assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Moreover, "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.*, at 615. Petitioners have not persuaded us that the impact of the statute on the conduct of other speakers will differ from its impact on their own sidewalk counseling. Cf. *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 801 (1984). Like petitioners' own activities, the conduct of other protesters and counselors at all health care facilities are encompassed within the statute's "legitimate sweep." Therefore, the statute is not overly broad.

VI

Petitioners also claim that § 18–9–122(3) is unconstitutionally vague. They find a lack of clarity in three parts of the section: the meaning of "protest, education, or counseling"; the "consent" requirement; and the determination whether one is "approaching" within eight feet of another.

A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement. *Chicago* v. *Morales*, 527 U. S. 41, 56–57 (1999).

In this case, the first concern is ameliorated by the fact that § 18–9–122(3) contains a scienter requirement. The statute only applies to a person who "knowingly" approaches within eight feet of another, without that person's consent, for the purpose of engaging in oral protest, education, or counseling. The likelihood that anyone would not understand any of those common words seems quite remote.

Petitioners proffer hypertechnical theories as to what the statute covers, such as whether an outstretched arm constitutes "approaching."[40] And while "[t]here is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question," *American Communications Assn.* v. *Douds*, 339 U. S. 382, 412 (1950), because we are "[c]ondemned to the use of words, we can never expect mathematical certainty from our language," *Grayned* v. *City of Rockford*, 408 U. S. 104, 110 (1972). For these reasons, we rejected similar vagueness challenges to the injunctions at issue in *Schenck*, 519 U. S., at 383, and *Madsen*, 512 U. S., at 775–776. We thus conclude that "it is clear what the ordinance as a whole prohibits." *Grayned*, 408 U. S., at 110. More importantly, speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid "in the vast majority of its intended applications," *United States* v. *Raines*, 362 U. S. 17, 23 (1960).

For the same reason, we are similarly unpersuaded by the suggestion that § 18–9–122(3) fails to give adequate guidance to law enforcement authorities. Indeed, it seems to us that one of the section's virtues is the specificity of the definitions of the zones described in the statute. "As always, enforcement requires the exercise of some degree of police judgment," *Grayned*, 408 U. S., at 114, and the degree of judgment involved here is acceptable.

VII

Finally, petitioners argue that § 18–9–122(3)'s consent requirement is invalid because it imposes an unconstitutional "prior restraint" on speech. We rejected this argument previously in *Schenck*, 519 U. S., at 374, n. 6, and *Madsen*, 512 U. S., at 764, n. 2. Moreover, the restrictions in this case raise an even lesser prior restraint concern than those at

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[40] Brief for Petitioners 48.

issue in *Schenck* and *Madsen* where particular speakers were at times completely banned within certain zones. Under this statute, absolutely no channel of communication is foreclosed. No speaker is silenced. And no message is prohibited. Petitioners are simply wrong when they assert that "[t]he statute compels speakers to obtain consent to speak and it authorizes private citizens to deny petitioners' requests to engage in expressive activities."[41] To the contrary, this statute does not provide for a "heckler's veto" but rather allows every speaker to engage freely in any expressive activity communicating all messages and viewpoints subject only to the narrow place requirement imbedded within the "approach" restriction.

Furthermore, our concerns about "prior restraints" relate to restrictions imposed by official censorship.[42] The regulations in this case, however, only apply if the pedestrian does not consent to the approach.[43] Private citizens have always retained the power to decide for themselves what they wish to read, and within limits, what oral messages they want to consider. This statute simply empowers private citizens entering a health care facility with the ability to prevent a speaker, who is within eight feet and advancing, from communicating a message they do not wish to hear. Further,

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[41] *Id.*, at 29.

[42] See *Ward*, 491 U. S., at 795, n. 5 ("[T]he regulations we have found invalid as prior restraints have 'had this in common: they gave *public officials* the power to deny use of a forum in advance of actual expression'" (quoting *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 553 (1975) (emphasis added))).

[43] While we have in prior cases found governmental grants of power to private actors constitutionally problematic, those cases are distinguishable. In those cases, the regulations allowed a single, private actor to unilaterally silence a speaker even as to willing listeners. See, *e. g.*, *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 880 (1997) ("It would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech . . ."). The Colorado statute at issue here confers no such censorial power on the pedestrian.

the statute does not authorize the pedestrian to affect any other activity at any other location or relating to any other person. These restrictions thus do not constitute an unlawful prior restraint.

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The judgment of the Colorado Supreme Court is affirmed.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE O'CONNOR, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring.

I join the opinion of the Court and add this further word. The key to determining whether Colo. Rev. Stat. § 18–9–122(3) (1999) makes a content-based distinction between varieties of speech lies in understanding that content-based discriminations are subject to strict scrutiny because they place the weight of government behind the disparagement or suppression of some messages, whether or not with the effect of approving or promoting others. *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 812 (2000); *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382 (1992); cf. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95–96 (1972). Thus the government is held to a very exacting and rarely satisfied standard when it disfavors the discussion of particular subjects, *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991), or particular viewpoints within a given subject matter, *Carey* v. *Brown*, 447 U. S. 455, 461–463 (1980) (citing *Chicago*, *supra*, at 95–96); cf. *National Endowment for Arts* v. *Finley*, 524 U. S. 569, 601–602 (1998) (SOUTER, J., dissenting).

Concern about employing the power of the State to suppress discussion of a subject or a point of view is not, however, raised in the same way when a law addresses not the content of speech but the circumstances of its delivery. The right to express unpopular views does not necessarily immunize a speaker from liability for resorting to otherwise im-

permissible behavior meant to shock members of the speaker's audience, see *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968) (burning draft card), or to guarantee their attention, see *Kovacs* v. *Cooper*, 336 U. S. 77, 86–88 (1949) (sound trucks); *Frisby* v. *Schultz*, 487 U. S. 474, 484–485 (1988) (residential picketing); *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640, 647–648 (1981) (soliciting). Unless regulation limited to the details of a speaker's delivery results in removing a subject or viewpoint from effective discourse (or otherwise fails to advance a significant public interest in a way narrowly fitted to that objective), a reasonable restriction intended to affect only the time, place, or manner of speaking is perfectly valid. See *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989) ("Our cases make clear . . . that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information'" (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984))); 491 U. S., at 797 ("[O]ur cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech'" (quoting *United States* v. *Albertini*, 472 U. S. 675, 689 (1985))).

It is important to recognize that the validity of punishing some expressive conduct, and the permissibility of a time, place, or manner restriction, does not depend on showing that the particular behavior or mode of delivery has no association with a particular subject or opinion. Draft card burners disapprove of the draft, see *United States* v. *O'Brien*, *supra*, at 370, and abortion protesters believe abortion is morally wrong, *Madsen* v. *Women's Health Center*,

Inc., 512 U. S. 753, 758 (1994). There is always a correlation with subject and viewpoint when the law regulates conduct that has become the signature of one side of a controversy. But that does not mean that every regulation of such distinctive behavior is content based as First Amendment doctrine employs that term. The correct rule, rather, is captured in the formulation that a restriction is content based only if it is imposed because of the content of the speech, see *Ward*, *supra*, at 791 ("The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys"), and not because of offensive behavior identified with its delivery.

Since this point is as elementary as anything in traditional speech doctrine, it would only be natural to suppose that today's disagreement between the Court and the dissenting Justices must turn on unusual difficulty in evaluating the facts of this case. But it does not. The facts overwhelmingly demonstrate the validity of subsection (3) as a content-neutral regulation imposed solely to regulate the manner in which speakers may conduct themselves within 100 feet of the entrance of a health care facility.

No one disputes the substantiality of the government's interest in protecting people already tense or distressed in anticipation of medical attention (whether an abortion or some other procedure) from the unwanted intrusion of close personal importunity by strangers. The issues dividing the Court, then, go to the content neutrality of the regulation, its fit with the interest to be served by it, and the availability of other means of expressing the desired message (however offensive it may be even without physically close communication).

Each of these issues is addressed principally by the fact that subsection (3) simply does not forbid the statement of any position on any subject. It does not declare any view

as unfit for expression within the 100-foot zone or beyond it. What it forbids, and all it forbids, is approaching another person closer than eight feet (absent permission) to deliver the message. Anyone (let him be called protester, counselor, or educator) may take a stationary position within the regulated area and address any message to any person within sight or hearing. The stationary protester may be quiet and ingratiating, or loud and offensive; the law does not touch him, even though in some ways it could. See *Madsen*, *supra*, at 768–771 (injunction may bar protesters from 36-foot zone around entrances to clinic and parking lot).

This is not to say that enforcement of the approach restriction will have no effect on speech; of course it will make some difference. The effect of speech is a product of ideas and circumstances, and time, place, and manner are circumstances. The question is simply whether the ostensible reason for regulating the circumstances is really something about the ideas. Here, the evidence indicates that the ostensible reason is the true reason. The fact that speech by a stationary speaker is untouched by this statute shows that the reason for its restriction on approaches goes to the approaches, not to the content of the speech of those approaching. What is prohibited is a close encounter when the person addressed does not want to get close. So, the intended recipient can stay far enough away to prevent the whispered argument, mitigate some of the physical shock of the shouted denunciation, and avoid the unwanted handbill. But the content of the message will survive on any sign readable at eight feet and in any statement audible from that slight distance. Hence the implausibility of any claim that an antiabortion message, not the behavior of protesters, is what is being singled out.

The matter of proper tailoring to limit no more speech than necessary to vindicate the public interest deserves a few specific comments, some on matters raised by JUSTICE KENNEDY's dissent. Subsection (3) could possibly be ap-

plied to speakers unlike the present petitioners, who might not know that the entrance to the facility was within 100 feet, or who might try to engage people within 100 feet of a health facility other than a physician's office or hospital, or people having no business with the facility. These objections do not, however, weigh very heavily on a facial challenge like this. The specter of liability on the part of those who importune while oblivious of the facility is laid to rest by the requirement that a defendant act "knowingly." See Colo. Rev. Stat. § 18–1–503(4) (1999) (culpable mental state requirement deemed to apply to each element of offense, absent clear contrary intent). While it is true that subsection (3) was not enacted to protect dental patients, I cannot say it goes beyond the State's interest to do so; someone facing an hour with a drill in his tooth may reasonably be protected from the intrusive behavior of strangers who are otherwise free to speak. While some mere passersby may be protected needlessly, I am skeptical about the number of health care facilities with substantial pedestrian traffic within 100 feet of their doors but unrelated to the business conducted inside. Hence, I fail to see danger of the substantial overbreadth required to be shown before a statute is struck down out of concern for the speech rights of those not before the Court. Cf. *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 964–965 (1984); *Houston* v. *Hill*, 482 U. S. 451, 458 (1987).

As for the claim of vagueness, at first blush there is something objectionable. Those who do not choose to remain stationary may not approach within eight feet with a purpose, among others, of "engaging in oral protest, education, or counseling." Colo. Rev. Stat. § 18–9–122(3) (1999). While that formula excludes liability for enquiring about the time or the bus schedule within eight feet, "education" does not convey much else by way of limitation. But that is not fatal here. What is significant is not that the word fails to limit clearly, but that it pretty clearly fails to limit very much at

all. It succeeds in naturally covering any likely address by one person approaching another on a street or parking lot outside a building entrance (aside from common social greetings, protests, or requests for assistance). Someone planning to spread a message by accosting strangers is likely to understand the statute's application to "education." And just because the coverage is so obviously broad, the discretion given to the police in deciding whether to charge an offense seems no greater than the prosecutorial discretion inherent in any generally applicable criminal statute. Cf. *Grayned* v. *City of Rockford*, 408 U. S. 104, 108 (1972) (noting that "[v]ague laws may trap the innocent by not providing fair warning" and that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them"); *Coates* v. *Cincinnati*, 402 U. S. 611, 614 (1971). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward*, 491 U. S., at 794.

Although petitioners have not argued that the "floating bubble" feature of the 8-foot zone around a pedestrian is itself a failure of narrow tailoring, I would note the contrast between the operation of subsection (3) and that of the comparable portion of the injunction struck down in *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 377–379 (1997), where we observed that the difficulty of administering a floating bubble zone threatened to burden more speech than necessary. In *Schenck*, the floating bubble was larger (15 feet) and was associated with near-absolute prohibitions on speech. *Ibid.* Since subsection (3) prohibits only 8-foot approaches, however, with the stationary speaker free to speak, the risk is less. Whether floating bubble zones are so inherently difficult to administer that only fixed, no-speech zones (or prohibitions on ambulatory counseling within a fixed zone) should pass muster is an issue neither before us nor well suited to consideration on a facial challenge, cf. *Ward*, *supra*, at 794 ("Since respondent does not claim

that city officials enjoy unguided discretion to deny the right to speak altogether, it is open to question whether respondent's claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority").

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The Court today concludes that a regulation requiring speakers on the public thoroughfares bordering medical facilities to speak from a distance of eight feet is "not a 'regulation of speech,' " but "a regulation of the places where some speech may occur," *ante*, at 719; and that a regulation directed to only certain categories of speech (protest, education, and counseling) is not "content-based." For these reasons, it says, the regulation is immune from the exacting scrutiny we apply to content-based suppression of speech in the public forum. The Court then determines that the regulation survives the less rigorous scrutiny afforded content-neutral time, place, and manner restrictions because it is narrowly tailored to serve a government interest—protection of citizens' "right to be let alone"—that has explicitly been disclaimed by the State, probably for the reason that, as a basis for suppressing peaceful private expression, it is patently incompatible with the guarantees of the First Amendment.

None of these remarkable conclusions should come as a surprise. What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the "ad hoc nullification machine" that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice. *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 785 (1994) (SCALIA, J., concurring in judgment in part and dissenting in part). Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today contin-

ues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong. Because, like the rest of our abortion jurisprudence, today's decision is in stark contradiction of the constitutional principles we apply in all other contexts, I dissent.

I

Colorado's statute makes it a criminal act knowingly to approach within 8 feet of another person on the public way or sidewalk area within 100 feet of the entrance door of a health care facility for the purpose of passing a leaflet to, displaying a sign to, or engaging in oral protest, education, or counseling with such person. Whatever may be said about the restrictions on the other types of expressive activity, the regulation as it applies to oral communications is obviously and undeniably content based. A speaker wishing to approach another for the purpose of communicating *any* message except one of protest, education, or counseling may do so without first securing the other's consent. Whether a speaker must obtain permission before approaching within eight feet—and whether he will be sent to prison for failing to do so—depends entirely on *what he intends to say* when he gets there. I have no doubt that this regulation would be deemed content based *in an instant* if the case before us involved antiwar protesters, or union members seeking to "educate" the public about the reasons for their strike. "[I]t is," we would say, "the content of the speech that determines whether it is within or without the statute's blunt prohibition," *Carey* v. *Brown*, 447 U. S. 455, 462 (1980). But the jurisprudence of this Court has a way of changing when abortion is involved.

The Court asserts that this statute is not content based for purposes of our First Amendment analysis because it neither (1) discriminates among viewpoints nor (2) places restrictions on "any subject matter that may be discussed by a speaker." *Ante*, at 723. But we have never held that the

universe of content-based regulations is limited to those two categories, and such a holding would be absurd. Imagine, for instance, special place-and-manner restrictions on all speech except that which "conveys a sense of contentment or happiness." This "happy speech" limitation would not be "viewpoint based"—citizens would be able to express their joy in equal measure at either the rise or fall of the NASDAQ, at either the success or the failure of the Republican Party—and would not discriminate on the basis of subject matter, since gratification could be expressed about anything at all. Or consider a law restricting the writing or recitation of poetry—neither viewpoint based nor limited to any particular subject matter. Surely this Court would consider such regulations to be "content based" and deserving of the most exacting scrutiny.[1]

"The vice of content-based legislation—what renders it deserving of the high standard of strict scrutiny—is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Madsen*,

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[1] The Court responds that statutes which restrict categories of speech—as opposed to subject matter or viewpoint—are constitutionally worrisome only if a "significant number of communications, raising the same problem that the statute was enacted to solve, . . . fall outside the statute's scope, while others fall inside." *Ante*, at 723. I am not sure that is correct, but let us assume, for the sake of argument, that it is. The Court then proceeds to assert that "[t]he statutory phrases, 'oral protest, education, or counseling,' distinguish speech activities likely to" present the problem of "harassment, . . . nuisance, . . . persistent importuning, . . . following, . . . dogging, and . . . implied threat of physical touching," from "speech activities [such as my example of 'happy speech'] that are most unlikely to have those consequences," *ante*, at 724. Well. That may work for "oral protest"; but it is beyond imagining why "education" and "counseling" are especially *likely*, rather than especially *unlikely*, to involve such conduct. (Socrates *was* something of a *noodge*, but even he did not go *that* far.) *Unless*, of course, "education" and "counseling" are code words for efforts to dissuade women from abortion—in which event the statute would not be viewpoint neutral, which the Court concedes makes it invalid.

supra, at 794 (opinion of SCALIA, J.) (emphasis deleted). A restriction that operates only on speech that communicates a message of protest, education, or counseling presents exactly this risk. When applied, as it is here, at the entrance to medical facilities, it is a means of impeding speech against abortion. The Court's confident assurance that the statute poses no special threat to First Amendment freedoms because it applies alike to "used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries," *ante*, at 723, is a wonderful replication (except for its lack of sarcasm) of Anatole France's observation that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges . . . ." J. Bartlett, Familiar Quotations 550 (16th ed. 1992). This Colorado law is no more targeted at used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries than French vagrancy law was targeted at the rich. We know what the Colorado legislators, by their careful selection of content ("protest, education, and counseling"), were taking aim at, for they set it forth in the statute itself: the "right to protest or counsel *against* certain medical procedures" on the sidewalks and streets surrounding health care facilities. Colo. Rev. Stat. § 18–9–122(1) (1999) (emphasis added).

The Court is unpersuasive in its attempt to equate the present restriction with content-neutral regulation of demonstrations and picketing—as one may immediately suspect from the opinion's wildly expansive definitions of demonstrations as "'public display[s] of sentiment for or against a person or cause,'" and of picketing as an effort "'to persuade or otherwise influence.'" *Ante*, at 721–722, quoting Webster's Third New International Dictionary 600, 1710 (1993). (On these terms, Nathan Hale was a demonstrator and Patrick Henry a picket.) When the government regulates "picketing," or "demonstrating," it restricts a particular manner of expression that is, as the author of today's opinion has several times explained, "'a mixture of conduct and commu-

nication.'" *Frisby* v. *Schultz*, 487 U. S. 474, 497 (1988) (STEVENS, J., dissenting), quoting *NLRB* v. *Retail Store Employees*, 447 U. S. 607, 618–619 (1980) (STEVENS, J., concurring in part and concurring in result). The latter opinion quoted approvingly Justice Douglas's statement:

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation." *Bakery Drivers* v. *Wohl*, 315 U. S. 769, 776–777 (1942) (concurring opinion).

As JUSTICE STEVENS went on to explain, "no doubt the principal reason why handbills containing the same message are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea." *Retail Store Employees*, *supra*, at 619. Today, of course, JUSTICE STEVENS gives us an opinion restricting not only handbilling but even one-on-one conversation of a particular content. There comes a point—and the Court's opinion today passes it—at which the regulation of action intimately and unavoidably connected with traditional speech is a regulation of speech itself. The strictures of the First Amendment cannot be avoided by regulating the act of moving one's lips; and they cannot be avoided by regulating the act of extending one's arm to deliver a handbill, or peacefully approaching in order to speak. All of these acts can be regulated, to be sure; but not, on the basis of content, without satisfying the requirements of our strict-scrutiny First Amendment jurisprudence.

Even with regard to picketing, of course, we have applied strict scrutiny to content-based restrictions. See *Carey*, 447 U. S., at 461 (applying strict scrutiny to, and invalidating, an Illinois statute that made "permissibility of residential

picketing . . . dependent solely on the nature of the message being conveyed"). As discussed above, the prohibition here *is* content based: Those who wish to speak for purposes other than protest, counsel, or education may do so at close range without the listener's consent, while those who wish to speak for other purposes may not. This bears no resemblance to a blanket prohibition of picketing—unless, of course, one uses the fanciful definition of picketing ("an effort to persuade or otherwise influence") newly discovered by today's opinion. As for the Court's appeal to the fact that we often "examine the content of a communication" to determine whether it "constitutes a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods," *ante*, at 721, the distinction is almost too obvious to bear mention: Speech of a certain content is constitutionally proscribable. The Court has not yet taken the step of consigning "protest, education, and counseling" to that category.

Finally, the Court is not correct in its assertion that the restriction here is content neutral because it is "*justified* without reference to the content of regulated speech," in the sense that "the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech." *Ante*, at 719–720 (emphasis added). That is not an accurate statement of our law. The Court makes too much of the statement in *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989), that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.*, at 791, quoted *ante*, at 719. That is indeed "the *principal* inquiry"—suppression of uncongenial ideas is the worst offense against the First Amendment—but it is not the *only* inquiry. Even a law that has as its purpose something unrelated to the suppression of particular content cannot irrationally single out that content for its prohibition.

An ordinance directed at the suppression of noise (and therefore "justified without reference to the content of regulated speech") cannot be applied only to sound trucks delivering messages of "protest." Our very first use of the "justified by reference to content" language made clear that it is a prohibition *in addition to*, rather than in place of, the prohibition of facially content-based restrictions. "Selective exclusions from a public forum," we said, "may not be based on content alone, *and* may not be justified by reference to content alone." *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972) (emphasis added).

But in any event, if one accepts the Court's description of the interest served by this regulation, it is clear that the regulation is *both* based on content *and* justified by reference to content. Constitutionally proscribable "secondary effects" of speech are directly addressed in subsection (2) of the statute, which makes it unlawful to obstruct, hinder, impede, or block access to a health care facility—a prohibition broad enough to include all physical threats and all physically threatening approaches. The purpose of subsection (3), however (according to the Court), is to protect "[t]he unwilling listener's interest in avoiding unwanted communication," *ante*, at 716. On this analysis, Colorado has restricted certain categories of speech—protest, counseling, and education—out of an apparent belief that only speech with this content is sufficiently likely to be annoying or upsetting as to require consent before it may be engaged in at close range. It is reasonable enough to conclude that even the most gentle and peaceful close approach by a so-called "sidewalk counselor"—who wishes to "educate" the woman entering an abortion clinic about the nature of the procedure, to "counsel" against it and in favor of other alternatives, and perhaps even (though less likely if the approach is to be successful) to "protest" her taking of a human life—will often, indeed usually, have what might be termed the "secondary effect" of annoying or deeply upsetting the woman who is planning

the abortion. *But that is not an effect which occurs "without reference to the content" of the speech.* This singling out of presumptively "unwelcome" communications fits precisely the description of prohibited regulation set forth in *Boos* v. *Barry*, 485 U. S. 312, 321 (1988): It "targets the *direct impact* of a particular category of speech, not a secondary feature that happens to be associated with that type of speech." (Emphasis added.[2])

In sum, it blinks reality to regard this statute, in its application to oral communications, as anything other than a content-based restriction upon speech in the public forum. As such, it must survive that stringent mode of constitutional analysis our cases refer to as "strict scrutiny," which requires that the restriction be narrowly tailored to serve a compelling state interest. See *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000); *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983). Since the Court does not even attempt to support the regulation under this standard, I shall discuss it only briefly. Suffice it to say that if protecting people from un-

[2] The Court's contention that the statute is content neutral because it is not a "'regulation of speech'" but a "regulation of the places where some speech may occur," *ante*, at 719 (quoting *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989)), is simply baffling. First, because the proposition that a restriction upon the places where speech may occur is not a restriction upon speech is both absurd and contradicted by innumerable cases. See, *e. g.*, *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753 (1994); *Burson* v. *Freeman*, 504 U. S. 191 (1992); *Frisby* v. *Schultz*, 487 U. S. 474 (1988); *Boos* v. *Barry*, 485 U. S. 312 (1988); *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981); *Carey* v. *Brown*, 447 U. S. 455 (1980); *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972). And second, because the fact that a restriction is framed as a "regulation of the places where some speech may occur" has nothing whatever to do with whether the restriction is content neutral—which is why *Boos* held to be content based the ban on displaying, within 500 feet of foreign embassies, banners designed to "'bring into public odium any foreign government.'" 485 U. S., at 316.

welcome communications (the governmental interest the Court posits) is a compelling state interest, the First Amendment is a dead letter. And if (as I shall discuss at greater length below) forbidding peaceful, nonthreatening, but uninvited speech from a distance closer than eight feet is a "narrowly tailored" means of preventing the obstruction of entrance to medical facilities (the governmental interest the State asserts), narrow tailoring must refer not to the standards of Versace, but to those of Omar the tentmaker. In the last analysis all of this does not matter, however, since as I proceed to discuss neither the restrictions upon oral communications nor those upon handbilling can withstand a proper application of even the less demanding scrutiny we apply to truly content-neutral regulations of speech in a traditional public forum.

II

As the Court explains, under our precedents even a content-neutral, time, place, and manner restriction must be narrowly tailored to advance a significant state interest, and must leave open ample alternative means of communication. *Ward*, 491 U. S., at 802. It cannot be sustained if it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Id.*, at 799.

This requires us to determine, first, what *is* the significant interest the State seeks to advance? Here there appears to be a bit of a disagreement between the State of Colorado (which should know) and the Court (which is eager to speculate). Colorado has identified in the text of the statute itself the interest it sought to advance: to ensure that the State's citizens may "obtain medical counseling and treatment in an unobstructed manner" by "preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility." Colo. Rev. Stat. § 18–9–122(1) (1999). In its brief here, the State repeatedly confirms the interest squarely identified in the statute under review. See, *e. g.*, Brief for Respondents 15 ("Each provision of the statute was

chosen to precisely address crowding and physical intimidation: conduct shown to impede access, endanger safety and health, and strangle effective law enforcement"); *id.*, at 14 ("[T]his provision narrowly addresses the conduct shown to interfere with access through crowding and physical threats"). The Court nevertheless concludes that the Colorado provision is narrowly tailored to serve . . . *the State's interest in protecting its citizens' rights to be let alone from unwanted speech.*

Indeed, the situation is even more bizarre than that. The interest that the Court makes the linchpin of its analysis was not only unasserted by the State; it is not only completely *different* from the interest that the statute specifically sets forth; it was explicitly *disclaimed* by the State in its brief before this Court, and characterized as a "straw interest" *petitioners* served up in the hope of discrediting the State's case. *Id.*, at 25, n. 19. We may thus add to the lengthening list of "firsts" generated by this Court's relentlessly proabortion jurisprudence, the first case in which, in order to sustain a statute, the Court has relied upon a governmental interest not only unasserted by the State, but positively repudiated.

I shall discuss below the obvious invalidity of this statute assuming, first (in Part A), the fictitious state interest that the Court has invented, and then (in Part B), the interest actually recited in the statute and asserted by counsel for Colorado.

A

It is not without reason that Colorado claimed that, in attributing to this statute the false purpose of protecting citizens' right to be let alone, petitioners were seeking to discredit it. Just three Terms ago, in upholding an injunction against antiabortion activities, the Court refused to rely on any supposed "'right of the people approaching and entering the facilities to be left alone.'" *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 383 (1997). It expressed "doubt" that this "'right' . . . accurately reflects our

First Amendment jurisprudence." *Ibid.* Finding itself in something of a jam (the State here has passed a regulation that is obviously not narrowly tailored to advance any *other* interest), the Court today neatly repackages the repudiated "right" as an "interest" the State may decide to protect, *ante,* at 717, n. 24, and then places it onto the scales opposite the right to free speech in a traditional public forum.

To support the legitimacy of its self-invented state interest, the Court relies upon a *bon mot* in a 1928 dissent (which we evidently overlooked in *Schenck*). It characterizes the "unwilling listener's interest in avoiding unwanted communication" as an "aspect of the broader 'right to be let alone'" Justice Brandeis coined in his dissent in *Olmstead* v. *United States,* 277 U. S. 438, 478. The amusing feature is that even this slim reed contradicts rather than supports the Court's position. The right to be let alone that Justice Brandeis identified was a right the Constitution "conferred, *as against the government*"; it was *that* right, not some generalized "common-law right" or "interest" to be free from hearing the unwanted opinions of one's fellow citizens, which he called the "most comprehensive" and "most valued by civilized men." *Ibid.* (emphasis added). To the extent that there can be gleaned from our cases a "right to be let alone" in the sense that Justice Brandeis intended, it is the right of the *speaker* in the public forum to be free from government interference of the sort Colorado has imposed here.

In any event, the Court's attempt to disguise the "right to be let alone" as a "governmental interest in protecting the right to be let alone" is unavailing for the simple reason that this is not an interest that may be legitimately weighed against the speakers' First Amendment rights (which the Court demotes to the status of First Amendment "interests," *ante,* at 714). We have consistently held that "the Constitution does not *permit* government to decide which types of otherwise protected speech are sufficiently offensive to require protection *for the unwilling listener or viewer.*" *Erz-*

noznik v. *Jacksonville*, 422 U. S. 205, 210 (1975) (emphasis added). And as recently as in *Schenck*, the Court reiterated that "[a]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." 519 U. S., at 383 (internal quotation marks omitted).

The Court nonetheless purports to derive from our cases a principle limiting the protection the Constitution affords the speaker's right to direct "offensive messages" at "unwilling" audiences in the public forum. *Ante*, at 716. There is no such principle. We have upheld limitations on a speaker's exercise of his right to speak on the public streets *when that speech intrudes into the privacy of the home.* *Frisby*, 487 U. S., at 483, upheld a content-neutral municipal ordinance prohibiting picketing outside a residence or dwelling. The ordinance, we concluded, was justified by, and narrowly tailored to advance, the government's interest in the "protection of residential privacy." *Id.*, at 484. Our opinion rested upon the "unique nature of the home"; "the home," we said, "is different." *Ibid.* The reasoning of the case plainly assumed the *nonexistence* of the right—common law or otherwise—that the Court relies on today, the right to be free from unwanted speech when on the public streets and sidewalks. The home, we noted, was "'the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits.'" *Ibid.* (quoting *Carey*, 447 U. S., at 471). The limitation on a speaker's right to bombard the home with unwanted messages which we approved in *Frisby*—and in *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970), upon which the Court also relies—was predicated on the fact that "'we are often 'captives' *outside* the sanctuary of the home and subject to objectionable speech.'" *Frisby*, *supra*, at 484 (quoting *Rowan*, *supra*, at 738) (emphasis added). As the universally understood state of First Amendment law is described in a leading treatise: "Outside

the home, the burden is generally on the observer or listener to avert his eyes or plug his ears against the verbal assaults, lurid advertisements, tawdry books and magazines, and other 'offensive' intrusions which increasingly attend urban life." L. Tribe, American Constitutional Law § 12–19, p. 948 (2d ed. 1988). The Court today elevates the abortion clinic to the status of the home.[3]

There is apparently no end to the distortion of our First Amendment law that the Court is willing to endure in order to sustain this restriction upon the free speech of abortion opponents. The labor movement, in particular, has good cause for alarm in the Court's extensive reliance upon *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184 (1921), an opinion in which the Court held that the Clayton Act's prohibition of injunctions against lawful and peaceful labor picketing did not forbid the injunction in that particular case. The First Amendment was not at issue, and was not so much as mentioned in the opinion, so the case is scant authority for the point the Court wishes to make. The case is also irrelevant because it was "clear from the evidence that from the outset, violent methods were pursued from time to time in such a way as to characterize the attitude of the picketers as continuously threatening." *Id.*, at 200. No such finding was made, or could be made, here. More importantly, however, as far as our future labor cases

[3] I do not disagree with the Court that "our cases have repeatedly recognized the interests of unwilling listeners" in locations, such as public conveyances, where "'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure,'" *ante*, at 718 (quoting *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 209 (1975)). But we have never made the absurd suggestion that a pedestrian is a "captive" of the speaker who seeks to address him on the public sidewalks, where he may simply walk quickly by. *Erznoznik* itself, of course, *invalidated* a prohibition on the showing of films containing nudity on screens visible from the street, noting that "the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" *Id.*, at 210–211 (quoting *Cohen* v. *California*, 403 U. S. 15, 21 (1971).

are concerned: If a "right to be free" from "persistence, importunity, following and dogging," *id.*, at 204, short of actual intimidation, was part of our infant First Amendment law in 1921, I am shocked to think that it is there today. The Court's assertion that "[n]one of our decisions has minimized the enduring importance of 'a right to be free' from persistent 'importunity, following and dogging' after an offer to communicate has been declined," *ante*, at 718, is belied by the fact that this passage from *American Steel Foundries* has never—not once—found its way into any of the many First Amendment cases this Court has decided since 1921. We will have cause to regret today's injection of this irrelevant anachronism into the mainstream of our First Amendment jurisprudence.

Of course even if one accepted the *American Steel Foundries* dictum as an accurate expression of First Amendment law, the statute here is plainly not narrowly tailored to protect the interest that dictum describes. Preserving the "right to be free" from "persisten[t] importunity, following and dogging" does not remotely require imposing upon all speakers who wish to protest, educate, or counsel a duty to request permission to approach closer than eight feet. The only way the narrow-tailoring objection can be eliminated is to posit a state-created, First-Amendment-trumping "right to be let alone" as broad and undefined as Brandeis's *Olmstead* dictum, which may well (why not, if the Court wishes it?) embrace a right not to be spoken to without permission from a distance closer than eight feet. Nothing stands in the way of *that* solution to the narrow-tailoring problem—except, of course, its utter absurdity, which is no obstacle in abortion cases.

B

I turn now to the real state interest at issue here—the one set forth in the statute and asserted in Colorado's brief: the preservation of unimpeded access to health care facilities. We need look no further than subsection (2) of the statute to

see what a provision would look like that is narrowly tailored to serve *that* interest. Under the terms of that subsection, any person who "knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility" is subject to criminal and civil liability. It is possible, I suppose, that subsection (2) of the Colorado statute will leave unrestricted some expressive activity that, if engaged in from within eight feet, may be sufficiently harassing as to have the effect of impeding access to health care facilities. In subsection (3), however, the State of Colorado has prohibited a vast amount of speech that cannot possibly be thought to correspond to that evil.

To begin with, the 8-foot buffer zone attaches to *every* person on the public way or sidewalk within 100 feet of the entrance of a medical facility, regardless of whether that person is seeking to enter or exit the facility. In fact, the State acknowledged at oral argument that the buffer zone would attach to any person within 100 feet of the entrance door of a skyscraper in which a single doctor occupied an office on the 18th floor. Tr. of Oral Arg. 41. And even with respect to those who *are* seeking to enter or exit the facilities, the statute does not protect them only from speech that is so intimidating or threatening as to impede access. Rather, it covers *all* unconsented-to approaches for the purpose of oral protest, education, or counseling (including those made for the purpose of the most peaceful appeals) and, perhaps even more significantly, *every* approach made for the purposes of leafletting or handbilling, which we have never considered, standing alone, obstructive or unduly intrusive. The sweep of this prohibition is breathtaking.

The Court makes no attempt to justify on the facts this blatant violation of the narrow-tailoring principle. Instead, it flirts with the creation of yet a new constitutional "first" designed for abortion cases: "[W]hen," it says, "a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even

though it is not the least restrictive or least intrusive means of serving the statutory goal." *Ante*, at 726. The implication is that the availability of alternative means of communication permits the imposition of the speech restriction upon more individuals, or more types of communication, than narrow tailoring would otherwise demand. The Court assures us that "we have emphasized" this proposition "on more than one occasion," *ibid.* The only citation the Court provides, however, says no such thing. *Ward* v. *Rock Against Racism*, 491 U. S., at 798, quoted *ante*, at 726, n. 32, says only that narrow tailoring is not synonymous with "least restrictive" alternative. It does not at all suggest—and to my knowledge no other case does either—that narrow tailoring can be relaxed when there are other speech alternatives.

The burdens this law imposes upon the right to speak are substantial, despite an attempt to minimize them that is not even embarrassed to make the suggestion that they might actually "assist . . . the speakers' efforts to communicate their messages," *ante*, at 727. (Compare this with the Court's statement in a nonabortion case, joined by the author of today's opinion: "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 790–791 (1988).) The Court displays a willful ignorance of the type and nature of communication affected by the statute's restrictions. It seriously asserts, for example, that the 8-foot zone allows a speaker to communicate at a "normal conversational distance," *ante*, at 726–727. I have certainly held conversations at a distance of eight feet seated in the quiet of my chambers, but I have never walked along the public sidewalk—and have not seen others do so—"conversing" at an 8-foot remove. The suggestion is absurd. So is the suggestion that the opponents of abortion can take comfort in the fact that the statute "places no limitation on the number of speakers or the noise level, including the use of amplification

equipment," *ante*, at 726. That is good enough, I suppose, for "protesting"; but the Court must know that most of the "counseling" and "educating" likely to take place outside a health care facility cannot be done at a distance and at a high-decibel level. The availability of a powerful amplification system will be of little help to the woman who hopes to forge, in the last moments before another of her sex is to have an abortion, a bond of concern and intimacy that might enable her to persuade the woman to change her mind and heart. The counselor may wish to walk alongside and to say, sympathetically and as softly as the circumstances allow, something like: "My dear, I know what you are going through. I've been through it myself. You're not alone and you do not have to do this. There are other alternatives. Will you let me help you? May I show you a picture of what your child looks like at this stage of her human development?" The Court would have us believe that this can be done effectively—yea, perhaps even *more* effectively—by shouting through a bullhorn at a distance of eight feet.

The Court seems prepared, if only for a moment, see *ante*, at 727–728, to take seriously the magnitude of the burden the statute imposes on simple handbilling and leafletting. That concern is fleeting, however, since it is promptly assuaged by the realization that a leafletter may, without violating the statute, stand "near the path" of oncoming pedestrians and make his "proffe[r] . . . , which the pedestrians can easily accept," *ante*, at 727. It does not take a veteran labor organizer to recognize—although surely any would, see Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 7–8—that leafletting will be rendered utterly ineffectual by a requirement that the leafletter obtain from each subject permission to approach, or else man a stationary post (one that does not obstruct access to the facility, lest he violate subsection (2) of statute) and wait for passersby voluntarily to approach an outstretched hand. That simply is not how it is done, and the

Court knows it—or should. A leafletter, whether he is working on behalf of Operation Rescue, Local 109, or Bubba's Bar-B-Que, stakes out the best piece of real estate he can, and then walks a few steps toward individuals passing in his vicinity, extending his arm and making it *as easy as possible* for the passerby, whose natural inclination is generally not to seek out such distributions, to simply accept the offering. Few pedestrians are likely to give their "consent" to the approach of a handbiller (indeed, by the time he requested it they would likely have passed by), and even fewer are likely to walk over in order to pick up a leaflet. In the abortion context, therefore, ordinary handbilling, which we have in other contexts recognized to be a "classic for[m] of speech that lie[s] at the heart of the First Amendment," *Schenck*, 519 U. S., at 377, will in its most effective locations be rendered futile, the Court's implausible assertions to the contrary notwithstanding.

The Colorado provision differs in one fundamental respect from the "content-neutral" time, place, and manner restrictions the Court has previously upheld. Each of them rested upon a necessary connection between the regulated expression and the evil the challenged regulation sought to eliminate. So, for instance, in *Ward* v. *Rock Against Racism*, the Court approved the city's control over sound amplification because every occasion of amplified sound presented the evil of excessive noise and distortion disturbing the areas surrounding the public forum. The regulation we upheld in *Ward*, rather than "ban[ning] all concerts, or even all rock concerts, . . . instead focus[ed] on the source of the evils the city seeks to eliminate . . . and eliminates them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." 491 U. S., at 799, n. 7. In *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 808 (1984), the Court approved a prohibition on signs attached to utility poles which "did no more than eliminate the exact source of

the evil it sought to remedy." In *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640, 652 (1981), the Court upheld a regulation prohibiting the sale or distribution on the state fairgrounds of any merchandise, including printed or written material, except from a fixed location, because that precisely served the State's interest in "avoiding congestion and maintaining the orderly movement of fair patrons on the fairgrounds."

In contrast to the laws approved in those cases, the law before us here enacts a broad prophylactic restriction which does not "respon[d] precisely to the substantive problem which legitimately concern[ed]" the State, *Vincent*, *supra*, at 810—namely (the only problem asserted by Colorado), the obstruction of access to health facilities. Such prophylactic restrictions in the First Amendment context—even when they are content neutral—are not permissible. "Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U. S. 415, 438 (1963). In *United States* v. *Grace*, 461 U. S. 171 (1983), we declined to uphold a ban on certain expressive activity on the sidewalks surrounding the Supreme Court. The purpose of the restriction was the perfectly valid interest in security, just as the purpose of the restriction here is the perfectly valid interest in unobstructed access; and there, as here, the restriction furthered that interest—but it furthered it with insufficient precision and hence at excessive cost to the freedom of speech. There was, we said, "an insufficient nexus" between security and all the expressive activity that was banned, *id.*, at 181—just as here there is an insufficient nexus between the assurance of access and forbidding unconsented communications within eight feet.[4]

[4] The Court's suggestion, *ante*, at 730, that the restrictions imposed by the Colorado ban are unobjectionable because they "interfer[e] far less with a speaker's ability to communicate" than did the regulations involved

Compare with these venerable and consistent descriptions of our First Amendment law the defenses that the Court makes to the contention that the present statute is overbroad. (To be sure, the Court is assuming its own invented state interest—protection of the "right to be let alone"—rather than the interest that the statute describes, but even so the statements are extraordinary.) "The fact," the Court says, "that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance." *Ante*, at 730–731. That is true enough ordinarily, but it is *not* true with respect to restraints upon speech, which is what the doctrine of overbreadth is all about. (Of course it is also not true, thanks to one of the other proabortion "firsts" announced by the current Court, with respect to restrictions upon abortion, which—as our decision in *Stenberg* v. *Carhart*, *post*, p. 914, exemplifies—has been raised to First Amendment status, even as speech opposing abortion has been demoted from First Amendment status.) Again, the Court says that the overbreadth doctrine is not applicable because this law simply "does not 'ban' any signs, literature, or oral statements," but "merely regulates the places where communications may occur." *Ante*, at 731. I know of no precedent for the proposition that time, place, and manner restrictions are not subject to the doctrine of overbreadth. Our decision in *Grace*, *supra*, demonstrates the contrary: Restriction of speech on the sidewalks around

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in *Frisby* v. *Schultz*, 487 U. S. 474 (1988), and *Heffron*, and in cases requiring "silence" outside of a hospital (by which I presume the Court means *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753 (1994)), misses the point of narrow-tailoring analysis. We do not compare restrictions on speech to some Platonic ideal of speech restrictiveness, or to each other. Rather, our First Amendment doctrine requires us to consider whether the regulation in question burdens substantially more speech than necessary to achieve *the particular interest* the government has identified and asserted. *Ward*, 491 U. S., at 799. In each of the instances the Court cites, we concluded that the challenged regulation contained the precision that our cases require and that Colorado's statute (which the Court itself calls "prophylactic," *ante*, at 729) manifestly lacks.

the Supreme Court was invalidated because it went further than the needs of security justified. Surely New York City cannot require a parade permit and a security bond for any individual who carries a sign on the sidewalks of Fifth Avenue.

The Court can derive no support for its approval of Colorado's overbroad prophylactic measure from our decision in *Schenck*. To be sure, there we rejected the argument that the court injunction on demonstrating within a fixed buffer zone around clinic entrances was unconstitutional because it banned even "'peaceful, nonobstructive demonstrations.'" 519 U. S., at 381. The Court upheld the injunction, however, only because the "District Court was entitled to conclude," "[b]ased on defendants' past conduct" and "the record in [that] case," that the specific defendants involved would, if permitted within the buffer zone, "continue to do what they had done before: aggressively follow and crowd individuals right up to the clinic door and then refuse to move, or purposefully mill around parking lot entrances in an effort to impede or block the progress of cars." *Id.*, at 381–382. It is one thing to assume, as in *Schenck*, that a prophylactic injunction is necessary when the specific targets of that measure have demonstrated an inability or unwillingness to engage in protected speech activity without also engaging in *conduct* that the Constitution clearly does not protect. It is something else to assume that *all* those who wish to speak outside health care facilities across the State will similarly abuse their rights if permitted to exercise them. The First Amendment stands as a bar to exactly this type of prophylactic legislation. I cannot improve upon the Court's conclusion in *Madsen* that "it is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' speech is independently

proscribable (*i. e.*, 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand." 512 U. S., at 774 (citation omitted).

The foregoing discussion of overbreadth was written before the Court, in responding to JUSTICE KENNEDY, abandoned any pretense at compliance with that doctrine, and acknowledged—indeed, boasted—that the statute it approves "takes a prophylactic approach," *ante*, at 729, and adopts "[a] bright-line prophylactic rule," *ibid.*[5] I scarcely know how to respond to such an unabashed repudiation of our First Amendment doctrine. Prophylaxis is the antithesis of narrow tailoring, as the previously quoted passage from *Button* makes clear ("Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." 371 U. S., at 438). If the Court were going to make this concession, it could simply have dispensed with its earlier (unpersuasive) attempt to show that the statute *was* narrowly tailored. So one can add to the casualties of our whatever-it-takes proabortion jurisprudence the First Amendment doctrine of narrow tailoring and overbreadth. R. I. P.

* * *

Before it effectively threw in the towel on the narrow-tailoring point, the Court asserted the importance of taking

[5] Of course the Court greatly understates the scope of the prophylaxis, saying that "the statute's prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior," *ante*, at 729. But the statute prevents the "physically harassing" act of (shudder!) approaching within closer than eight feet not only when it is directed against pregnant women, but also (just to be safe) when it is directed against 300-pound, male, and unpregnant truck drivers—surely a distinction that is not "difficult to make accurately," *ibid.*

into account "'the place to which the regulations apply in determining whether these restrictions burden more speech than necessary.'" *Ante*, at 728 (quoting *Madsen*, *supra*, at 772). A proper regard for the "place" involved in this case should result in, if anything, a commitment by this Court to adhere to and rigorously enforce our speech-protective standards. The public forum involved here—the public spaces outside of health care facilities—has become, by necessity and by virtue of this Court's decisions, a forum of last resort for those who oppose abortion. The possibility of limiting abortion by legislative means—even abortion of a live-and-kicking child that is almost entirely out of the womb—has been rendered impossible by our decisions from *Roe* v. *Wade*, 410 U. S. 113 (1973), to *Stenberg* v. *Carhart*, *post*, p. 914. For those who share an abiding moral or religious conviction (or, for that matter, simply a biological appreciation) that abortion is the taking of a human life, there is no option but to persuade women, one by one, not to make that choice. And as a general matter, the most effective place, if not the only place, where that persuasion can occur is outside the entrances to abortion facilities. By upholding these restrictions on speech in this place the Court ratifies the State's attempt to make even that task an impossible one.

Those whose concern is for the physical safety and security of clinic patients, workers, and doctors should take no comfort from today's decision. Individuals or groups intent on bullying or frightening women out of an abortion, or doctors out of performing that procedure, will not be deterred by Colorado's statute; bullhorns and screaming from eight feet away will serve their purposes well. But those who would accomplish their moral and religious objectives by peaceful and civil means, by trying to persuade individual women of the rightness of their cause, will be deterred; and that is not a good thing in a democracy. This Court once recognized, as the Framers surely did, that the freedom to speak and persuade is inseparable from, and antecedent to, the survival

of self-government. The Court today rotates that essential safety valve on our democracy one-half turn to the right, and no one who seeks safe access to health care facilities in Colorado or elsewhere should feel that her security has by this decision been enhanced.

It is interesting to compare the present decision, which *upholds* an utterly bizarre proabortion "request to approach" provision of Colorado law, with *Stenberg*, *post*, p. 914, also announced today, which *strikes down* a live-birth abortion prohibition adopted by 30 States and twice passed by both Houses of Congress (though vetoed both times by the President). The present case disregards the State's own assertion of the purpose of its proabortion law, and posits instead a purpose that the Court believes will be more likely to render the law *constitutional*. *Stenberg* rejects the State's assertion of the very meaning of its antiabortion law, and declares instead a meaning that will render the law *un*constitutional. The present case *rejects* overbreadth challenges to a proabortion law that regulates speech, on grounds that have no support in our prior jurisprudence and that instead amount to a total repudiation of the doctrine of overbreadth. *Stenberg applies* overbreadth analysis to an antiabortion law that has nothing to do with speech, even though until eight years ago overbreadth was unquestionably the exclusive preserve of the First Amendment. See *Janklow* v. *Planned Parenthood, Sioux Falls Clinic*, 517 U. S. 1174, 1177–1181 (1996) (SCALIA, J., dissenting from denial of certiorari); *Ada* v. *Guam Soc. of Obstetricians & Gynecologists*, 506 U. S. 1011, 1013 (1992) (SCALIA, J., dissenting from denial of certiorari).

Does the deck seem stacked? You bet. As I have suggested throughout this opinion, today's decision is not an isolated distortion of our traditional constitutional principles, but is one of many aggressively proabortion novelties announced by the Court in recent years. See, *e. g.*, *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753 (1994); *Schenck*

v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357 (1997); *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986). Today's distortions, however, are particularly blatant. Restrictive views of the First Amendment that have been in dissent since the 1930's suddenly find themselves in the majority. "Uninhibited, robust, and wide open" debate is replaced by the power of the State to protect an unheard-of "right to be let alone" on the public streets. I dissent.

JUSTICE KENNEDY, dissenting.

The Court's holding contradicts more than a half century of well-established First Amendment principles. For the first time, the Court approves a law which bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk. If from this time forward the Court repeats its grave errors of analysis, we shall have no longer the proud tradition of free and open discourse in a public forum. In my view, JUSTICE SCALIA's First Amendment analysis is correct and mandates outright reversal. In addition to undermining established First Amendment principles, the Court's decision conflicts with the essence of the joint opinion in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). It seems appropriate in these circumstances to reinforce JUSTICE SCALIA's correct First Amendment conclusions and to set forth my own views.

I

The Court uses the framework of *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989), for resolution of the case. The Court wields the categories of *Ward* so that what once were rules to protect speech now become rules to restrict it. This is twice unfortunate. The rules of *Ward* are diminished in value for later cases; and the *Ward* analysis ought not have been undertaken at all. To employ *Ward*'s com-

plete framework is a mistake at the outset, for *Ward* applies only if a statute is content neutral. Colorado's statute is a textbook example of a law which is content based.

A

The statute makes it a criminal offense to "knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility." Colo. Rev. Stat. § 18–9–122(3) (1999). The law imposes content-based restrictions on speech by reason of the terms it uses, the categories it employs, and the conditions for its enforcement. It is content based, too, by its predictable and intended operation. Whether particular messages violate the statute is determined by their substance. The law is a prime example of a statute inviting screening and censoring of individual speech; and it is serious error to hold otherwise.

The Court errs in asserting the Colorado statute is no different from laws sustained as content neutral in earlier cases. The prohibitions against "picketing" and/or "leafleting" upheld in *Frisby* v. *Schultz*, 487 U. S. 474 (1988), *United States* v. *Grace*, 461 U. S. 171 (1983), and *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972), the Court says, see *ante*, at 722, and n. 30, are no different from the restrictions on "protest, education, or counseling" imposed by the Colorado statute. The parallel the Court sees does not exist. No examination of the content of a speaker's message is required to determine whether an individual is picketing, or distributing a leaflet, or impeding free access to a building. Under the Colorado enactment, however, the State must review content to determine whether a person has engaged in criminal "protest, education, or counseling." When a citizen

approaches another on the sidewalk in a disfavored-speech zone, an officer of the State must listen to what the speaker says. If, in the officer's judgment, the speaker's words stray too far toward "protest, education, or counseling"—the boundaries of which are far from clear—the officer may decide the speech has moved from the permissible to the criminal. The First Amendment does not give the government such power.

The statute is content based for an additional reason: It restricts speech on particular topics. Of course, the enactment restricts "oral protest, education, or counseling" on any subject; but a statute of broad application is not content neutral if its terms control the substance of a speaker's message. If oral protest, education, or counseling on every subject within an 8-foot zone present a danger to the public, the statute should apply to every building entrance in the State. It does not. It applies only to a special class of locations: entrances to buildings with health care facilities. We would close our eyes to reality were we to deny that "oral protest, education, or counseling" outside the entrances to medical facilities concern a narrow range of topics—indeed, one topic in particular. By confining the law's application to the specific locations where the prohibited discourse occurs, the State has made a content-based determination. The Court ought to so acknowledge. Clever content-based restrictions are no less offensive than censoring on the basis of content. See, *e. g.*, *United States* v. *Eichman*, 496 U. S. 310 (1990). If, just a few decades ago, a State with a history of enforcing racial discrimination had enacted a statute like this one, regulating "oral protest, education, or counseling" within 100 feet of the entrance to any lunch counter, our predecessors would not have hesitated to hold it was content based or viewpoint based. It should be a profound disappointment to defenders of the First Amendment that the Court today refuses to apply the same structural analysis when the speech involved is less palatable to it.

The Court, in error and irony, validates the Colorado statute because it purports to restrict all of the proscribed expressive activity regardless of the subject. The even-handedness the Court finds so satisfying, however, is but a disguise for a glaring First Amendment violation. The Court, by citing the breadth of the statute, cannot escape the conclusion that its categories are nonetheless content based. The liberty of a society is measured in part by what its citizens are free to discuss among themselves. Colorado's scheme of disfavored-speech zones on public streets and sidewalks, and the Court's opinion validating them, are antithetical to our entire First Amendment tradition. To say that one citizen can approach another to ask the time or the weather forecast or the directions to Main Street but not to initiate discussion on one of the most basic moral and political issues in all of contemporary discourse, a question touching profound ideas in philosophy and theology, is an astonishing view of the First Amendment. For the majority to examine the statute under rules applicable to content-neutral regulations is an affront to First Amendment teachings.

After the Court errs in finding the statute content neutral, it compounds the mistake by finding the law viewpoint neutral. Viewpoint-based rules are invidious speech restrictions, yet the Court approves this one. The purpose and design of the statute—as everyone ought to know and as its own defenders urge in attempted justification—are to restrict speakers on one side of the debate: those who protest abortions. The statute applies only to medical facilities, a convenient yet obvious mask for the legislature's true purpose and for the prohibition's true effect. One need read no further than the statute's preamble to remove any doubt about the question. The Colorado Legislature sought to restrict "a person's right to protest or counsel against certain medical procedures." Colo. Rev. Stat. § 18–9–122(1) (1999). The word "against" reveals the legislature's desire to restrict

discourse on one side of the issue regarding "certain medical procedures." The testimony to the Colorado Legislature consisted, almost in its entirety, of debates and controversies with respect to abortion, a point the majority acknowledges. *Ante*, at 715. The legislature's purpose to restrict unpopular speech should be beyond dispute.

The statute's operation reflects its objective. Under the most reasonable interpretation of Colorado's law, if a speaker approaches a fellow citizen within any one of Colorado's thousands of disfavored-speech zones and chants in praise of the Supreme Court and its abortion decisions, I should think there is neither protest, nor education, nor counseling. If the opposite message is communicated, however, a prosecution to punish protest is warranted. The antispeech distinction also pertains if a citizen approaches a public official visiting a health care facility to make a point in favor of abortion rights. If she says, "Good job, Governor," there is no violation; if she says, "Shame on you, Governor," there is. Furthermore, if the speaker addresses a woman who is considering an abortion and says, "Please take just a moment to read these brochures and call our support line to talk with women who have been in your situation," the speaker would face criminal penalties for counseling. Yet if the speaker simply says, "We are for abortion rights," I should think this is neither education nor counseling. Thus does the Court today ensure its own decisions can be praised but not condemned. Thus does it restrict speech designed to teach that the exercise of a constitutional right is not necessarily concomitant with making a sound moral choice. Nothing in our law or our enviable free speech tradition sustains this self-serving rule. Colorado is now allowed to punish speech because of its content and viewpoint.

The Court time and again has held content-based or viewpoint-based regulations to be presumptively invalid. See *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 345–346 (1995); *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382 (1992);

Simon & Schuster, Inc. v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991) (" 'Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment' " (quoting *Regan* v. *Time, Inc.*, 468 U. S. 641, 648–649 (1984))). Here the statute "suppresses expression out of concern for its likely communicative impact." *Eichman*, 496 U. S., at 317. Like the picketing statute struck down in *Boos* v. *Barry*, 485 U. S. 312 (1998), this prohibition seeks to eliminate public discourse on an entire subject and topic. The Court can cite not a single case where we sustained a law aimed at a broad class of topics on grounds that it is both content and viewpoint neutral. Cf. *McIntyre* v. *Ohio Elections Comm'n*, *supra*, at 345 ("[E]ven though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech"); *Boos*, *supra*, at 319 ("[A] regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic' " (quoting *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537 (1980))); see also *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 784–785 (1978) (invalidating statute which permitted corporations to speak on political issues decided by referenda, but not on other subjects). Statutes which impose content-based or viewpoint-based restrictions are subjected to exacting scrutiny. The State has failed to sustain its burden of proving that its statute is content and viewpoint neutral. See *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions"). The *Ward* time, place, and manner analysis is simply inapplicable to this law. I would hold the statute invalid from the very start.

B

In a further glaring departure from precedent we learn today that citizens have a right to avoid unpopular speech in a public forum. *Ante*, at 716–717. For reasons JUSTICE SCALIA explains in convincing fashion, neither Justice Brandeis' dissenting opinion in *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928), nor the Court's opinion in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184 (1921), establishes a right to be free from unwelcome expression aired by a fellow citizen in a traditional public forum: "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views." *Edwards* v. *South Carolina*, 372 U. S. 229, 237 (1963).

The Court's reliance on *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970), and *Erznoznik* v. *Jacksonville*, 422 U. S. 205 (1975), is inapt. *Rowan* involved a federal statute allowing individuals to remove their names from commercial mailing lists. Businesses contended the statute infringed upon their First Amendment right to communicate with private citizens. The Court rejected the challenge, reasoning that the First Amendment affords individuals some control over what, and how often, unwelcome commercial messages enter their private residences. 397 U. S., at 736, 738. *Rowan* did not hold, contrary to statements in today's opinion, see *ante*, at 718, that the First Amendment permits the government to restrict private speech in a public forum. Indeed, the Court in *Rowan* recognized what everyone, before today, understood to be true: "[W]e are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound . . . ." 397 U. S., at 738.

In *Erznoznik*, the Court struck down a municipal ordinance prohibiting drive-in movie theaters visible from either a public street or a public place from showing films containing nudity. The ordinance, the Court concluded, imposed a content-based restriction upon speech and was both too

broad and too narrow to serve the interests asserted by the municipality. 422 U. S., at 211–215. The law, moreover, was not analogous to the rare, "selective restrictions" on speech previously upheld to protect individual privacy. *Id.*, at 208–209 (citing and discussing *Rowan*, *supra*, and *Lehman* v. *Shaker Heights*, 418 U. S. 298 (1974)). The Court did not, contrary to the majority's assertions, suggest that government is free to enact categorical measures restricting traditional, peaceful communications among citizens in a public forum. Instead, the Court admonished that citizens usually bear the burden of disregarding unwelcome messages. 422 U. S., at 211 (citing *Cohen* v. *California*, 403 U. S. 15, 21 (1971)).

Today's decision is an unprecedented departure from this Court's teachings respecting unpopular speech in public fora.

II

The Colorado statute offends settled First Amendment principles in another fundamental respect. It violates the constitutional prohibitions against vague or overly broad criminal statutes regulating speech. The enactment's fatal ambiguities are multiple and interact to create further imprecisions. The result is a law more vague and overly broad than any criminal statute the Court has sustained as a permissible regulation of speech. The statute's imprecisions are so evident that this, too, ought to have ended the case without further discussion.

The law makes it a criminal offense to "knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility." Colo. Rev. Stat. § 18–9–122(3) (1999). The operative terms and phrases of the statute are not defined. The case comes

to us from the state court system; and as the Colorado courts did not give the statute a sufficient narrowing construction, questions of vagueness and overbreadth should be addressed by this Court in the first instance. See *Coates* v. *Cincinnati,* 402 U. S. 611, 613–614 (1971).

In the context of a law imposing criminal penalties for pure speech, "protest" is an imprecise word; "counseling" is an imprecise word; "education" is an imprecise word. No custom, tradition, or legal authority gives these terms the specificity required to sustain a criminal prohibition on speech. I simply disagree with the majority's estimation that it is "quite remote" that "anyone would not understand any of those common words." *Ante*, at 732. The criminal statute is subject to manipulation by police, prosecutors, and juries. Its substantial imprecisions will chill speech, so the statute violates the First Amendment. Cf. *Kolender* v. *Lawson,* 461 U. S. 352, 358, 360 (1983); *Herndon* v. *Lowry,* 301 U. S. 242, 263–264 (1937).

In operation the statute's inevitable arbitrary effects create vagueness problems of their own. The 8-foot no-approach zone is so unworkable it will chill speech. Assume persons are about to enter a building from different points and a protester is walking back and forth with a sign or attempting to hand out leaflets. If she stops to create the 8-foot zone for one pedestrian, she cannot reach other persons with her message; yet if she moves to maintain the 8-foot zone while trying to talk to one patron she may move knowingly closer to a patron attempting to enter the facility from a different direction. In addition, the statute requires a citizen to give affirmative consent before the exhibitor of a sign or the bearer of a leaflet can approach. When dealing with strangers walking fast toward a building's entrance, there is a middle ground of ambiguous answers and mixed signals in which misinterpretation can subject a good-faith speaker to criminal liability. The mere failure to give a reaction, for instance, is a failure to give consent. These ele-

ments of ambiguity compound the others. Finally, as we all know, the identity or enterprise of the occupants of a building which fronts on a public street is not always known to the public. Health care providers may occupy but a single office in a large building. The Colorado citizen may walk from a disfavored-speech zone to a free zone with little or no ability to discern when one ends and the other begins. The statute's vagueness thus becomes as well one source of its overbreadth. The only sure way to avoid violating the law is to refrain from picketing, leafletting, or oral advocacy altogether. Scienter cannot save so vague a statute as this.

A statute is vague when the conduct it forbids is not ascertainable. See *Chicago* v. *Morales*, 527 U. S. 41, 56 (1999). "[People] of common intelligence cannot be required to guess at the meaning of the enactment." *Winters* v. *New York*, 333 U. S. 507, 515 (1948). The terms "oral protest, education, or counseling" are at least as imprecise as criminal prohibitions on speech the Court has declared void for vagueness in past decades. In *Coates* v. *Cincinnati*, 402 U. S. 611 (1971), the Court encountered little difficulty in striking down a municipal ordinance making it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." *Ibid.* The Court held the ordinance to be unconstitutionally vague because "it subject[ed] the exercise of the right of assembly to an unascertainable standard, and [was] unconstitutionally broad because it authorize[d] the punishment of constitutionally protected conduct." *Id.*, at 614. Vagueness led to overbreadth as well in *Houston* v. *Hill*, 482 U. S. 451 (1987), where the Court invalidated an ordinance making it "'unlawful for any person to . . . in any manner oppose . . . or interrupt any policeman in the execution of his duty.'" *Id.*, at 455. The "sweeping" restriction, the Court reasoned, placed citizens at risk of arrest for exercising their

"freedom . . . to oppose or challenge police action," a right "by which we distinguish a free nation from a police state." *Id.*, at 462–463.

The requirement of specificity for statutes that impose criminal sanctions on public expression was established well before *Coates* and *Hill*, of course. In *Carlson* v. *California*, 310 U. S. 106 (1940), a unanimous Court invalidated an ordinance prohibiting individuals from carrying or displaying any sign or banner or from picketing near a place of business "for the purpose of inducing or influencing, or attempting to induce or influence, any person to refrain from entering any such works, or factory, or place of business, or employment." *Id.*, at 109. The statute employed imprecise language, providing citizens with no guidance as to whether particular expressive activities fell within its reach. The Court found that the "sweeping and inexact terms of the ordinance disclose the threat to freedom of speech inherent in its existence," a result at odds with the guarantees of the First Amendment. *Id.*, at 112.

Rather than adhere to this rule, the Court turns it on its head, stating the statute's overbreadth is "a virtue, not a vice." *Ante*, at 731. The Court goes even further, praising the statute's "prophylactic approach; it forbids all unwelcome demonstrators to come closer than eight feet." *Ante*, at 729. Indeed, in the Court's view, "bright-line prophylactic rule[s] may be the best way to provide protection" to those individuals unwilling to hear a fellow citizen's message in a public forum. *Ibid.* The Court is quite wrong. Overbreadth is a constitutional flaw, not a saving feature. Sweeping within its ambit even more protected speech does not save a criminal statute invalid in its essential reach and design. The Court, moreover, cannot meet the concern that the statute is vague; for neither the Colorado courts nor established legal principles offer satisfactory guidance in interpreting the statute's imprecisions.

III

Even aside from the erroneous, most disturbing assumptions that the statute is content neutral, viewpoint neutral, and neither vague nor overbroad, the Court falls into further serious error when it turns to the time, place, and manner rules set forth in *Ward*.

An essential requirement under *Ward* is that the regulation in question not "burden substantially more speech than is necessary to further the government's legitimate interests." 491 U. S., at 799. As we have seen, however, Colorado and the Court attempt to justify the law on just the opposite assumption.

I have explained already how the statute is a failed attempt to make the enactment appear content neutral, a disguise for the real concern of the legislation. The legislature may as well have enacted a statute subjecting "oral protest, education, or counseling near abortion clinics" to criminal penalty. Both the State and the Court attempt to sidestep the enactment's obvious content-based restriction by praising the statute's breadth, by telling us all topics of conversation, not just discourse on abortion, are banned within the statutory proscription. The saving feature the Court tries to grasp simply creates additional free speech infirmity. Our precedents do not permit content censoring to be cured by taking even more protected speech within a statute's reach. The statute before us, as construed by the majority, would do just that. If it indeed proscribes "oral protest, education, or counseling" on all subjects across the board, it by definition becomes "substantially broader than necessary to achieve the government's interest." *Id.*, at 800.

The whimsical, arbitrary nature of the statute's operation is further demonstration of a restriction upon more speech than necessary. The happenstance of a dental office being located in a building brings the restricted-speech zone into play. If the same building also houses an organization dedi-

cated, say, to environmental issues, a protest against the group's policies would be barred. Yet if, on the next block there were a public interest enterprise in a building with no health care facility, the speech would be unrestricted. The statute is a classic example of a proscription not narrowly tailored and resulting in restrictions of far more speech than necessary to achieve the legislature's object. The first time, place, and manner requirement of *Ward* cannot be satisfied.

Assuming Colorado enacted the statute to respond to incidents of disorderly and unlawful conduct near abortion clinics, there were alternatives to restricting speech. It is beyond dispute that pinching or shoving or hitting is a battery actionable under the criminal law and punishable as a crime. State courts have also found an actionable tort when there is a touching, done in an offensive manner, of an object closely identified with the body, even if it is not clothing or the body itself. See, *e. g.*, *Fisher* v. *Carrousel Motor Hotel, Inc.*, 424 S. W. 2d 627, 630 (Tex. 1967) ("Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting" (citing Prosser, Insult & Outrage, 44 Calif. L. Rev. 40 (1956))). The very statute before us, in its other parts, includes a provision aimed at ensuring access to health care facilities. The law imposes criminal sanctions upon any person who "knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility." Colo. Rev. Stat. § 18–9–122(2) (1999). With these means available to ensure access, the statute's overreaching in the regulation of speech becomes again apparent.

The majority insists the statute aims to protect distraught women who are embarrassed, vexed, or harassed as they attempt to enter abortion clinics. If these are punishable acts, they should be prohibited in those terms. In the course of praising Colorado's approach, the majority does not pause to tell us why, in its view, substantially less restrictive means

cannot be employed to ensure citizens access to health care facilities or to prevent physical contact between citizens. The Court's approach is at odds with the rigor demanded by *Ward*. See 491 U. S., at 799 ("Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals").

There are further errors in the Court's novel, prophylactic analysis. The prophylactic theory seems to be based on a supposition that most citizens approaching a health care facility are unwilling to listen to a fellow citizen's message and that face-to-face communications will lead to lawless behavior within the power of the State to punish. These premises have no support in law or in fact. And even when there is authority to adopt preventive measures, of course, the First Amendment does not allow a speech prohibition in an imprecise or overly broad statute. Cf. *Thornhill* v. *Alabama*, 310 U. S. 88, 105 (1940) ("The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter"). The Court places our free speech traditions in grave jeopardy by licensing legislatures to adopt "bright-line prophylactic rule[s] . . . to provide protection" to unwilling listeners in a quintessential public forum. *Ante*, at 729.

The Court's lack of concern with the statute's flaws is explained in part by its disregard of the importance of free discourse and the exchange of ideas in a traditional public forum. Our precedents have considered the level of protection afforded speech in specific locations, but the rules formulated in those decisions are not followed today. "To ascertain what limits, if any, may be placed on protected speech," our precedents instruct "we have often focused on

the 'place' of that speech, considering the nature of the forum the speaker seeks to employ. . . . [T]he standards by which limitations on speech must be evaluated 'differ depending on the character of the property at issue.'" *Frisby* v. *Schultz*, 487 U. S., at 479 (quoting *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 44 (1983)). The quoted language was part of our holding in an important free speech case; and it is a holding the majority disregards.

Frisby upheld a municipal ordinance restricting targeted picketing in residential areas. The primary purpose of the ordinance, and a reason the Court sustained it, was to protect and preserve the tranquility of private homes. The private location at which respondents sought to engage in their expressive activities was stressed throughout the Court's opinion. See 487 U. S., at 483 ("[W]e construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited"). "Although in many locations," the Court reasoned, "we expect individuals simply to avoid speech they do not want to hear, the home is different. 'That we are often "captives" outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere.'" *Id.*, at 484 (quoting *Rowan* v. *Post Office Dept.*, 397 U. S., at 738).

The Colorado law does not seek to protect private residences. Nor does the enactment impose a place restriction upon expressive activity undertaken on property, such as fairgrounds, designated for limited, special purposes. See, *e. g.*, *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640, 655 (1981). The statute applies to public streets and sidewalks, traditional public fora which "'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" See *Boos*, 485 U. S., at 318 (quoting *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515 (1939) (opinion of Roberts, J.)). Given our traditions with respect to open discussion in public fora, this statute,

which sweeps so largely on First Amendment freedoms, cannot be sustained.

The statute fails a further test under *Ward*, for it does not "'leave open ample alternative channels for communication of the information.'" 491 U. S., at 791 (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984)). *Frisby* again instructs us. A second reason we sustained the ordinance banning targeted residential picketing was because "ample alternativ[e]" avenues for communication remained open:

> "'Protestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching. . . . They may go door-to-door to proselytize their views. They may distribute literature in this manner . . . or through the mails. They may contact residents by telephone, short of harassment.'" 487 U. S., at 483–484 (quoting Brief for Appellants in No. 87–168, O. T. 1987, pp. 41–42).

The residential picketing ordinance, the Court concluded, "permit[ted] the more general dissemination of a message" to the targeted audience. 487 U. S., at 483.

The same conclusion cannot be reached here. Door-to-door distributions or mass mailing or telephone campaigns are not effective alternative avenues of communication for petitioners. They want to engage in peaceful face-to-face communication with individuals the petitioners believe are about to commit a profound moral wrong. Without the ability to interact in person, however momentarily, with a clinic patron near the very place where a woman might elect to receive an abortion, the statute strips petitioners of using speech in the time, place, and manner most vital to the protected expression.

In addition to leaving petitioners without adequate means of communication, the law forecloses peaceful leafletting, a mode of speech with deep roots in our Nation's history and

traditions. In an age when vast resources and talents are commanded by a sophisticated media to shape opinions on limitless subjects and ideas, the distribution of leaflets on a sidewalk may seem a bit antiquated. This case proves the necessity for the traditional mode of speech. It must be remembered that the whole course of our free speech jurisprudence, sustaining the idea of open public discourse which is the hallmark of the American constitutional system, rests to a significant extent on cases involving picketing and leafletting. Our foundational First Amendment cases are based on the recognition that citizens, subject to rare exceptions, must be able to discuss issues, great or small, through the means of expression they deem best suited to their purpose. It is for the speaker, not the government, to choose the best means of expressing a message. "The First Amendment," our cases illustrate, "protects [citizens'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer* v. *Grant*, 486 U. S. 414, 424 (1988). The Court's conclusion that Colorado's 8-foot no-approach zone protects citizens' ability to leaflet or otherwise engage in peaceful protest is untenable.

Given the Court's holding, it is necessary to recall our cases protecting the right to protest and hand out leaflets. In *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938), the Court invalidated an ordinance forbidding the distribution of literature of any kind without the written permission of a city official. "The liberty of the press," the Court explained, "is not confined to newspapers and periodicals." *Id.*, at 452. "It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Ibid.*

In *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147 (1939), reinforcing *Lovell*, the Court struck down a series of

municipal ordinances prohibiting the distribution of handbills on public streets on the rationale of preventing littering. *Schneider* made clear that while citizens may not enjoy a right to force an unwilling person to accept a leaflet, they do have a protected right to tender it. The Court stressed a basic First Amendment precept: "[T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." 308 U. S., at 163. The words of the Court more than a half century ago demonstrate the necessity to adhere to those principles today:

> "Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.
>
> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and

liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." *Id.*, at 160–161 (footnote omitted).

After *Lovell* and *Schneider* the Court gave continued, explicit definition to our custom and practice of free and open discourse by picketing and leafletting. In *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), the Court considered a First Amendment challenge to a statute prohibiting "'[l]oitering or picketing'" near "'the premises or place of business of any . . . firm, corporation, or association of people, engaged in a lawful business.'" *Id.*, at 91. Petitioner was arrested, charged, and convicted of violating the statute by engaging in peaceful picketing in front of a manufacturing plant. *Id.*, at 94–95. The Court invalidated the Alabama statute. The breadth of Alabama's speech restriction was one reason for ruling it invalid on its face, just as it should be for the statute we consider today:

"[Alabama Code §] 3448 has been applied by the state courts so as to prohibit a single individual from walking

> slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor; the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer." *Id.*, at 98–99 (footnote omitted).

The statute, in short, prohibited "whatever the means used to publicize the facts of a labor dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise . . . so long as it occurs in the vicinity of the scene of the dispute." *Id.*, at 101.

The Court followed these observations with an explication of fundamental free speech principles I would have thought controlling in the present case:

> "It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society.
>
> "The range of activities proscribed by § 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective ex-

> ercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests." *Id.*, at 104.

Carlson v. *California*, 310 U. S. 106 (1940), is in accord. In the course of reversing Carlson's conviction for engaging in a peaceful protest near a construction project in Shasta County, California, the Court declared that a citizen's right to "publiciz[e] the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by [the First Amendment through] the Fourteenth Amendment against abridgment by a State." *Id.*, at 113.

The principles explained in *Thornhill* and *Carlson* were reaffirmed a few years later in the context of speech on religious matters when an individual sought to advertise a meeting of the Jehovah's Witnesses by engaging in a door-to-door distribution of leaflets. *Martin* v. *City of Struthers*, 319 U. S. 141 (1943). The petitioner was convicted under a city ordinance which prohibited individuals from "distributing handbills, circulars or other advertisements" to private residences. *Id.*, at 142. The Court invalidated the ordinance, reinforcing the vital idea today's Court ignores:

> "While door to door distributers of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the

> dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance. 'Pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people.'" *Id.*, at 145 (quoting *Schneider*, 308 U. S., at 164).

The Court's more recent precedents honor the same principles: Government cannot foreclose a traditional medium of expression. In *City of Ladue* v. *Gilleo*, 512 U. S. 43 (1994), we considered a challenge to a municipal ordinance prohibiting, *inter alia*, "such absolutely pivotal speech as [the display of] a sign protesting an imminent governmental decision to go to war." *Id.*, at 54. Respondent had placed a sign in a window of her home calling "For Peace in the Gulf." *Id.*, at 46. We invalidated the ordinance, finding that the local government "ha[d] almost completely foreclosed a venerable means of communication that is both unique and important." *Id.*, at 54. The opinion, which drew upon *Lovell*, *Martin*, and *Schneider*, was also careful to note the importance of the restriction on place imposed by the ordinance in question: "Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means." 512 U. S., at 56. So, too, did we stress the importance of preserving the means citizens use to express messages bearing on important public debates. See *id.*, at 57 ("Residential signs are an unusually cheap and convenient form of communication[,] [e]specially for persons of modest means or limited mobility . . .").

A year later in *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334 (1995), we once more confirmed the privileged status peaceful leafletting enjoys in our free speech tradition. Ohio prohibited anonymous leafletting in connection with

election campaigns. Invalidating the law, we observed as follows: "'Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.'" *Id.*, at 341 (quoting *Talley* v. *California*, 362 U. S. 60, 64 (1960)). We rejected the State's claim that the restriction was needed to prevent fraud and libel in its election processes. Ohio had other laws in place to achieve these objectives. 514 U. S., at 350. The case, we concluded, rested upon fundamental free speech principles:

> "Indeed, the speech in which Mrs. McIntyre engaged—handing out leaflets in the advocacy of a politically controversial viewpoint—is the essence of First Amendment expression. That this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to Mrs. McIntyre's expression: Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed. No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's." *Id.*, at 347 (citations omitted).

Petitioners commenced the present suit to challenge a statute preventing them from expressing their views on abortion through the same peaceful and vital methods approved in *Lovell*, *Schneider*, *Thornhill*, *Carlson*, and *McIntyre*. Laws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against. We must remember that, by decree of this Court in discharging our duty to interpret the Constitution, any plea to the government to outlaw some abortions will be to no effect. See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). Absent the ability to ask the government to intervene, citizens who oppose abortion must seek to convince their fellow citizens of the moral imperative

of their cause. In a free society protest serves to produce stability, not to undermine it. "The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes." *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949). As Justice Brandeis observed: "[The Framers] recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form." *Whitney* v *California*, 274 U. S. 357, 375–376 (1927) (concurring opinion).

The means of expression at stake here are of controlling importance. Citizens desiring to impart messages to women considering abortions likely do not have resources to use the mainstream media for their message, much less resources to locate women contemplating the option of abortion. Lacking the aid of the government or the media, they seek to resort to the time honored method of leafletting and the display of signs. Nowhere is the speech more important than at the time and place where the act is about to occur. As the named plaintiff, Leila Jeanne Hill, explained, "I engage in a variety of activities designed to impart information to abortion-bound women and their friends and families. . . ." App. 49. "In my many years of sidewalk counseling I have seen a number of [these] women change their minds about aborting their unborn children as a result of my sidewalk counseling, and God's grace." *Id.*, at 51.

When a person is walking at a hurried pace to enter a building, a solicitor who must stand still eight feet away cannot know whether the person can be persuaded to accept the leaflet or not. Merely viewing a picture or brief message on the outside of the leaflet might be critical in the choice to receive it. To solicit by pamphlet is to tender it to the person. The statute ignores this fact. What the statute restricts is one person trying to communicate to another, which ought to be the heart of civilized discourse.

Colorado's excuse, and the Court's excuse, for the serious burden imposed upon the right to leaflet or to discuss is that it occurs at the wrong place. Again, Colorado and the Court have it just backwards. For these protesters the 100-foot zone in which young women enter a building is not just the last place where the message can be communicated. It likely is the only place. It is the location where the Court should expend its utmost effort to vindicate free speech, not to burden or suppress it.

Perhaps the leaflet will contain a picture of an unborn child, a picture the speaker thinks vital to the message. One of the arguments by the proponents of abortion, I had thought, was that a young woman might have been so uninformed that she did not know how to avoid pregnancy. The speakers in this case seek to ask the same uninformed woman, or indeed any woman who is considering an abortion, to understand and to contemplate the nature of the life she carries within her. To restrict the right of the speaker to hand her a leaflet, to hold a sign, or to speak quietly is for the Court to deny the neutrality that must be the first principle of the First Amendment. In this respect I am in full agreement with JUSTICE SCALIA's explanation of the insult the Court gives when it tells us these grave moral matters can be discussed just as well through a bullhorn. It would be remiss, moreover, not to observe the profound difference a leaflet can have in a woman's decisionmaking process.

Consider the account of one young woman who testified before the Colorado Senate:

> "Abortion is a major decision. Unfortunately, most women have to make this decision alone. I did and I know that I'm not the only one. As soon as I said the word 'pregnant,' he was history, never to be heard of, from again. I was scared and all alone. I was too embarrassed to ask for help. If this law had been in effect then, I would not have got any information at all and gone through with my abortion because the only people that were on my side were the people at the abortion clinic. They knew exactly how I was feeling and what to say to make it all better. In my heart, I knew abortion was wrong, but it didn't matter. I had never taken responsibility for my actions so why start then. One of the major reasons I did not go through with my scheduled abortion was a picture I was given while I was pregnant. This was the first time I had ever seen the other side of the story. I think I speak for a lot of women, myself included, when I say abortion is the only way out because of *[sic]* it's all I knew. In Sex Education, I was not taught about adoption or the fetus or anything like that. All I learned about was venereal diseases and abortion. The people supplying the pamphlet helped me make my choice. I got an informed decision, I got information from both sides, and I made an informed decision that my son and I could both live with. Because of this picture I was given, right there, this little boy got a chance at life that he would never have had." *Id.,* at 167–168.

There are, no doubt, women who would testify that abortion was necessary and unregretted. The point here is simply that speech makes a difference, as it must when acts of lasting significance and profound moral consequence are being contemplated. The majority reaches a contrary conclusion

only by disregarding settled free speech principles. In doing so it delivers a grave wound to the First Amendment as well as to the essential reasoning in the joint opinion in *Casey*, a concern to which I now turn.

IV

In *Planned Parenthood of Southeastern Pa.* v. *Casey*, the Court reaffirmed its prior holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages. The majority opinion in *Casey* considered the woman's liberty interest and principles of *stare decisis*, but took care to recognize the gravity of the personal decision: "[Abortion] is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted." 505 U. S., at 852.

The Court now strikes at the heart of the reasoned, careful balance I had believed was the basis for the opinion in *Casey*. The vital principle of the opinion was that in defined instances the woman's decision whether to abort her child was in its essence a moral one, a choice the State could not dictate. Foreclosed from using the machinery of government to ban abortions in early term, those who oppose it are remitted to debate the issue in its moral dimensions. In a cruel way, the Court today turns its back on that balance. It in effect tells us the moral debate is not so important after all and can be conducted just as well through a bullhorn from an 8-foot distance as it can through a peaceful, face-to-face exchange of a leaflet. The lack of care with which the Court sustains the Colorado statute reflects a most troubling abdication of our responsibility to enforce the First Amendment.

There runs through our First Amendment theory a concept of immediacy, the idea that thoughts and pleas and petitions must not be lost with the passage of time. In a fleeting existence we have but little time to find truth through discourse. No better illustration of the immediacy of speech, of the urgency of persuasion, of the preciousness of time, is presented than in this case. Here the citizens who claim First Amendment protection seek it for speech which, if it is to be effective, must take place at the very time and place a grievous moral wrong, in their view, is about to occur. The Court tears away from the protesters the guarantees of the First Amendment when they most need it. So committed is the Court to its course that it denies these protesters, in the face of what they consider to be one of life's gravest moral crises, even the opportunity to try to offer a fellow citizen a little pamphlet, a handheld paper seeking to reach a higher law.

I dissent.

Syllabus

MITCHELL ET AL. *v.* HELMS ET AL.

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

No. 98–1648. Argued December 1, 1999—Decided June 28, 2000

Chapter 2 of the Education Consolidation and Improvement Act of 1981 channels federal funds via state educational agencies (SEA's) to local educational agencies (LEA's), which in turn lend educational materials and equipment, such as library and media materials and computer software and hardware, to public and private elementary and secondary schools to implement "secular, neutral, and nonideological" programs. The enrollment of each participating school determines the amount of Chapter 2 aid that it receives. In an average year, about 30% of Chapter 2 funds spent in Jefferson Parish, Louisiana, are allocated for private schools, most of which are Catholic or otherwise religiously affiliated. Respondents filed suit alleging, among other things, that Chapter 2, as applied in the parish, violated the First Amendment's Establishment Clause. Agreeing, the Chief Judge of the District Court held, under *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613, that Chapter 2 had the primary effect of advancing religion because the materials and equipment loaned to the Catholic schools were direct aid and the schools were pervasively sectarian. He relied primarily on *Meek* v. *Pittenger*, 421 U. S. 349, and *Wolman* v. *Walter*, 433 U. S. 229, in which programs providing many of the same sorts of materials and equipment as does Chapter 2 were struck down, even though programs providing for the loan of public school textbooks to religious schools were upheld. After the judge issued an order permanently excluding pervasively sectarian schools in the parish from receiving any Chapter 2 materials or equipment, he retired. Another judge then reversed that order, upholding Chapter 2 under, *inter alia*, *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1, in which a public school district was allowed to provide a sign-language interpreter to a deaf student at a Catholic high school as part of a federal program for the disabled. While respondents' appeal was pending, this Court decided *Agostini* v. *Felton*, 521 U. S. 203, approving a program under Title I of the Elementary and Secondary Education Act of 1965 that provided public employees to teach remedial classes at religious and other private schools. Concluding that *Agostini* had neither directly overruled *Meek* and *Wolman* nor rejected their distinction between textbooks and other in-kind aid, the Fifth Circuit relied on those two cases to invalidate Chapter 2.

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Held: The judgment is reversed.

151 F. 3d 347, reversed.

JUSTICE THOMAS, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY, concluded that Chapter 2, as applied in Jefferson Parish, is not a law respecting an establishment of religion simply because many of the private schools receiving Chapter 2 aid in the parish are religiously affiliated. Pp. 807–836.

(a) In modifying the *Lemon* test—which asked whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion, see 403 U. S., at 612–613—*Agostini* examined only the first and second of those factors, see 521 U. S., at 222–223, recasting the entanglement inquiry as simply one criterion relevant to determining a statute's effect, *id.*, at 232–233. The Court also acknowledged that its cases had pared somewhat the factors that could justify a finding of excessive entanglement. *Id.*, at 233–234. It then set out three primary criteria for determining a statute's effect: Government aid has the effect of advancing religion if it (1) results in governmental indoctrination, (2) defines its recipients by reference to religion, or (3) creates an excessive entanglement. *Ibid.* In this case, the inquiry under *Agostini*'s purpose and effect test is a narrow one. Because the District Court's holding that Chapter 2 has a secular purpose is not challenged, only Chapter 2's effect need be considered. Further, in determining that effect, only the first two *Agostini* criteria need be considered, because the District Court's holding that Chapter 2 does not create an excessive entanglement is not challenged. Pp. 807–808.

(b) Whether governmental aid to religious schools results in religious indoctrination ultimately depends on whether any indoctrination that occurs could reasonably be attributed to governmental action. See, *e. g.*, *Agostini*, 521 U. S., at 226. Moreover, the answer to the indoctrination question will resolve the question whether an educational aid program "subsidizes" religion. See *id.*, at 230–231. In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, the Court has consistently turned to the neutrality principle, upholding aid that is offered to a broad range of groups or persons without regard to their religion. As a way of assuring neutrality, the Court has repeatedly considered whether any governmental aid to a religious institution results from the genuinely independent and private choices of individual parents, *e. g.*, *id.*, at 226. *Agostini*'s second primary criterion—whether an aid program defines its recipients by reference to religion, *id.*, at 234—is closely related to the first. It looks to the same facts as the neutrality inquiry, see *id.*, at 225–226, but uses

those facts to answer a somewhat different question—whether the criteria for allocating the aid create a financial incentive to undertake religious indoctrination, *id.*, at 231. Such an incentive is not present where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. *Ibid.* Pp. 809–814.

(c) Two rules offered by respondents to govern the determination whether Chapter 2 has the effect of advancing religion are rejected. Pp. 814–825.

(i) Respondents' chief argument—that direct, nonincidental aid to religious schools is always impermissible—is inconsistent with this Court's more recent cases. The purpose of the direct/indirect distinction is to prevent "subsidization" of religion, and the Court's more recent cases address this concern through the principle of private choice, as incorporated in the first *Agostini* criterion (*i. e.*, whether any indoctrination could be attributed to the government). If aid to schools, even "direct aid," is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any "support of religion." *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481, 489. Although the presence of private choice is easier to see when aid literally passes through individuals' hands, there is no reason why the Establishment Clause requires such a form. Indeed, *Agostini* expressly rejected respondents' absolute line. 521 U. S., at 225. To the extent respondents intend their direct/indirect distinction to require that any aid be literally placed in schoolchildren's hands rather than given directly to their schools, *Meek* and *Wolman*, the cases on which they rely, demonstrate the irrelevance of such formalism. Further, respondents' formalistic line breaks down in the application to real-world programs. Whether a program is labeled "direct" or "indirect" is a rather arbitrary choice that does not further the constitutional analysis. See *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236, 243–245. Although "special Establishment Clause dangers" may exist when *money* is given directly to religious schools, see, *e. g.*, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 842, such direct payments are not at issue here. Pp. 815–820.

(ii) Respondents' second argument—that provision to religious schools of aid that is divertible to religious use is always impermissible—is also inconsistent with the Court's more recent cases, particularly *Zobrest*, *supra*, at 18–23, and *Witters*, and is also unworkable. *Meek* and *Wolman*, on which respondents appear to rely for their divertibility rule, offer little, if any, support for their rule. The issue is not diverti-

bility but whether the aid itself has an impermissible content. Where the aid would be suitable for use in a public school, it is also suitable for use in any private school. Similarly, the prohibition against the government providing impermissible content resolves the Establishment Clause concerns that exist if aid is actually diverted to religious uses. See, *e. g.*, *Agostini*, *supra*, at 224–226. A concern for divertibility, as opposed to improper content, is also misplaced because it is boundless—enveloping all aid, no matter how trivial—and thus has only the most attenuated (if any) link to any realistic concern for preventing an establishment of religion. Finally, *any* aid, with or without content, is "divertible" in the sense that it allows schools to "divert" resources. Yet the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends. *E. g.*, *Committee for Public Ed. and Religious Liberty* v. *Regan*, 444 U. S. 646, 658. Pp. 820–825.

(d) Additional factors cited by the dissent—including the concern for political divisiveness that post-*Aguilar* v. *Felton*, 473 U. S. 402, cases have disregarded, see, *e. g.*, *Agostini*, *supra*, at 233–234, are rejected. In particular, whether a recipient school is pervasively sectarian, a factor that has been disregarded in recent cases, *e. g.*, *Witters*, *supra*, is not relevant to the constitutionality of a school-aid program. Pp. 825–829.

(e) Applying the two relevant *Agostini* criteria reveals that there is no basis for concluding that Jefferson Parish's Chapter 2 program has the effect of advancing religion. First, Chapter 2 does not define its recipients by reference to religion, since aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. 521 U. S., at 231. There is no improper incentive because, under the statute, aid is allocated based on school enrollment. Second, Chapter 2 does not result in governmental indoctrination of religion. It determines eligibility for aid neutrally, making a broad array of schools eligible without regard to their religious affiliations or lack thereof. See *id.*, at 225–226. It also allocates aid based on the private choices of students and their parents as to which schools to attend. See *id.*, at 222. Thus, it is not problematic that Chapter 2 could fairly be described as providing "direct" aid. Finally, the Chapter 2 aid provided to religious schools does not have an impermissible content. The statute explicitly requires that such aid be "secular, neutral, and nonideological," and the record indicates that the Louisiana SEA and the Jefferson Parish LEA have faithfully enforced this requirement insofar as relevant to this case. Although there is evidence that equipment has been, or at least easily could be, diverted for use in religious classes, that evidence is not relevant to the constitutional analysis.

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Scattered *de minimis* statutory violations of the restrictions on content, discovered and remedied by the relevant authorities themselves before this litigation began almost 15 years ago, should not be elevated to such a level as to convert an otherwise unobjectionable parishwide program into a law that has the effect of advancing religion. Pp. 829–835.

(f) To the extent that *Meek* and *Wolman* conflict with the foregoing analysis, they are overruled. Pp. 835–836.

JUSTICE O'CONNOR, joined by JUSTICE BREYER, concluded that *Agostini* v. *Felton*, 521 U. S. 203, controls the constitutional inquiry presented here, and requires reversal of the Fifth Circuit's judgment that the Chapter 2 program is unconstitutional as applied in Jefferson Parish. To the extent *Meek* v. *Pittenger*, 421 U. S. 349, and *Wolman* v. *Walter*, 433 U. S. 229, are inconsistent with the Court's judgment today, they should be overruled. Pp. 836–867.

(a) The plurality announces a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school-aid programs. That rule is particularly troubling because, first, its treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to school-aid programs. Although neutrality is important, see, *e. g.*, *Agostini*, 521 U. S., at 228, 231–232, the Court has never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid. Rather, neutrality has heretofore been only one of several factors the Court considers. See, *e. g.*, *id.*, at 226–228. Second, the plurality's approval of actual diversion of government aid to religious indoctrination is in tension with this Court's precedents. See, *e. g.*, *id.*, at 226–227. Actual diversion is constitutionally impermissible. *E. g.*, *Bowen* v. *Kendrick*, 487 U. S. 589, 621–622, 624. The Court should not treat a per-capita-aid program like Chapter 2 the same as the true private choice programs approved in *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481, and *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1. Because *Agostini* represents the Court's most recent attempt to devise a general framework for approaching questions concerning neutral school-aid programs, and involved an Establishment Clause challenge to a school-aid program closely related to the instant program, the *Agostini* criteria should control here. Pp. 837–844.

(b) Under *Agostini*, the Court asks whether the government acted with the purpose of advancing or inhibiting religion and whether the aid has the "effect" of doing so. 521 U. S., at 222–223. The specific criteria used to determine an impermissible effect have changed in recent cases, see *id.*, at 223, which disclose three primary criteria to guide the determination: (1) whether the aid results in governmental indoctri-

nation, (2) whether the program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion, *id.*, at 234. Finally, the same criteria can be reviewed to determine whether a program constitutes endorsement of religion. *Id.*, at 235. Respondents neither question the Chapter 2 program's secular purpose nor contend that it creates an excessive entanglement. Accordingly, the Court need ask only whether Chapter 2, as applied in Jefferson Parish, results in governmental indoctrination or defines its recipients by reference to religion. It is clear that Chapter 2 does not so define aid recipients. Rather, it uses wholly neutral and secular criteria to allocate aid to students enrolled in religious and secular schools alike. As to the indoctrination inquiry, the Chapter 2 program bears the same hallmarks of the program upheld in *Agostini:* Aid is allocated on the basis of neutral, secular criteria; it is supplementary to, and does not supplant, nonfederal funds; no Chapter 2 funds reach the coffers of religious schools; the aid is secular; evidence of actual diversion is *de minimis;* and the program includes adequate safeguards. Regardless of whether these factors are constitutional requirements, they are sufficient to find that the program at issue does not have the impermissible effect of advancing religion. For the same reasons, the Chapter 2 program cannot reasonably be viewed as an endorsement of religion. Pp. 844–849.

(c) Respondents' contentions that *Agostini* is distinguishable and that *Meek* and *Wolman* are controlling here must be rejected. *Meek* and *Wolman* created an inexplicable rift within the Court's Establishment Clause jurisprudence. Those decisions adhered to the prior holding in *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236, that statutes authorizing the lending of textbooks to religious school students did not violate the Establishment Clause, see, *e. g.*, *Meek*, 421 U. S., at 359–362 (plurality opinion), but invalidated the lending of instructional materials and equipment to religious schools, *e. g.*, *id.*, at 362–366, on the ground that any assistance in support of the pervasively sectarian schools' educational missions would inevitably have the impermissible effect of advancing religion, see, *e. g.*, *id.*, at 365–366. The irrationality of this distinction is patent. See *Wallace* v. *Jaffree*, 472 U. S. 38, 110. Respondents' assertion that materials and equipment, unlike textbooks, are reasonably divertible to religious uses is rejected because it does not provide a logical distinction: An educator can use virtually any instructional tool, even a textbook, to teach a religious message. Pp. 849–857.

(d) The Court should follow the rule applied in the context of textbook lending programs: To establish a First Amendment violation, plaintiffs must prove that the aid actually is, or has been, used for religious

purposes. See, *e. g.*, *Allen*, *supra*, at 248. *Agostini* and the cases on which it relied have undermined the assumptions underlying *Meek* and *Wolman*. *Agostini*'s definitive rejection of the presumption that public-school employees teaching in religious schools would inevitably inculcate religion also stood for—or at least strongly pointed to—the broader proposition that such presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause. Respondents' contentions that *Agostini* should be limited to its facts, and that a presumption of religious inculcation for instructional materials and equipment should be retained, must be rejected. The assumption that religious-school instructors can abide by restrictions on the use of government-provided textbooks, see *Meek*, *supra*, at 384, should extend to instructional materials and equipment. *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 399–400 (O'Connor, J., concurring in judgment in part and dissenting in part), distinguished. Pp. 857–860.

(e) Respondents' contention that the actual administration of Chapter 2 in Jefferson Parish violated the Establishment Clause is rejected. The limited evidence amassed by respondents during 4 years of discovery (which began approximately 15 years ago) is at best *de minimis* and therefore insufficient to affect the constitutional inquiry. Their assertion that the government must have a failsafe mechanism capable of detecting *any* instance of diversion was rejected in *Agostini*, *supra*, at 234. Because the presumption adopted in *Meek* and *Wolman* respecting the use of instructional materials and equipment by religious-school teachers should be abandoned, there is no constitutional need for *pervasive* monitoring under the Chapter 2 program. Moreover, a review of the specific safeguards employed under Chapter 2 at the federal, state, and local levels demonstrates that they are constitutionally sufficient. Respondents' evidence does not demonstrate any actual diversion, but, at most, proves the possibility of diversion in two isolated instances. The evidence of violations of Chapter 2's supplantation and secular-content restrictions is equally insignificant and, therefore, should be treated the same. This Court has never declared an entire aid program unconstitutional on Establishment Clause grounds solely because of violations on the minuscule scale of those at issue here. The presence of so few examples tends to show not that the "no-diversion" rules have failed, but that they have worked. Pp. 860–867.

Thomas, J., announced the judgment of the Court and delivered an opinion, in which Rehnquist, C. J., and Scalia and Kennedy, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment, in which

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BREYER, J., joined, *post,* p. 836. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post,* p. 867.

Michael W. McConnell argued the cause for petitioners. With him on the briefs were *Patricia A. Dean*, *Andrew T. Karron*, *John C. Massaro*, and *Steffen N. Johnson.*

Deputy Solicitor General Underwood argued the cause for respondents. With her on the briefs were *Solicitor General Waxman*, *Acting Assistant Attorney General Ogden*, *Paul R. Q. Wolfson*, *Michael Jay Singer*, and *Howard S. Scher.*

Lee Boothby argued the cause for respondents. With him on the brief was *Nicholas P. Miller.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Ohio et al. by *Betty D. Montgomery*, Attorney General of Ohio, *Edward B. Foley*, State Solicitor, *Robert C. Maier*, Assistant Solicitor, and by the Attorneys General for their respective States as follows: *Ken Salazar* of Colorado, *Robert A. Butterworth* of Florida, *James E. Ryan* of Illinois, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Jennifer M. Granholm* of Michigan, *Mike Moore* of Mississippi, *Don Stenberg* of Nebraska, *John J. Farmer, Jr.*, of New Jersey, *Charles M. Condon* of South Carolina, and *Mark L. Earley* of Virginia; for the City of New York et al. by *Michael D. Hess*, *Leonard J. Koerner*, and *Edward F. X. Hart;* for the American Center for Law and Justice by *Jay Alan Sekulow*, *John P. Tuskey*, *Walter W. Weber*, *Colby M. May*, and *Vincent P. McCarthy;* for the Arizona Council for Academic Private Education et al. by *Edward McGlynn Gaffney, Jr.*, and *David J. Hessler;* for the AVI CHAI Foundation by *Nathan Lewin*, *Julia E. Guttman*, and *Jody Manier Kris;* for the Becket Fund for Religious Liberty by *Kevin J. Hasson* and *Eric W. Treene;* for the Catholic League for Religious and Civil Rights by *Robert P. George;* for the Knights of Columbus by *Kevin T. Baine* and *Emmet T. Flood;* for the United States Catholic Conference by *Mark E. Chopko*, *John A. Liekweg*, and *Jeffrey Hunter Moon;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *R. Shawn Gunnarson.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Drew S. Days III*, *Anthony M. Radice*, *Lev L. Dassin*, and *Laura R. Taichman;* for the Baptist Joint Committee on Public Affairs by *Melissa Rogers* and *J. Brent Walker;* for the Interfaith Religious Liberty Foundation et al. by *Derek Davis* and *Alan J. Reinach;* for the National Committee for Public Education and Religious Liberty et al. by *Marshall Beil* and *Philip Goldstein;* for the National Education

JUSTICE THOMAS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join.

As part of a longstanding school-aid program known as Chapter 2, the Federal Government distributes funds to state and local governmental agencies, which in turn lend educational materials and equipment to public and private schools, with the enrollment of each participating school determining the amount of aid that it receives. The question is whether Chapter 2, as applied in Jefferson Parish, Louisiana, is a law respecting an establishment of religion, because many of the private schools receiving Chapter 2 aid in that parish are religiously affiliated. We hold that Chapter 2 is not such a law.

I

A

Chapter 2 of the Education Consolidation and Improvement Act of 1981, Pub. L. 97–35, 95 Stat. 469, as amended, 20 U. S. C. §§ 7301–7373,[1] has its origins in the Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. 89–10, 79 Stat. 55, and is a close cousin of the provision of the ESEA

Association by *Robert H. Chanin*, *Jeremiah A. Collins*, and *Michael D. Simpson;* for the National Jewish Commission on Law and Public Affairs by *Dennis Rapps*, *David Zwiebel*, *Nathan Diament*, and *Nathan Lewin;* and for the National School Boards Association et al. by *Julie Underwood*, *Jay Worona*, and *Pilar Sokol.*

Briefs of *amici curiae* were filed for the Christian Legal Society et al. by *Steven T. McFarland*, *Samuel B. Casey*, and *Carl H. Esbeck;* for the Institute for Justice et al. by *William H. Mellor* and *Clint Bolick;* for the Pacific Legal Foundation by *Sharon L. Browne* and *Deborah J. La Fetra;* and for the Rutherford Institute by *John W. Whitehead* and *Steven H. Aden.*

[1] Chapter 2 is now technically Subchapter VI of Chapter 70 of 20 U. S. C., where it was codified by the Improving America's Schools Act of 1994, Pub. L. 103–382, 108 Stat. 3707. For convenience, we will use the term "Chapter 2," as the lower courts did. Prior to 1994, Chapter 2 was codified at 20 U. S. C. §§ 2911–2976 (1988 ed.).

that we recently considered in *Agostini* v. *Felton*, 521 U. S. 203 (1997). Like the provision at issue in *Agostini*, Chapter 2 channels federal funds to local educational agencies (LEA's), which are usually public school districts, via state educational agencies (SEA's), to implement programs to assist children in elementary and secondary schools. Among other things, Chapter 2 provides aid

> "for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials." 20 U. S. C. § 7351(b)(2).

LEA's and SEA's must offer assistance to both public and private schools (although any private school must be nonprofit). §§ 7312(a), 7372(a)(1). Participating private schools receive Chapter 2 aid based on the number of children enrolled in each school, see § 7372(a)(1), and allocations of Chapter 2 funds for those schools must generally be "equal (consistent with the number of children to be served) to expenditures for programs . . . for children enrolled in the public schools of the [LEA]," § 7372(b). LEA's must in all cases "assure equitable participation" of the children of private schools "in the purposes and benefits" of Chapter 2. § 7372(a)(1); see § 7372(b). Further, Chapter 2 funds may only "supplement and, to the extent practical, increase the level of funds that would . . . be made available from non-Federal sources." § 7371(b). LEA's and SEA's may not operate their programs "so as to supplant funds from non-Federal sources." *Ibid.*

Several restrictions apply to aid to private schools. Most significantly, the "services, materials, and equipment" provided to private schools must be "secular, neutral, and nonideological." § 7372(a)(1). In addition, private schools may not acquire control of Chapter 2 funds or title to Chapter 2

materials, equipment, or property. § 7372(c)(1). A private school receives the materials and equipment listed in § 7351(b)(2) by submitting to the LEA an application detailing which items the school seeks and how it will use them; the LEA, if it approves the application, purchases those items from the school's allocation of funds, and then lends them to that school.

In Jefferson Parish (the Louisiana governmental unit at issue in this case), as in Louisiana as a whole, private schools have primarily used their allocations for nonrecurring expenses, usually materials and equipment. In the 1986–1987 fiscal year, for example, 44% of the money budgeted for private schools in Jefferson Parish was spent by LEA's for acquiring library and media materials, and 48% for instructional equipment. Among the materials and equipment provided have been library books, computers, and computer software, and also slide and movie projectors, overhead projectors, television sets, tape recorders, VCR's, projection screens, laboratory equipment, maps, globes, filmstrips, slides, and cassette recordings.[2]

It appears that, in an average year, about 30% of Chapter 2 funds spent in Jefferson Parish are allocated for private schools. For the 1985–1986 fiscal year, 41 private schools participated in Chapter 2. For the following year, 46 participated, and the participation level has remained relatively constant since then. See App. 132a. Of these 46, 34 were Roman Catholic; 7 were otherwise religiously affiliated; and 5 were not religiously affiliated.

B

Respondents filed suit in December 1985, alleging, among other things, that Chapter 2, as applied in Jefferson Parish,

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[2] Congress in 1988 amended the section governing the sorts of materials and equipment available under Chapter 2. Compare 20 U. S. C. § 3832(1)(B) (1982 ed.) with § 7351(b)(2) (1994 ed.). The record in this case closed in 1989, and the effect of the amendment is not at issue.

violated the Establishment Clause of the First Amendment of the Federal Constitution. The case's tortuous history over the next 15 years indicates well the degree to which our Establishment Clause jurisprudence has shifted in recent times, while nevertheless retaining anomalies with which the lower courts have had to struggle.

In 1990, after extended discovery, Chief Judge Heebe of the District Court for the Eastern District of Louisiana granted summary judgment in favor of respondents. *Helms* v. *Cody*, Civ. A. No. 85–5533, 1990 WL 36124 (Mar. 27), App. to Pet. for Cert. 137a. He held that Chapter 2 violated the Establishment Clause because, under the second part of our three-part test in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971), the program had the primary effect of advancing religion. Chapter 2 had such effect, in his view, because the materials and equipment loaned to the Catholic schools were direct aid to those schools and because the Catholic schools were, he concluded after detailed inquiry into their doctrine and curriculum, "pervasively sectarian." App. to Pet. for Cert. 151a. Chief Judge Heebe relied primarily on *Meek* v. *Pittenger*, 421 U. S. 349 (1975), and *Wolman* v. *Walter*, 433 U. S. 229 (1977), in which we held unconstitutional programs that provided many of the same sorts of materials and equipment as does Chapter 2. In 1994, after having resolved the numerous other issues in the case, he issued an order permanently excluding pervasively sectarian schools in Jefferson Parish from receiving any Chapter 2 materials or equipment.

Two years later, Chief Judge Heebe having retired, Judge Livaudais received the case. Ruling in early 1997 on post-judgment motions, he reversed the decision of former Chief Judge Heebe and upheld Chapter 2, pointing to several significant changes in the legal landscape over the previous seven years. *Helms* v. *Cody*, 1997 WL 35283 (Jan. 28), App. to Pet. for Cert. 79a. In particular, Judge Livaudais cited our 1993 decision in *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1, in which we held that a State could, as part

of a federal program for the disabled, provide a sign-language interpreter to a deaf student at a Catholic high school.

Judge Livaudais also relied heavily on a 1995 decision of the Court of Appeals for the Ninth Circuit, *Walker* v. *San Francisco Unified School Dist.*, 46 F. 3d 1449, upholding Chapter 2 on facts that he found "virtually indistinguishable." The Ninth Circuit acknowledged in *Walker*, as Judge Heebe had in his 1990 summary judgment ruling, that *Meek* and *Wolman* appeared to erect a constitutional distinction between providing textbooks (permissible) and providing any other in-kind aid (impermissible). 46 F. 3d, at 1464–1465; see *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236 (1968) (upholding textbook program). The Court of Appeals viewed this distinction, however, as "thin" and "unmoored from any Establishment Clause principles," and, more importantly, as "rendered untenable" by subsequent cases, particularly *Zobrest.* 46 F. 3d, at 1465–1466. These cases, in the Ninth Circuit's view, revived the principle of *Allen* and of *Everson* v. *Board of Ed. of Ewing*,[3] that "state benefits provided to all citizens without regard to religion are constitutional." 46 F. 3d, at 1465. The Ninth Circuit also relied, *id.*, at 1467, on our observation in *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687 (1994), that "we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges," *id.*, at 704. The Ninth Circuit purported to distinguish *Meek* and *Wolman* based on the percentage of schools receiving aid that were parochial (a large percentage in those cases and a moderate percentage in *Walker*), 46 F. 3d, at 1468, but that court undermined this distinction when it observed that *Meek* also upheld "the massive provision of text-

[3] *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947) (upholding reimbursement to parents for costs of busing their children to public or private school).

books to parochial schools." 46 F. 3d, at 1468, n. 16. Thus, although the Ninth Circuit did not explicitly hold that *Meek* and *Wolman* were no longer good law, its reasoning seemed to require that conclusion.

Finally, in addition to relying on our decision in *Zobrest* and the Ninth Circuit's decision in *Walker*, Judge Livaudais invoked *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995), in which, a few months after *Walker*, we held that the Establishment Clause does not require a public university to exclude a student-run religious publication from assistance available to numerous other student-run publications.

Following Judge Livaudais' ruling, respondents appealed to the Court of Appeals for the Fifth Circuit. While that appeal was pending, we decided *Agostini*, in which we approved a program that, under Title I of the ESEA, provided public employees to teach remedial classes at private schools, including religious schools. In so holding, we overruled *Aguilar* v. *Felton*, 473 U. S. 402 (1985), and partially overruled *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373 (1985), both of which had involved such a program.

The Fifth Circuit thus faced a dilemma between, on the one hand, the Ninth Circuit's holding and analysis in *Walker* and our subsequent decisions in *Rosenberger* and *Agostini*, and, on the other hand, our holdings in *Meek* and *Wolman*. To resolve the dilemma, the Fifth Circuit abandoned any effort to find coherence in our case law or to divine the future course of our decisions and instead focused on our particular holdings. *Helms* v. *Picard*, 151 F. 3d 347, 371 (1998). It thought such an approach required not only by the lack of coherence but also by *Agostini*'s admonition to lower courts to abide by any applicable holding of this Court even though that holding might seem inconsistent with our subsequent decisions, see *Agostini*, 521 U. S., at 237. The Fifth Circuit acknowledged that *Agostini*, by recognizing our rejection of the rule that "all government aid that directly assists the

educational function of religious schools is invalid," *id.*, at 225, had rejected a premise of *Meek*, but that court nevertheless concluded that *Agostini* had neither directly overruled *Meek* and *Wolman* nor rejected their distinction between textbooks and other in-kind aid. The Fifth Circuit therefore concluded that *Meek* and *Wolman* controlled, and thus it held Chapter 2 unconstitutional. We granted certiorari. 527 U. S. 1002 (1999).

II

The Establishment Clause of the First Amendment dictates that "Congress shall make no law respecting an establishment of religion." In the over 50 years since *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947), we have consistently struggled to apply these simple words in the context of governmental aid to religious schools.[4] As we admitted in *Tilton* v. *Richardson*, 403 U. S. 672 (1971), "candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area." *Id.*, at 678 (plurality opinion); see *Lemon*, 403 U. S., at 671 (White, J., concurring in judgment).

In *Agostini*, however, we brought some clarity to our case law, by overruling two anomalous precedents (one in whole, the other in part) and by consolidating some of our previously disparate considerations under a revised test. Whereas in *Lemon* we had considered whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion, see 403 U. S., at 612–613, in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors, see 521 U. S., at 222–223. We acknowledged

[4] Cases prior to *Everson* discussed the issue only indirectly, see, *e. g.*, *Vidal* v. *Philadelphia*, 2 How. 127, 198–200 (1844); *Quick Bear* v. *Leupp*, 210 U. S. 50, 81 (1908), or evaluated aid to schools under other provisions of the Constitution, see *Cochran* v. *Louisiana Bd. of Ed.*, 281 U. S. 370, 374–375 (1930).

that our cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect. *Agostini, supra,* at 232–233. We also acknowledged that our cases had pared somewhat the factors that could justify a finding of excessive entanglement. 521 U. S., at 233–234. We then set out revised criteria for determining the effect of a statute:

> "To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.*, at 234.

In this case, our inquiry under *Agostini*'s purpose and effect test is a narrow one. Because respondents do not challenge the District Court's holding that Chapter 2 has a secular purpose, and because the Fifth Circuit also did not question that holding, cf. 151 F. 3d, at 369, n. 17, we will consider only Chapter 2's effect. Further, in determining that effect, we will consider only the first two *Agostini* criteria, since neither respondents nor the Fifth Circuit has questioned the District Court's holding, App. to Pet. for Cert. 108a, that Chapter 2 does not create an excessive entanglement. Considering Chapter 2 in light of our more recent case law, we conclude that it neither results in religious indoctrination by the government nor defines its recipients by reference to religion. We therefore hold that Chapter 2 is not a "law respecting an establishment of religion." In so holding, we acknowledge what both the Ninth and Fifth Circuits saw was inescapable—*Meek* and *Wolman* are anomalies in our case law. We therefore conclude that they are no longer good law.

A

As we indicated in *Agostini*, and have indicated elsewhere, the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action. See *Agostini*, *supra*, at 226 (presence of sign-language interpreter in Catholic school "'cannot be attributed to *state* decisionmaking'" (quoting *Zobrest*, 509 U. S., at 10) (emphasis added in *Agostini*)); 521 U. S., at 230 (question is whether "any use of [governmental] aid to indoctrinate religion could be attributed to the State"); see also *Rosenberger*, 515 U. S., at 841–842; *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481, 488–489 (1986); *Mueller* v. *Allen*, 463 U. S. 388, 397 (1983); cf. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 337 (1987) ("For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence"). We have also indicated that the answer to the question of indoctrination will resolve the question whether a program of educational aid "subsidizes" religion, as our religion cases use that term. See *Agostini*, 521 U. S., at 230–231; see also *id.*, at 230.

In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any par-

ticular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, see *Allen*, 392 U. S., at 245–247 (discussing dual secular and religious purposes of religious schools), then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. The government, in crafting such an aid program, has had to conclude that a given level of aid is necessary to further that purpose among secular recipients and has provided no more than that same level to religious recipients.

As a way of assuring neutrality, we have repeatedly considered whether any governmental aid that goes to a religious institution does so "only as a result of the genuinely independent and private choices of individuals." *Agostini*, *supra*, at 226 (internal quotation marks omitted). We have viewed as significant whether the "private choices of individual parents," as opposed to the "unmediated" will of government, *Ball*, 473 U. S., at 395, n. 13 (internal quotation marks omitted), determine what schools ultimately benefit from the governmental aid, and how much. For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment. Private choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program, see, *e. g.*, Gilder, The Revitalization of Everything: The Law of the Microcosm, Harv. Bus. Rev. 49 (Mar./Apr. 1988), and that could lead to a program inadvertently favoring one religion or favoring religious private schools in general over nonreligious ones.

The principles of neutrality and private choice, and their relationship to each other, were prominent not only in *Agos-*

tini, *supra*, at 225–226, 228, 230–232, but also in *Zobrest*, *Witters*, and *Mueller*.[5] The heart of our reasoning in *Zobrest*, upholding governmental provision of a sign-language interpreter to a deaf student at his Catholic high school, was as follows:

> "The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as 'disabled' under the [statute], without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the [statute] creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking." 509 U. S., at 10.

As this passage indicates, the private choices helped to ensure neutrality, and neutrality and private choices together eliminated any possible attribution to the government even when the interpreter translated classes on Catholic doctrine.

Witters and *Mueller* employed similar reasoning. In *Witters*, we held that the Establishment Clause did not bar a State from including within a neutral program providing tuition payments for vocational rehabilitation a blind person studying at a Christian college to become a pastor, missionary, or youth director. We explained:

> "Any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients. Washington's

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[5] JUSTICE O'CONNOR acknowledges that "neutrality is an important reason for upholding government-aid programs," one that our recent cases have "emphasized . . . repeatedly." *Post*, at 838 (opinion concurring in judgment).

> program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited and . . . creates no financial incentive for students to undertake sectarian education. . . . [T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.
>
> . . . . . .
>
> "[I]t does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a *state* action sponsoring or subsidizing religion." 474 U. S., at 487–488 (footnote, citations, and internal quotation marks omitted).[6]

Further, five Members of this Court, in separate opinions, emphasized both the importance of neutrality and of private choices, and the relationship between the two. See *id.*, at

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[6] The majority opinion also noted that only a small portion of the overall aid under the State's program would go to religious education, see *Witters*, 474 U. S., at 488, but it appears that five Members of the Court thought this point irrelevant. See *id.*, at 491, n. 3 (Powell, J., joined by Burger, C. J., and REHNQUIST, J., concurring) (citing *Mueller* v. *Allen*, 463 U. S. 388, 401 (1983), to assert that validity of program "does not depend on the fact that petitioner appears to be the only handicapped student who has sought to use his assistance to pursue religious training"); 474 U. S., at 490 (White, J., concurring) (agreeing with "most of Justice Powell's concurring opinion with respect to the relevance of *Mueller*," but not specifying further); *id.*, at 493 (O'CONNOR, J., concurring in part and concurring in judgment) (agreeing with Justice Powell's reliance on *Mueller* and explaining that the program did not have an impermissible effect, because it was neutral and involved private choice, and thus "[n]o reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief"). More recently, in *Agostini* v. *Felton*, 521 U. S. 203 (1997), we held that the proportion of aid benefiting students at religious schools pursuant to a neutral program involving private choices was irrelevant to the constitutional inquiry. *Id.*, at 229 (refusing "to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid"); see also *post*, at 848 (O'CONNOR, J., concurring in judgment) (quoting this passage).

490–491 (Powell, J., joined by Burger, C. J., and REHNQUIST, J., concurring); *id.*, at 493 (O'CONNOR, J., concurring in part and concurring in judgment); see also *id.*, at 490 (White, J., concurring).

The tax deduction for educational expenses that we upheld in *Mueller* was, in these respects, the same as the tuition grant in *Witters*. We upheld it chiefly because it "neutrally provides state assistance to a broad spectrum of citizens," 463 U. S., at 398–399, and because "numerous, private choices of individual parents of school-age children," *id.*, at 399, determined which schools would benefit from the deductions. We explained that "[w]here, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Ibid.* (citation omitted); see *id.*, at 397 (neutrality indicates lack of state *imprimatur*).

Agostini's second primary criterion for determining the effect of governmental aid is closely related to the first. The second criterion requires a court to consider whether an aid program "define[s] its recipients by reference to religion." 521 U. S., at 234. As we briefly explained in *Agostini*, *id.*, at 230–231, this second criterion looks to the same set of facts as does our focus, under the first criterion, on neutrality, see *id.*, at 225–226, but the second criterion uses those facts to answer a somewhat different question—whether the criteria for allocating the aid "creat[e] a financial incentive to undertake religious indoctrination," *id.*, at 231. In *Agostini* we set out the following rule for answering this question:

> "This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion." *Ibid.*

The cases on which *Agostini* relied for this rule, and *Agostini* itself, make clear the close relationship between this rule, incentives, and private choice. For to say that a program does not create an incentive to choose religious schools is to say that the private choice is truly "independent," *Witters*, 474 U. S., at 487. See *Agostini*, *supra*, at 232 (holding that Title I did not create any impermissible incentive, because its services were "available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school"); *Zobrest*, 509 U. S., at 10 (discussing, in successive sentences, neutrality, private choice, and financial incentives, respectively); *Witters*, *supra*, at 488 (similar). When such an incentive does exist, there is a greater risk that one could attribute to the government any indoctrination by the religious schools. See *Zobrest*, *supra*, at 10.

We hasten to add, what should be obvious from the rule itself, that simply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does not mean that the program, by reducing the cost of securing a religious education, creates, under *Agostini*'s second criterion, an "incentive" for parents to choose such an education for their children. For *any* aid will have some such effect. See *Allen*, 392 U. S., at 244; *Everson*, 330 U. S., at 17; see also *Mueller*, 463 U. S., at 399.

B

Respondents inexplicably make no effort to address Chapter 2 under the *Agostini* test. Instead, dismissing *Agostini* as factually distinguishable, they offer two rules that they contend should govern our determination of whether Chapter 2 has the effect of advancing religion. They argue first, and chiefly, that "direct, nonincidental" aid to the primary educational mission of religious schools is always impermissible. Second, they argue that provision to religious schools of aid that is divertible to religious use is similarly impermis-

sible.[7] Respondents' arguments are inconsistent with our more recent case law, in particular *Agostini* and *Zobrest*, and we therefore reject them.

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Although some of our earlier cases, particularly *Ball*, 473 U. S., at 393–394, did emphasize the distinction between direct and indirect aid, the purpose of this distinction was

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[7] Respondents also contend that Chapter 2 aid supplants, rather than supplements, the core educational function of parochial schools and therefore has the effect of furthering religion. Our case law does provide some indication that this distinction may be relevant to determining whether aid results in governmental indoctrination, see *Agostini*, 521 U. S., at 228–229; *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1, 12 (1993); but see *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 396 (1985), but we have never delineated the distinction's contours or held that it is constitutionally required.

Nor, to the extent that the supplement/supplant line is separable from respondents' direct/indirect and "no divertibility" arguments, do we need to resolve the distinction's constitutional status today, for, as we have already noted, Chapter 2 itself requires that aid may only be supplemental. 20 U. S. C. § 7371(b). See also *post*, at 867 (O'CONNOR, J., concurring in judgment) (declining to decide whether supplement/supplant distinction is a constitutional requirement); but see *post*, at 852 (explaining that computers are "necessary" to "the educational process"). We presume that whether a parish has complied with that statutory requirement would be, at the very least, relevant to whether a violation of any constitutional supplement/supplant requirement has occurred, yet we have no reason to believe that there has been any material statutory violation. A statewide review by the Louisiana SEA indicated that § 7371(b) receives nearly universal compliance. App. 112a. More importantly, neither the District Court nor the Fifth Circuit even hinted that Jefferson Parish had violated § 7371(b), and respondents barely mention the statute in their brief to this Court, offering only the slimmest evidence of any possible violation, see *id.*, at 63a. Respondents argue that any Chapter 2 aid that a school uses to comply with state requirements (such as those relating to computers and libraries) necessarily violates whatever supplement/supplant line may exist in the Constitution, but our decision in *Committee for Public Ed. and Religious Liberty* v. *Regan*, 444 U. S. 646 (1980), upholding reimbursement to parochial schools of costs relating to state-mandated testing, rejects any such blanket rule.

merely to prevent "subsidization" of religion, see *id.*, at 394. As even the dissent all but admits, see *post*, at 889 (opinion of SOUTER, J.), our more recent cases address this purpose not through the direct/indirect distinction but rather through the principle of private choice, as incorporated in the first *Agostini* criterion (*i. e.*, whether any indoctrination could be attributed to the government). If aid to schools, even "direct aid," is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any "support of religion," *Witters*, *supra*, at 489. See *supra*, at 810. Although the presence of private choice is easier to see when aid literally passes through the hands of individuals—which is why we have mentioned directness in the same breath with private choice, see, *e. g.*, *Agostini*, 521 U. S., at 226; *Witters*, *supra*, at 487; *Mueller*, *supra*, at 399—there is no reason why the Establishment Clause requires such a form.

Indeed, *Agostini* expressly rejected the absolute line that respondents would have us draw. We there explained that "we have departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid." 521 U. S., at 225. *Agostini* relied primarily on *Witters* for this conclusion and made clear that private choice and neutrality would resolve the concerns formerly addressed by the rule in *Ball*. It was undeniable in *Witters* that the aid (tuition) would ultimately go to the Inland Empire School of the Bible and would support religious education. We viewed this arrangement, however, as no different from a government issuing a paycheck to one of its employees knowing that the employee would direct the funds to a religious institution. Both arrangements would be valid, for the same reason: "[A]ny money that ultimately went to religious institutions did so 'only as a result of the genuinely independent and private choices of' individuals."

Agostini, *supra*, at 226 (quoting *Witters*, 474 U. S., at 487). In addition, the program in *Witters* was neutral. 521 U. S., at 225 (quoting *Witters*, *supra*, at 487).

As *Agostini* explained, the same reasoning was at work in *Zobrest*, where we allowed the government-funded interpreter to provide assistance at a Catholic school, "even though she would be a mouthpiece for religious instruction," because the interpreter was provided according to neutral eligibility criteria and private choice. 521 U. S., at 226. Therefore, the religious messages interpreted by the interpreter could not be attributed to the government, see *ibid.* (We saw no difference in *Zobrest* between the government hiring the interpreter directly and the government providing funds to the parents who then would hire the interpreter. 509 U. S., at 13, n. 11.) We rejected the dissent's objection that we had never before allowed "a public employee to participate directly in religious indoctrination." See *id.*, at 18 (opinion of Blackmun, J.). Finally, in *Agostini* itself, we used the reasoning of *Witters* and *Zobrest* to conclude that remedial classes provided under Title I of the ESEA by public employees did not impermissibly finance religious indoctrination. 521 U. S., at 228; see *id.*, at 230–232. We found it insignificant that students did not have to directly apply for Title I services, that Title I instruction was provided to students in groups rather than individually, and that instruction was provided in the facilities of the private schools. *Id.*, at 226–229.

To the extent that respondents intend their direct/indirect distinction to require that any aid be literally placed in the hands of schoolchildren rather than given directly to the school for teaching those same children, the very cases on which respondents most rely, *Meek* and *Wolman*, demonstrate the irrelevance of such formalism. In *Meek*, we justified our rejection of a program that loaned instructional materials and equipment by, among other things, pointing out that the aid was loaned to the schools, and thus was "direct

aid." 421 U. S., at 362–363. The materials-and-equipment program in *Wolman* was essentially identical, except that the State, in an effort to comply with *Meek*, see *Wolman*, 433 U. S., at 233, 250, loaned the aid to the students. (The revised program operated much like the one we upheld in *Allen*. Compare *Wolman*, *supra*, at 248, with *Allen*, 392 U. S., at 243–245.) Yet we dismissed as "technical" the difference between the two programs: "[I]t would exalt form over substance if this distinction were found to justify a result different from that in *Meek*." 433 U. S., at 250. *Wolman* thus, although purporting to reaffirm *Meek*, actually undermined that decision, as is evident from the similarity between the reasoning of *Wolman* and that of the *Meek* dissent. Compare *Wolman*, *supra*, at 250 (The "technical change in legal bailee" was irrelevant), with *Meek*, *supra*, at 391 (REHNQUIST, J., concurring in judgment in part and dissenting in part) ("Nor can the fact that the school is the bailee be regarded as constitutionally determinative"). That *Meek* and *Wolman* reached the same result, on programs that were indistinguishable but for the direct/indirect distinction, shows that that distinction played no part in *Meek*.

Further, respondents' formalistic line breaks down in the application to real-world programs. In *Allen*, for example, although we did recognize that students themselves received and owned the textbooks, we also noted that the books provided were those that the private schools required for courses, that the schools could collect students' requests for books and submit them to the board of education, that the schools could store the textbooks, and that the textbooks were essential to the schools' teaching of secular subjects. See 392 U. S., at 243–245. Whether one chooses to label this program "direct" or "indirect" is a rather arbitrary choice, one that does not further the constitutional analysis.

Of course, we have seen "special Establishment Clause dangers," *Rosenberger*, 515 U. S., at 842, when *money* is

given to religious schools or entities directly rather than, as in *Witters* and *Mueller*, indirectly. See 515 U. S., at 842 (collecting cases); *id.*, at 846–847 (O'CONNOR, J., concurring); see also *Bowen* v. *Kendrick*, 487 U. S. 589, 608–609 (1988); compare *Committee for Public Ed. and Religious Liberty* v. *Regan*, 444 U. S. 646 (1980), with *Levitt* v. *Committee for Public Ed. & Religious Liberty*, 413 U. S. 472 (1973).[8] But

[8] The reason for such concern is not that the form *per se* is bad, but that such a form creates special risks that governmental aid will have the effect of advancing religion (or, even more, a purpose of doing so). An indirect form of payment reduces these risks. See *Mueller*, 463 U. S., at 399 (neutral tax deduction, because of its indirect form, allowed economic benefit to religious schools only as result of private choice and thus did not suggest state sanction of schools' religious messages). It is arguable, however, at least after *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481 (1986), that the principles of neutrality and private choice would be adequate to address those special risks, for it is hard to see the basis for deciding *Witters* differently simply if the State had sent the tuition check directly to whichever school Witters chose to attend. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 848 (1995) (O'CONNOR, J., concurring) (explaining *Witters* as reconciling principle of neutrality with principle against public funding of religious messages by relying on principle of private choice). Similarly, we doubt it would be unconstitutional if, to modify *Witters*' hypothetical, see 474 U. S., at 486–487; *supra*, at 816, a government employer directly sent a portion of an employee's paycheck to a religious institution designated by that employee pursuant to a neutral charitable program. We approved a similar arrangement in *Quick Bear*, 210 U. S., at 77–82, and the Federal Government appears to have long had such a program, see 1999 Catalog of Caring: Combined Federal Campaign of the National Capital Area 44, 45, 59, 74–75 (listing numerous religious organizations, many of which engage in religious education or in proselytizing, to which federal employees may contribute via payroll deductions); see generally *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788 (1985) (discussing Combined Federal Campaign). Finally, at least some of our prior cases striking down direct payments involved serious concerns about whether the payments were truly neutral. See, *e. g.*, *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 762–764, 768, 774–780 (1973) (striking down, by 8-to-1 vote, program providing direct grants for maintenance and repair of school facilities, where payments were allocated per-pupil but were only

direct payments of money are not at issue in this case, and we refuse to allow a "special" case to create a rule for all cases.

2

Respondents also contend that the Establishment Clause requires that aid to religious schools not be impermissibly religious in nature or be divertible to religious use. We agree with the first part of this argument but not the second. Respondents' "no divertibility" rule is inconsistent with our more recent case law and is unworkable. So long as the governmental aid is not itself "unsuitable for use in the public schools because of religious content," *Allen*, *supra*, at 245, and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern. And, of course, the use to which the aid is put does not affect the criteria governing the aid's allocation and thus does not create any impermissible incentive under *Agostini*'s second criterion.

Our recent precedents, particularly *Zobrest*, require us to reject respondents' argument. For *Zobrest* gave no consideration to divertibility or even to actual diversion. Had such things mattered to the Court in *Zobrest*, we would have found the case to be quite easy—for *striking down* rather than, as we did, upholding the program—which is just how the dissent saw the case. See, *e. g.*, 509 U. S., at 18 (Blackmun, J., dissenting) ("Until now, the Court never has authorized a public employee to participate directly in religious indoctrination"); *id.*, at 22 ("[G]overnment crosses the boundary when it furnishes the medium for communication of a religious message. . . . [A] state-employed sign-language interpreter would serve as the conduit for James' religious education, thereby assisting Salpointe [High School] in its mission of religious indoctrination"); *id.*, at 23 (interpreter

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available to private, nonprofit schools in low-income areas, "'all or practically all'" of which were Catholic). *Id.*, at 768.

"is likely to place the *imprimatur* of governmental approval upon the favored religion"); see generally *id.*, at 18–23. Quite clearly, then, we did not, as respondents do, think that the *use* of governmental aid to further religious indoctrination was synonymous with religious indoctrination *by* the government or that such use of aid created any improper incentives.

Similarly, had we, in *Witters*, been concerned with divertibility or diversion, we would have unhesitatingly, perhaps summarily, struck down the tuition-reimbursement program, because it was certain that Witters sought to participate in it to acquire an education in a religious career from a sectarian institution. Diversion was guaranteed. *Mueller* took the same view as *Zobrest* and *Witters*, for we did not in *Mueller* require the State to show that the tax deductions were only for the costs of education in secular subjects. We declined to impose any such segregation requirement for either the tuition-expense deductions or the deductions for items strikingly similar to those at issue in *Meek* and *Wolman*, and here. See *Mueller*, 463 U. S., at 391, n. 2; see also *id.*, at 414 (Marshall, J., dissenting) ("The instructional materials which are subsidized by the Minnesota tax deduction plainly may be used to inculcate religious values and belief").

JUSTICE O'CONNOR acknowledges that the Court in *Zobrest* and *Witters* approved programs that involved actual diversion. See *post*, at 841 (opinion concurring in judgment). The dissent likewise does not deny that *Witters* involved actual diversion. See *post*, at 895–896, n. 16. The dissent does claim that the aid in *Zobrest* "was not considered divertible," *post*, at 895, n. 16, but the dissent in *Zobrest*, which the author of today's dissent joined, understood the case otherwise. See *supra*, at 820. As that dissent made clear, diversion is the use of government aid to further a religious message. See *Zobrest*, *supra*, at 21–22 (Blackmun, J., dissenting); see also *post*, at 842, 857 (O'CONNOR, J., concurring in judgment). By that definition, the

government-provided interpreter in *Zobrest* was not only divertible, but actually diverted.

Respondents appear to rely on *Meek* and *Wolman* to establish their rule against "divertible" aid. But those cases offer little, if any, support for respondents. *Meek* mentioned divertibility only briefly in a concluding footnote, see 421 U. S., at 366, n. 16, and that mention was, at most, peripheral to the Court's reasoning in striking down the lending of instructional materials and equipment. The aid program in *Wolman* explicitly barred divertible aid, 433 U. S., at 248–249, so a concern for divertibility could not have been part of our reason for finding that program invalid.

The issue is not divertibility of aid but rather whether the aid itself has an impermissible content. Where the aid would be suitable for use in a public school, it is also suitable for use in any private school. Similarly, the prohibition against the government providing impermissible content resolves the Establishment Clause concerns that exist if aid is actually diverted to religious uses.[9] In *Agostini*, we explained *Zobrest* by making just this distinction between the content of aid and the use of that aid: "Because the only *government* aid in *Zobrest* was the interpreter, who was *herself not inculcating* any religious messages, no *government* indoctrination took place." 521 U. S., at 224 (second emphasis added). *Agostini* also acknowledged that what the dissenters in *Zobrest* had charged was essentially true: *Zobrest* did effect a "shift . . . in our Establishment Clause law." 521 U. S., at 225. The interpreter herself, assuming that she

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[9] The dissent would find an establishment of religion if a government-provided projector were used in a religious school to show a privately purchased religious film, even though a public school that possessed the same kind of projector would likely be constitutionally barred from *refusing* to allow a student bible club to use that projector in a classroom to show the very same film, where the classrooms and projectors were generally available to student groups. See *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993).

fulfilled her assigned duties, see *id.*, at 224–225, had "no inherent religious significance," *Allen*, 392 U. S., at 244 (discussing bus rides in *Everson*), and so it did not matter (given the neutrality and private choice involved in the program) that she "would be a mouthpiece for religious instruction," *Agostini*, *supra*, at 226 (discussing *Zobrest*). And just as a government interpreter does not herself inculcate a religious message—even when she is conveying one—so also a government computer or overhead projector does not itself inculcate a religious message, even when it is conveying one.

In *Agostini* itself, we approved the provision of public employees to teach secular remedial classes in private schools partly because we concluded that there was no reason to suspect that indoctrinating content would be part of such governmental aid. See 521 U. S., at 223–225, 226–227, 234–235. Relying on *Zobrest*, we refused to presume that the public teachers would " 'inject religious content' " into their classes, 521 U. S., at 225, especially given certain safeguards that existed; we also saw no evidence that they had done so, *id.*, at 226–227.

In *Allen* we similarly focused on content, emphasizing that the textbooks were preapproved by public school authorities and were not "unsuitable for use in the public schools because of religious content." 392 U. S., at 245. See *Lemon*, 403 U. S., at 617 ("We note that the dissenters in *Allen* seemed chiefly concerned with the pragmatic difficulties involved in *ensuring the truly secular content* of the textbooks" (emphasis added)). Although it might appear that a book, because it has a pre-existing content, is not divertible, and thus that lack of divertibility motivated our holding in *Allen*, it is hard to imagine any book that could not, in even moderately skilled hands, serve to illustrate a religious message.[10] *Post*, at 855 (O'CONNOR, J., concurring in judgment)

[10] Although we did, elsewhere in *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236 (1968), observe, in response to a party's argument, that there was no evidence that the schools were using secular text-

(agreeing with this point). Indeed, the plaintiffs in *Walker* essentially conceded as much. 46 F. 3d, at 1469, n. 17. A teacher could, for example, easily use Shakespeare's King Lear, even though set in pagan times, to illustrate the Fourth Commandment. See Exodus 20:12 ("Honor your father and your mother"). Thus, it is a non sequitur for the dissent to contend that the textbooks in *Allen* were "not readily divertible to religious teaching purposes" because they "had a known and fixed secular content." *Post*, at 893–894.

A concern for divertibility, as opposed to improper content, is misplaced not only because it fails to explain why the sort of aid that we have allowed is permissible, but also because it is boundless—enveloping all aid, no matter how trivial—and thus has only the most attenuated (if any) link to any realistic concern for preventing an "establishment of religion." Presumably, for example, government-provided lecterns, chalk, crayons, pens, paper, and paintbrushes would have to be excluded from religious schools under respondents' proposed rule. But we fail to see how indoctrination by means of (*i. e.*, diversion of) such aid could be attributed to the government. In fact, the risk of improper attribution is *less* when the aid *lacks* content, for there is no risk (as there is with books) of the government inadvertently providing improper content. See *Allen*, *supra*, at 255–262 (Douglas, J., dissenting). Finally, *any* aid, with or without content, is "divertible" in the sense that it allows schools to "divert" resources. Yet we have "'not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.'" *Regan*, 444 U. S., at 658 (quoting *Hunt* v. *McNair*, 413 U. S. 734, 743 (1973)).

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books to somehow further religious instruction, see *id.*, at 248, we had no occasion to say what the consequence would be were such use occurring and, more importantly, we think that this brief concluding comment cannot be read, especially after *Zobrest* (not to mention *Witters*, *Mueller*, and *Agostini*) as essential to the reasoning of *Allen*.

It is perhaps conceivable that courts could take upon themselves the task of distinguishing among the myriad kinds of possible aid based on the ease of diverting each kind. But it escapes us how a court might coherently draw any such line. It not only is far more workable, but also is actually related to real concerns about preventing advancement of religion by government, simply to require, as did *Zobrest*, *Agostini*, and *Allen*, that a program of aid to schools not provide improper content and that it determine eligibility and allocate the aid on a permissible basis.[11]

C

The dissent serves up a smorgasbord of 11 factors that, depending on the facts of each case "in all its particularity," *post*, at 877, could be relevant to the constitutionality of a school-aid program. And those 11 are a bare minimum. We are reassured that there are likely more.[12] See *post*, at 885, 888. Presumably they will be revealed in future cases, as needed, but at least one additional factor is evident from the dissent itself: The dissent resurrects the concern for political divisiveness that once occupied the Court but that post-*Aguilar* cases have rightly disregarded. Compare *post*, at 868, 872, 901, 902, 909, n. 27, with *Agostini*, 521 U. S., at 233–234; *Bowen*, 487 U. S., at 617, n. 14; *Amos*, 483 U. S., at 339–340, n. 17. As JUSTICE O'CONNOR explained in dissent in *Aguilar:* "It is curious indeed to base our interpretation of the Constitution on speculation as to the likelihood of a phenomenon which the parties may create merely by

[11] JUSTICE O'CONNOR agrees that the Constitution does not bar divertible aid. See *post*, at 857 (opinion concurring in judgment). She also finds actual diversion unproblematic if "true private-choice" directs the aid. See *post*, at 842. And even when there is not such private choice, she thinks that some amount of actual diversion is tolerable and that safeguards for preventing and detecting actual diversion may be minimal, as we explain further, *infra*, at 832–834.

[12] It is thus surprising for the dissent to accuse us of following a rule of "breathtaking . . . manipulability." *Post*, at 901, n. 19.

prosecuting a lawsuit." 473 U. S., at 429. While the dissent delights in the perverse chaos that all these factors produce, *post*, at 899; see also *post*, at 869, 885, the Constitution becomes unnecessarily clouded, and legislators, litigants, and lower courts groan, as the history of this case amply demonstrates. See Part I–B, *supra*.

One of the dissent's factors deserves special mention: whether a school that receives aid (or whose students receive aid) is pervasively sectarian. The dissent is correct that there was a period when this factor mattered, particularly if the pervasively sectarian school was a primary or secondary school. *Post*, at 885–887, 894, 898, 902–906. But that period is one that the Court should regret, and it is thankfully long past.

There are numerous reasons to formally dispense with this factor. First, its relevance in our precedents is in sharp decline. Although our case law has consistently mentioned it even in recent years, we have not struck down an aid program in reliance on this factor since 1985, in *Aguilar* and *Ball*. *Agostini* of course overruled *Aguilar* in full and *Ball* in part, and today JUSTICE O'CONNOR distances herself from the part of *Ball* with which she previously agreed, by rejecting the distinction between public and private employees that was so prominent in *Agostini*. Compare *post*, at 858–860, 863–864 (opinion concurring in judgment), with *Agostini*, *supra*, at 223–225, 234–235. In *Witters*, a year after *Aguilar* and *Ball*, we did not ask whether the Inland Empire School of the Bible was pervasively sectarian. In *Bowen*, a 1988 decision, we refused to find facially invalid an aid program (although one not involving schools) whose recipients had, the District Court found, included pervasively sectarian institutions. See 487 U. S., at 636, 647, 648 (Blackmun, J., dissenting). Although we left it open on remand for the District Court to reaffirm its prior finding, we took pains to emphasize the narrowness of the "pervasively sectarian" category, see *id.*, at 620–621 (opinion of the Court), and two

Members of the majority questioned whether this category was "well-founded," *id.*, at 624 (KENNEDY, J., joined by SCALIA, J., concurring). Then, in *Zobrest* and *Agostini*, we upheld aid programs to children who attended schools that were not only pervasively sectarian but also were primary and secondary. *Zobrest*, in turning away a challenge based on the pervasively sectarian nature of Salpointe Catholic High School, emphasized the presence of private choice and the absence of government-provided sectarian content. 509 U. S., at 13. *Agostini*, in explaining why the aid program was constitutional, did not bother to mention that pervasively sectarian schools were at issue,[13] see 521 U. S., at 226–235, a fact that was not lost on the dissent, see *id.*, at 249 (opinion of SOUTER, J.). In disregarding the nature of the school, *Zobrest* and *Agostini* were merely returning to the approach of *Everson* and *Allen*, in which the Court upheld aid programs to students at pervasively sectarian schools. See *post*, at 875, 885–886 (SOUTER, J., dissenting) (noting this fact regarding *Everson*); *Allen*, 392 U. S., at 251–252 (Black, J., dissenting); *id.*, at 262–264, 269–270, n. (Douglas, J., dissenting).

Second, the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose. See *supra*, at 810. If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be. The pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole

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[13] Nor does JUSTICE O'CONNOR do so today in her analysis of Jefferson Parish's Chapter 2 program.

of their lives, or who make the mistake of being effective in transmitting their views to children.

Third, the inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs. See *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 887 (1990) (collecting cases). Yet that is just what this factor requires, as was evident before the District Court. Although the dissent welcomes such probing, see *post*, at 904–906, we find it profoundly troubling. In addition, and related, the application of the "pervasively sectarian" factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *Widmar* v. *Vincent*, 454 U. S. 263 (1981).

Finally, hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. Cf. *Chicago* v. *Morales*, 527 U. S. 41, 53–54, n. 20 (1999) (plurality opinion). Although the dissent professes concern for "the implied exclusion of the less favored," *post*, at 868, the exclusion of pervasively sectarian schools from government-aid programs is just that, particularly given the history of such exclusion. Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." See generally Green, The Blaine Amendment Reconsidered, 36 Am. J. Legal Hist. 38 (1992).

Notwithstanding its history, of course, "sectarian" could, on its face, describe the school of any religious sect, but the Court eliminated this possibility of confusion when, in *Hunt* v. *McNair*, 413 U. S., at 743, it coined the term "pervasively sectarian"—a term which, at that time, could be applied almost exclusively to Catholic parochial schools and which even today's dissent exemplifies chiefly by reference to such schools. See *post*, at 886, 904–906 (opinion of SOUTER, J.).

In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.

III

Applying the two relevant *Agostini* criteria, we see no basis for concluding that Jefferson Parish's Chapter 2 program "has the effect of advancing religion." *Agostini*, *supra*, at 234. Chapter 2 does not result in governmental indoctrination, because it determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents of schoolchildren, and does not provide aid that has an impermissible content. Nor does Chapter 2 define its recipients by reference to religion.

Taking the second criterion first, it is clear that Chapter 2 aid "is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U. S., at 231. Aid is allocated based on enrollment: "Private schools receive Chapter 2 materials and equipment based on the per capita number of students at each school," *Walker*, 46 F. 3d, at 1464, and allocations to private schools must "be equal (consistent with the number of children to be served) to expenditures for programs under this subchapter for children enrolled in the public schools of the [LEA]," 20 U. S. C. § 7372(b). LEA's must provide Chapter 2 materials and equipment for the benefit

of children in private schools "[t]o the extent consistent with the number of children in the school district of [an LEA] . . . who are enrolled in private nonprofit elementary and secondary schools." § 7372(a)(1). See App. to Pet. for Cert. 87a (District Court, recounting testimony of head of Louisiana's Chapter 2 program that LEA's are told that "'for every dollar you spend for the public school student, you spend the same dollar for the non-public school student'"); §§ 7372(a)(1) and (b) (children in private schools must receive "equitable participation"). The allocation criteria therefore create no improper incentive. Chapter 2 does, by statute, deviate from a pure per capita basis for allocating aid to LEA's, increasing the per-pupil allocation based on the number of children within an LEA who are from poor families, reside in poor areas, or reside in rural areas. §§ 7312(a)–(b). But respondents have not contended, nor do we have any reason to think, that this deviation in the allocation *to* the LEA's leads to deviation in the allocation among schools *within* each LEA, see §§ 7372(a)–(b), and, even if it did, we would not presume that such a deviation created any incentive one way or the other with regard to religion.

Chapter 2 also satisfies the first *Agostini* criterion. The program makes a broad array of schools eligible for aid without regard to their religious affiliations or lack thereof. § 7372; see § 7353(a)(3). We therefore have no difficulty concluding that Chapter 2 is neutral with regard to religion. See *Agostini*, *supra*, at 225–226. Chapter 2 aid also, like the aid in *Agostini*, *Zobrest*, and *Witters*, reaches participating schools only "as a consequence of private decisionmaking." *Agostini*, *supra*, at 222. Private decisionmaking controls because of the per capita allocation scheme, and those decisions are independent because of the program's neutrality. See 521 U. S., at 226. It is the students and their parents—not the government—who, through their choice of school, determine who receives Chapter 2 funds. The aid follows the child.

Because Chapter 2 aid is provided pursuant to private choices, it is not problematic that one could fairly describe Chapter 2 as providing "direct" aid. The materials and equipment provided under Chapter 2 are presumably used from time to time by entire classes rather than by individual students (although individual students are likely the chief consumers of library books and, perhaps, of computers and computer software), and students themselves do not need to apply for Chapter 2 aid in order for their schools to receive it, but, as we explained in *Agostini*, these traits are not constitutionally significant or meaningful. See *id.*, at 228–229. Nor, for reasons we have already explained, is it of constitutional significance that the schools themselves, rather than the students, are the bailees of the Chapter 2 aid. The ultimate beneficiaries of Chapter 2 aid are the students who attend the schools that receive that aid, and this is so regardless of whether individual students lug computers to school each day or, as Jefferson Parish has more sensibly provided, the schools receive the computers. Like the Ninth Circuit, and unlike the dissent, *post*, at 888, we "see little difference in loaning science kits to students who then bring the kits to school as opposed to loaning science kits to the school directly." *Walker*, *supra*, at 1468, n. 16; see *Allen*, 392 U. S., at 244, n. 6.

Finally, Chapter 2 satisfies the first *Agostini* criterion because it does not provide to religious schools aid that has an impermissible content. The statute explicitly bars anything of the sort, providing that all Chapter 2 aid for the benefit of children in private schools shall be "secular, neutral, and nonideological," § 7372(a)(1), and the record indicates that the Louisiana SEA and the Jefferson Parish LEA have faithfully enforced this requirement insofar as relevant to this case. The chief aid at issue is computers, computer software, and library books. The computers presumably have no preexisting content, or at least none that would be impermissible for use in public schools. Respondents do not contend

otherwise. Respondents also offer no evidence that religious schools have received software from the government that has an impermissible content.

There is evidence that equipment has been, or at least easily could be, diverted for use in religious classes. See, *e. g.*, App. 108a, 118a, 205a–207a. JUSTICE O'CONNOR, however, finds the safeguards against diversion adequate to prevent and detect actual diversion. *Post*, at 861, 867 (opinion concurring in judgment). The safeguards on which she relies reduce to three: (1) signed assurances that Chapter 2 aid will be used only for secular, neutral, and nonideological purposes, (2) monitoring visits, and (3) the requirement that equipment be labeled as belonging to Chapter 2.[14] As to the first, JUSTICE O'CONNOR rightly places little reliance on it. *Post*, at 862. As to the second, monitoring by SEA and LEA officials is highly unlikely to prevent or catch diversion.[15] As to the third, compliance with the labeling re-

[14] Many of the other safeguards on which JUSTICE O'CONNOR relies are safeguards against improper content, not against diversion. See *post*, at 862, 863 (opinion concurring in judgment). Content is a different matter from diversion and is much easier to police than is the mutable use of materials and equipment (which is one reason that we find the safeguards against improper content adequate, *infra*, at 834–835). Similarly, the statutory provisions against supplanting nonfederal funds and against paying federal funds for religious worship or instruction, on which JUSTICE O'CONNOR also relies, *post*, at 861, are of little, if any, relevance to diversion—the former because diversion need not supplant, and the latter because religious schools receive no funds, 20 U. S. C. § 7372(c)(1).

[15] The SEA director acknowledged as much when he said that the SEA enforces the rule against diversion "as best we can," only visits "[o]ne or two" of the private schools whenever it reviews an LEA, and reviews each LEA only once every three years. App. 94a–95a. When asked whether there was "any way" for SEA officials to know of diversion of a Chapter 2 computer, he responded, "No, there is no way." *Id.*, at 118a.

Monitoring by the Jefferson Parish LEA is similarly ineffective. The LEA visits each private school only once a year, for less than an hour and a half, and alerts the school to the visit in advance. *Id.*, at 142a, 151a–152a, 182a–183a. The monitoring visits consist of reviewing records of equipment use and of speaking to a single contact person. Self-reporting is the sole source for the records of use. *Id.*, at 140a. In the case of overhead

quirement is haphazard, see App. 113a, and, even if the requirement were followed, we fail to see how a label prevents diversion.[16] In addition, we agree with the dissent that there is evidence of actual diversion and that, were the safeguards anything other than anemic, there would almost certainly be more such evidence. See *post*, at 903, 906–910.[17] In any event, for reasons we discussed in Part II–B–2,

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projectors, the record appears to be just a sign-out sheet, and the LEA official simply checks whether "the recordation of use is attempted." *Id.*, at 143a. The contact person is not a teacher; monitoring does not include speaking with teachers; and the LEA makes no effort to inform teachers of the restrictions on use of Chapter 2 equipment. *Id.*, at 154a–155a. The contact person also is usually not involved with the computers. *Id.*, at 163a. Thus, the contact person is uninvolved in the actual use of the divertible equipment and, therefore, in no position to know whether diversion has occurred. See *id.*, at 154a. Unsurprisingly, then, no contact person has ever reported diversion. *Id.*, at 147a. (In *Agostini*, by contrast, monitors visited each classroom—unannounced—once a month, and the teachers received specific training in what activities were permitted. 521 U. S., at 211–212, 234.) The head of the Jefferson Parish LEA admitted that she had, and could have, no idea whether Chapter 2 equipment was being diverted:

"Q: Would there be any way to ascertain, from this on-site visit, whether the material or equipment purchased are used not only in accordance with Chapter 2 plan submitted, but for other purposes, also?

"A: No.

"Q: Now, would it be your view that a church-affiliated school that would teach the creation concept of the origin of man, that if they used [a Chapter 2] overhead projector, that would be a violation . . . ?

"A: Yes.

"Q: Now, is there any way, do you ever ask that question of a church-affiliated school, as to whether they use it for that purpose?

"A: No." App. 144a, 150a–151a.

See *id.*, at 139a, 145a, 146a–147a (similar).

[16] In fact, a label, by associating the government with any religious use of the equipment, exacerbates any Establishment Clause problem that might exist when diversion occurs.

[17] JUSTICE O'CONNOR dismisses as *de minimis* the evidence of actual diversion. *Post*, at 864–865 (opinion concurring in judgment). That may be, but it is good to realize just what she considers *de minimis*. There is

supra, the evidence of actual diversion and the weakness of the safeguards against actual diversion are not relevant to the constitutional inquiry, whatever relevance they may have under the statute and regulations.

Respondents do, however, point to some religious books that the LEA improperly allowed to be loaned to several religious schools, and they contend that the monitoring programs of the SEA and the Jefferson Parish LEA are insufficient to prevent such errors. The evidence, however, establishes just the opposite, for the improper lending of library books occurred—and was discovered and remedied—before this litigation began almost 15 years ago.[18] In other words, the monitoring system worked. See *post*, at 866 (O'CONNOR, J., concurring in judgment). Further, the violation by the LEA and the private schools was minor and, in the view of the SEA's coordinator, inadvertent. See App. 122a. There were approximately 191 improper book requests over three years (the 1982–1983 through 1984–1985 school years); these requests came from fewer than half of the 40 private schools then participating; and the cost of the 191 books

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persuasive evidence that Chapter 2 audiovisual equipment was used in a Catholic school's theology department. "[M]uch" of the equipment at issue "was purchased with Federal funds," App. 205a, and those federal funds were, from the 1982–1983 school year on, almost certainly Chapter 2 funds, see *id.*, at 210a; cf. *id.*, at 187a, 189a. The diversion occurred over seven consecutive school years, *id.*, at 206a–207a, and the use of the equipment in the theology department was massive in each of those years, outstripping in every year use in other departments such as science, math, and foreign language, *ibid.* In addition, the dissent has documented likely diversion of computers. *Post*, at 910.

[18] The coordinator of the Jefferson Parish LEA ordered the books recalled sometime in the summer or early fall of 1985, and it appears that the schools had complied with the recall order by the second week of December 1985. App. 162a, 80a–81a. Respondents filed suit in early December. This self-correction is a key distinction between this instance of providing improper content and the evidence of actual diversion. See n. 17, *supra.*

amounted to "less than one percent of the total allocation over all those years." *Id.*, at 132a–133a.

The District Court found that prescreening by the LEA coordinator of requested library books was sufficient to prevent statutory violations, see App. to Pet. for Cert. 107a, and the Fifth Circuit did not disagree. Further, as noted, the monitoring system appears adequate to catch those errors that do occur. We are unwilling to elevate scattered *de minimis* statutory violations, discovered and remedied by the relevant authorities themselves prior to any litigation, to such a level as to convert an otherwise unobjectionable parishwide program into a law that has the effect of advancing religion.

IV

In short, Chapter 2 satisfies both the first and second primary criteria of *Agostini*. It therefore does not have the effect of advancing religion. For the same reason, Chapter 2 also "cannot reasonably be viewed as an endorsement of religion," *Agostini*, 521 U. S., at 235. Accordingly, we hold that Chapter 2 is not a law respecting an establishment of religion. Jefferson Parish need not exclude religious schools from its Chapter 2 program.[19] To the extent that *Meek* and *Wolman* conflict with this holding, we overrule them.

Our conclusion regarding *Meek* and *Wolman* should come as no surprise. The Court as early as *Wolman* itself left no doubt that *Meek* and *Allen* were irreconcilable, see 433 U. S., at 251, n. 18, and we have repeatedly reaffirmed *Allen* since then, see, *e. g.*, *Agostini*, *supra*, at 231. (In fact, *Meek*, in

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[19] Indeed, as petitioners observe, to require exclusion of religious schools from such a program would raise serious questions under the Free Exercise Clause. See, *e. g.*, *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs"); *Everson*, 330 U. S., at 16; cf. *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1996) (holding that Free Speech Clause bars exclusion of religious viewpoints from limited public forum).

discussing the materials-and-equipment program, did not even cite *Allen*. See *Meek*, 421 U. S., at 363–366.) Less than three years after *Wolman*, we explained that *Meek* did not, despite appearances, hold that "all loans of secular instructional material and equipment inescapably have the effect of direct advancement of religion." *Regan*, 444 U. S., at 661–662 (internal quotation marks omitted). Then, in *Mueller*, we conceded that the aid at issue in *Meek* and *Wolman* did "resembl[e], in many respects," the aid that we had upheld in *Everson* and *Allen*. 463 U. S., at 393, and n. 3; see *id.*, at 402, n. 10; see also *id.*, at 415 (Marshall, J., dissenting) (viewing *Allen* as incompatible with *Meek* and *Wolman*, and the distinction between textbooks and other instructional materials as "simply untenable"). Most recently, *Agostini*, in rejecting *Ball*'s assumption that "all government aid that directly assists the educational function of religious schools is invalid," *Agostini*, *supra*, at 225, necessarily rejected a large portion (perhaps all, see *Ball*, 473 U. S., at 395) of the reasoning of *Meek* and *Wolman* in invalidating the lending of materials and equipment, for *Ball* borrowed that assumption from those cases. See 521 U. S., at 220–221 (Shared Time program at issue in *Ball* was "surely invalid . . . [g]iven the holdings in *Meek* and *Wolman*" regarding instructional materials and equipment). Today we simply acknowledge what has long been evident and was evident to the Ninth and Fifth Circuits and to the District Court.

The judgment of the Fifth Circuit is reversed.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE BREYER joins, concurring in the judgment.

In 1965, Congress passed the Elementary and Secondary Education Act, 79 Stat. 27 (1965 Act). Under Title I, Congress provided monetary grants to States to address the needs of educationally deprived children of low-income families. Under Title II, Congress provided further monetary

grants to States for the acquisition of library resources, textbooks, and other instructional materials for use by children and teachers in public and private elementary and secondary schools. Since 1965, Congress has reauthorized the Title I and Title II programs several times. Three Terms ago, we held in *Agostini* v. *Felton*, 521 U. S. 203 (1997), that Title I, as applied in New York City, did not violate the Establishment Clause. I believe that *Agostini* likewise controls the constitutional inquiry respecting Title II presented here, and requires the reversal of the Court of Appeals' judgment that the program is unconstitutional as applied in Jefferson Parish, Louisiana. To the extent our decisions in *Meek* v. *Pittenger*, 421 U. S. 349 (1975), and *Wolman* v. *Walter*, 433 U. S. 229 (1977), are inconsistent with the Court's judgment today, I agree that those decisions should be overruled. I therefore concur in the judgment.

I

I write separately because, in my view, the plurality announces a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school aid programs. Reduced to its essentials, the plurality's rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content. The plurality also rejects the distinction between direct and indirect aid, and holds that the actual diversion of secular aid by a religious school to the advancement of its religious mission is permissible. Although the expansive scope of the plurality's rule is troubling, two specific aspects of the opinion compel me to write separately. First, the plurality's treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school aid programs. Second, the plurality's approval of actual diversion of government aid to religious indoctrination is in tension with our

precedents and, in any event, unnecessary to decide the instant case.

The clearest example of the plurality's near-absolute position with respect to neutrality is found in its following statement:

> "If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose." *Ante*, at 809–810 (citation omitted).

I agree with JUSTICE SOUTER that the plurality, by taking such a stance, "appears to take evenhandedness neutrality and in practical terms promote it to a single and sufficient test for the establishment constitutionality of school aid." *Post*, at 900 (dissenting opinion).

I do not quarrel with the plurality's recognition that neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges. Our cases have described neutrality in precisely this manner, and we have emphasized a program's neutrality repeatedly in our decisions approving various forms of school aid. See, *e. g.*, *Agostini*, *supra*, at 228, 231–232; *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1, 10 (1993); *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481, 487–488 (1986); *id.*, at 493 (O'CONNOR, J., concurring in part and concurring

in judgment); *Mueller* v. *Allen*, 463 U. S. 388, 397–399 (1983). Nevertheless, we have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid. For example, in *Agostini*, neutrality was only one of several factors we considered in determining that New York City's Title I program did not have the impermissible effect of advancing religion. See 521 U. S., at 226–228 (noting lack of evidence of inculcation of religion by Title I instructors, legal requirement that Title I services be supplemental to regular curricula, and that no Title I funds reached religious schools' coffers). Indeed, given that the aid in *Agostini* had secular content and was distributed on the basis of wholly neutral criteria, our consideration of additional factors demonstrates that the plurality's rule does not accurately describe our recent Establishment Clause jurisprudence. See also *Zobrest*, *supra*, at 10, 12–13 (noting that no government funds reached religious school's coffers, aid did not relieve school of expense it otherwise would have assumed, and aid was not distributed to school but to the child).

Justice Souter provides a comprehensive review of our Establishment Clause cases on government aid to religious institutions that is useful for its explanation of the various ways in which we have used the term "neutrality" in our decisions. See *post*, at 878–883. Even if we at one time used the term "neutrality" in a descriptive sense to refer to those aid programs characterized by the requisite equipoise between support of religion and antagonism to religion, Justice Souter's discussion convincingly demonstrates that the evolution in the meaning of the term in our jurisprudence is cause to hesitate before equating the neutrality of recent decisions with the neutrality of old. As I have previously explained, neutrality is important, but it is by no means the only "axiom in the history and precedent of the Establishment Clause." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 846 (1995) (concurring opinion). Thus,

I agree with JUSTICE SOUTER's conclusion that our "most recent use of 'neutrality' to refer to generality or evenhandedness of distribution . . . is relevant in judging whether a benefit scheme so characterized should be seen as aiding a sectarian school's religious mission, but this neutrality is not alone sufficient to qualify the aid as constitutional." *Post,* at 883–884.

I also disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause. See *ante,* at 820–825. Although "[o]ur cases have permitted some government funding of secular functions performed by sectarian organizations," our decisions "provide no precedent for the use of public funds to finance religious activities." *Rosenberger, supra,* at 847 (O'CONNOR, J., concurring). At least two of the decisions at the heart of today's case demonstrate that we have long been concerned that secular government aid not be diverted to the advancement of religion. In both *Agostini,* our most recent school aid case, and *Board of Ed. of Central School Dist. No. 1* v. *Allen,* 392 U. S. 236 (1968), we rested our approval of the relevant programs in part on the fact that the aid had not been used to advance the religious missions of the recipient schools. See *Agostini, supra,* at 226–227 ("[N]o evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students"); *Allen, supra,* at 248 ("Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion"). Of course, our focus on the lack of such evidence would have been entirely unnecessary if we had believed that the Establishment Clause permits the actual diversion of secular government aid to religious indoctrination. Our decision in *Bowen* v. *Kendrick,* 487 U. S. 589 (1988), also demonstrates that actual diversion is constitutionally impermissible. After conclud-

ing that the government-aid program in question was constitutional on its face, we remanded the case so that the District Court could determine, after further factual development, whether aid recipients had used the government aid to support their religious objectives. See *id.*, at 621–622; *id.*, at 624 (Kennedy, J., concurring) ("[T]he only purpose of further inquiring whether any particular grantee institution is pervasively sectarian is as a preliminary step to demonstrating that the funds are in fact being used to further religion"). The remand would have been unnecessary if, as the plurality contends, actual diversion were irrelevant under the Establishment Clause.

The plurality bases its holding that actual diversion is permissible on *Witters* and *Zobrest*. *Ante*, at 820–821. Those decisions, however, rested on a significant factual premise missing from this case, as well as from the majority of cases thus far considered by the Court involving Establishment Clause challenges to school aid programs. Specifically, we decided *Witters* and *Zobrest* on the understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use. See *Witters*, 474 U. S., at 488; *Zobrest*, 509 U. S., at 10, 12. Accordingly, our approval of the aid in both cases relied to a significant extent on the fact that "[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Witters*, *supra*, at 487; see *Zobrest*, *supra*, at 10 ("[A] government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents"). This characteristic of both programs made them less like a direct subsidy, which would be impermissible under the Establishment Clause, and more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution. See, *e. g.*, *Witters*, *supra*, at 486–487; see also *Rosenberger*, *supra*, at 848 (O'Connor, J., concurring) (discussing *Witters*).

Recognizing this distinction, the plurality nevertheless finds *Witters* and *Zobrest*—to the extent those decisions might permit the use of government aid for religious purposes—relevant in any case involving a neutral, per-capita-aid program. See *ante*, at 830–831. Like JUSTICE SOUTER, I do not believe that we should treat a per-capita-aid program the same as the true private-choice programs considered in *Witters* and *Zobrest*. See *post*, at 902. First, when the government provides aid directly to the student beneficiary, that student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education. The fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student's private decision. See *Rosenberger*, 515 U. S., at 848 (O'CONNOR, J., concurring) (discussing importance of private choice in *Witters*); *Witters*, 474 U. S., at 488 ("[T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State"); *id.*, at 493 (O'CONNOR, J., concurring in part and concurring in judgment) ("The aid to religion at issue here is the result of petitioner's private choice"). It is for this reason that in *Agostini* we relied on *Witters* and *Zobrest* to reject the rule "that all government aid that directly assists the educational function of religious schools is invalid," 521 U. S., at 225, yet also rested our approval of New York City's Title I program in part on the lack of evidence of actual diversion, *id.*, at 226–227.

Second, I believe the distinction between a per capita school aid program and a true private-choice program is significant for purposes of endorsement. See, *e. g.*, *Lynch* v. *Donnelly*, 465 U. S. 668, 692 (1984) (O'CONNOR, J., concurring). In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students

who, in turn, decide to use the aid at the same religious schools. In the former example, if the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement. Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as *government* support for the advancement of religion. That the amount of aid received by the school is based on the school's enrollment does not separate the government from the endorsement of the religious message. The aid formula does not—and could not—indicate to a reasonable observer that the inculcation of religion is endorsed only by the individuals attending the religious school, who each affirmatively choose to direct the secular government aid to the school and its religious mission. No such choices have been made. In contrast, when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, "[n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief." *Witters*, *supra*, at 493 (O'CONNOR, J., concurring in part and concurring in judgment). Rather, endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid.

Finally, the distinction between a per-capita-aid program and a true private-choice program is important when considering aid that consists of direct monetary subsidies. This Court has "recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Rosenberger*, 515 U. S., at 842; see also *ibid.* (collecting cases). If, as the plurality contends, a per-capita-aid program is identical in relevant constitutional respects to a true private-choice program, then there is no reason that, under the plurality's reasoning, the government should be precluded from providing direct money payments

to religious organizations (including churches) based on the number of persons belonging to each organization. And, because actual diversion is permissible under the plurality's holding, the participating religious organizations (including churches) could use that aid to support religious indoctrination. To be sure, the plurality does not actually hold that its theory extends to direct money payments. See *ante*, at 818–820. That omission, however, is of little comfort. In its logic—as well as its specific advisory language, see *ante*, at 819–820, n. 8—the plurality opinion foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives.

Our school aid cases often pose difficult questions at the intersection of the neutrality and no-aid principles and therefore defy simple categorization under either rule. As I explained in *Rosenberger*, "[r]esolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case." 515 U. S., at 847 (concurring opinion). *Agostini* represents our most recent attempt to devise a general framework for approaching questions concerning neutral school aid programs. *Agostini* also concerned an Establishment Clause challenge to a school aid program closely related to the one at issue here. For these reasons, as well as my disagreement with the plurality's approach, I would decide today's case by applying the criteria set forth in *Agostini*.

II

In *Agostini*, after reexamining our jurisprudence since *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373 (1985), we explained that the general principles used to determine whether government aid violates the Establishment Clause have remained largely unchanged. 521 U. S., at 222. Thus,

we still ask "whether the government acted with the purpose of advancing or inhibiting religion" and "whether the aid has the 'effect' of advancing or inhibiting religion." *Id.*, at 222–223. We also concluded in *Agostini*, however, that the specific criteria used to determine whether government aid has an impermissible effect had changed. *Id.*, at 223. Looking to our recently decided cases, we articulated three primary criteria to guide the determination whether a government-aid program impermissibly advances religion: (1) whether the aid results in governmental indoctrination, (2) whether the aid program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion. *Id.*, at 234. Finally, we noted that the same criteria could be reviewed to determine whether a government-aid program constitutes an endorsement of religion. *Id.*, at 235.

Respondents neither question the secular purpose of the Chapter 2 (Title II) program nor contend that it creates an excessive entanglement. (Due to its denomination as Chapter 2 of the Education Consolidation and Improvement Act of 1981, 95 Stat. 469, the parties refer to the 1965 Act's Title II program, as modified by subsequent legislation, as "Chapter 2." For ease of reference, I will do the same.) Accordingly, for purposes of deciding whether Chapter 2, as applied in Jefferson Parish, Louisiana, violates the Establishment Clause, we need ask only whether the program results in governmental indoctrination or defines its recipients by reference to religion.

Taking the second inquiry first, it is clear that Chapter 2 does not define aid recipients by reference to religion. In *Agostini*, we explained that scrutiny of the manner in which a government-aid program identifies its recipients is important because "the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." 521 U. S., at 231. We then clarified that this financial incentive is not present

"where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Ibid.* Under Chapter 2, the Secretary of Education allocates funds to the States based on each State's share of the Nation's school-age population. 20 U. S. C. § 7311(b). The state educational agency (SEA) of each recipient State, in turn, must distribute the State's Chapter 2 funds to local educational agencies (LEA's) "according to the relative enrollments in public and private, nonprofit schools within the school districts of such agencies," adjusted to take into account those LEA's "which have the greatest numbers or percentages of children whose education imposes a higher than average cost per child." § 7312(a). The LEA must then expend those funds on "innovative assistance programs" designed to improve student achievement. § 7351(b). The statute generally requires that an LEA ensure the "equitable participation" of children enrolled in private nonprofit elementary and secondary schools, § 7372(a)(1), and specifically mandates that all LEA expenditures on behalf of children enrolled in private schools "be equal (consistent with the number of children to be served) to expenditures for programs . . . for children enrolled in the public schools of the [LEA]," § 7372(b). As these statutory provisions make clear, Chapter 2 uses wholly neutral and secular criteria to allocate aid to students enrolled in religious and secular schools alike. As a result, it creates no financial incentive to undertake religious indoctrination.

Agostini next requires us to ask whether Chapter 2 "result[s] in governmental indoctrination." 521 U. S., at 234. Because this is a more complex inquiry under our case law, it is useful first to review briefly the basis for our decision in *Agostini* that New York City's Title I program did not result in governmental indoctrination. Under that program, public-school teachers provided Title I instruction to eligible

students on private school premises during regular school hours. Twelve years earlier, in *Aguilar* v. *Felton*, 473 U. S. 402 (1985), we had held the same New York City program unconstitutional. In *Ball*, a companion case to *Aguilar*, we also held that a similar program in Grand Rapids, Michigan, violated the Constitution. Our decisions in *Aguilar* and *Ball* were both based on a presumption, drawn in large part from *Meek*, see 421 U. S., at 367–373, that public-school instructors who teach secular classes on the campuses of religious schools will inevitably inculcate religion in their students.

In *Agostini*, we recognized that "[o]ur more recent cases [had] undermined the assumptions upon which *Ball* and *Aguilar* relied." 521 U. S., at 222. First, we explained that the Court had since abandoned "the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Id.*, at 223. Rather, relying on *Zobrest*, we explained that in the absence of evidence showing that teachers were actually using the Title I aid to inculcate religion, we would presume that the instructors would comply with the program's secular restrictions. See *Agostini*, 521 U. S., at 223–224, 226–227. The Title I services were required by statute to be "'secular, neutral, and nonideological.'" *Id.*, at 210 (quoting 20 U. S. C. § 6321(a)(2)).

Second, we noted that the Court had "departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid." *Agostini*, *supra*, at 225. Relying on *Witters* and *Zobrest*, we noted that our cases had taken a more forgiving view of neutral government programs that make aid available generally without regard to the religious or nonreligious character of the recipient school. See *Agostini*, 521 U. S., at 225–226. With respect to the specific Title I pro-

gram at issue, we noted several factors that precluded us from finding an impermissible financing of religious indoctrination: the aid was "provided to students at whatever school they choose to attend," the services were "by law supplemental to the regular curricula" of the benefited schools, "[n]o Title I funds ever reach the coffers of religious schools," and there was no evidence of Title I instructors having "attempted to inculcate religion in students." *Id.*, at 226–228. Relying on the same factors, we also concluded that the New York City program could not "reasonably be viewed as an endorsement of religion." *Id.*, at 235. Although we found it relevant that Title I services could not be provided on a schoolwide basis, we also explained that this fact was likely a sufficient rather than a necessary condition of the program's constitutionality. We were not "willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." *Id.*, at 229.

The Chapter 2 program at issue here bears the same hallmarks of the New York City Title I program that we found important in *Agostini*. First, as explained above, Chapter 2 aid is distributed on the basis of neutral, secular criteria. The aid is available to assist students regardless of whether they attend public or private nonprofit religious schools. Second, the statute requires participating SEA's and LEA's to use and allocate Chapter 2 funds only to supplement the funds otherwise available to a religious school. 20 U. S. C. § 7371(b). Chapter 2 funds must in no case be used to supplant funds from non-Federal sources. *Ibid.* Third, no Chapter 2 funds ever reach the coffers of a religious school. Like the Title I program considered in *Agostini*, all Chapter 2 funds are controlled by public agencies—the SEA's and LEA's. § 7372(c)(1). The LEA's purchase instructional and educational materials and then lend those materials to public and private schools. See §§ 7351(a), (b)(2). With respect to lending to private schools under Chapter 2, the statute

specifically provides that the relevant public agency must retain title to the materials and equipment. § 7372(c)(1). Together with the supplantation restriction, this provision ensures that religious schools reap no financial benefit by virtue of receiving loans of materials and equipment. Finally, the statute provides that all Chapter 2 materials and equipment must be "secular, neutral, and nonideological." § 7372(a)(1). That restriction is reinforced by a further statutory prohibition on "the making of any payment . . . for religious worship or instruction." § 8897. Although respondents claim that Chapter 2 aid has been diverted to religious instruction, that evidence is *de minimis*, as I explain at greater length below. See *infra*, at 864–867.

III

Respondents contend that *Agostini* is distinguishable, pointing to the distinct character of the aid program considered there. See Brief for Respondents 44–47. In *Agostini*, federal funds paid for public-school teachers to provide secular instruction to eligible children on the premises of their religious schools. Here, in contrast, federal funds pay for instructional materials and equipment that LEA's lend to religious schools for use by those schools' own teachers in their classes. Because we held similar programs unconstitutional in *Meek* and *Wolman*, respondents contend that those decisions, and not *Agostini*, are controlling. See, *e. g.*, Brief for Respondents 11, 22–25. Like respondents, Justice Souter also relies on *Meek* and *Wolman* in finding the character of the Chapter 2 aid constitutionally problematic. See *post*, at 893, 903.

At the time they were decided, *Meek* and *Wolman* created an inexplicable rift within our Establishment Clause jurisprudence concerning government aid to schools. Seven years before our decision in *Meek*, we held in *Allen* that a New York statute that authorized the lending of textbooks to students attending religious schools did not violate the

Establishment Clause. 392 U. S., at 238. We explained that the statute "merely [made] available to all children the benefits of a general program to lend school books free of charge," that the State retained ownership of the textbooks, and that religious schools received no financial benefit from the program. *Id.*, at 243–244. We specifically rejected the contrary argument that the statute violated the Establishment Clause because textbooks are critical to the teaching process, which in a religious school is employed to inculcate religion. *Id.*, at 245–248.

In *Meek* and *Wolman*, we adhered to *Allen*, holding that the textbook lending programs at issue in each case did not violate the Establishment Clause. See *Meek*, 421 U. S., at 359–362 (plurality opinion); *Wolman*, 433 U. S., at 236–238 (plurality opinion). At the same time, however, we held in both cases that the lending of instructional materials and equipment to religious schools was unconstitutional. See *Meek*, *supra*, at 362–366; *Wolman*, *supra*, at 248–251. We reasoned that, because the religious schools receiving the materials and equipment were pervasively sectarian, any assistance in support of the schools' educational missions would inevitably have the impermissible effect of advancing religion. For example, in *Meek* we explained:

> "[I]t would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize [the statute] as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion." 421 U. S., at 365–366 (quoting *Hunt* v. *McNair*, 413 U. S. 734, 743 (1973)).

Thus, we held that the aid program "*necessarily results* in aid to the sectarian school enterprise as a whole," and "*inescapably results* in the direct and substantial advancement of religious activity." *Meek*, *supra*, at 366 (emphases added). Similarly, in *Wolman*, we concluded that, "[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid *inevitably flows* in part in support of the religious role of the schools." 433 U. S., at 250 (emphasis added).

For whatever reason, the Court was not willing to extend this presumption of inevitable religious indoctrination to school aid when it instead consisted of textbooks lent free of charge. For example, in *Meek*, despite identifying the religious schools' secular educational functions and religious missions as inextricably intertwined, 421 U. S., at 366, the Court upheld the textbook lending program because "the record in the case . . . , like the record in *Allen*, contains no suggestion that religious textbooks will be lent or that the books provided will be used for anything other than purely secular purposes," *id.*, at 361–362 (citation omitted). Accordingly, while the Court was willing to apply an irrebuttable presumption that secular instructional materials and equipment would be diverted to use for religious indoctrination, it required evidence that religious schools were diverting secular textbooks to religious instruction.

The inconsistency between the two strands of the Court's jurisprudence did not go unnoticed, as Justices on both sides of the *Meek* and *Wolman* decisions relied on the contradiction to support their respective arguments. See, *e. g.*, *Meek*, 421 U. S., at 384 (Brennan, J., concurring in part and dissenting in part) ("[W]hat the Court says of the instructional materials and equipment may be said perhaps even more accurately of the textbooks" (citation omitted)); *id.*, at 390 (Rehnquist, J., concurring in judgment in part and dissenting in part) ("The failure of the majority to justify the differing approaches to textbooks and instructional materials and

equipment in the above respect is symptomatic of its failure even to attempt to distinguish the . . . textbook loan program, which the plurality upholds, from the . . . instructional materials and equipment loan program, which the majority finds unconstitutional"). The irrationality of this distinction is patent. As one Member of our Court has noted, it has meant that "a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class." *Wallace* v. *Jaffree*, 472 U. S. 38, 110 (1985) (REHNQUIST, J., dissenting) (footnotes omitted).

Indeed, technology's advance since the *Allen*, *Meek*, and *Wolman* decisions has only made the distinction between textbooks and instructional materials and equipment more suspect. In this case, for example, we are asked to draw a constitutional line between lending textbooks and lending computers. Because computers constitute instructional equipment, adherence to *Meek* and *Wolman* would require the exclusion of computers from any government school aid program that includes religious schools. Yet, computers are now as necessary as were schoolbooks 30 years ago, and they play a somewhat similar role in the educational process. That *Allen*, *Meek*, and *Wolman* would permit the constitutionality of a school aid program to turn on whether the aid took the form of a computer rather than a book further reveals the inconsistency inherent in their logic.

Respondents insist that there is a reasoned basis under the Establishment Clause for the distinction between textbooks and instructional materials and equipment. They claim that the presumption that religious schools will use instructional materials and equipment to inculcate religion is sound because such materials and equipment, unlike textbooks, are reasonably divertible to religious uses. For example, no matter what secular criteria the government employs in selecting a film projector to lend to a religious school, school officials can always divert that projector to re-

ligious instruction. Respondents therefore claim that the Establishment Clause prohibits the government from giving or lending aid to religious schools when that aid is reasonably divertible to religious uses. See, *e. g.*, Brief for Respondents 11, 35. Justice Souter also states that the divertibility of secular government aid is an important consideration under the Establishment Clause, although he apparently would not ascribe it the constitutionally determinative status that respondents do. See *post*, at 885, 890–895.

I would reject respondents' proposed divertibility rule. First, respondents cite no precedent of this Court that would require it. The only possible direct precedential support for such a rule is a single sentence contained in a footnote from our *Wolman* decision. There, the Court described *Allen* as having been "premised on the view that the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses." *Wolman*, *supra*, at 251, n. 18. To the extent this simple description of *Allen* is even correct, it certainly does not constitute an actual holding that the Establishment Clause prohibits the government from lending any divertible aid to religious schools. Rather, as explained above, the *Wolman* Court based its holding invalidating the lending of instructional materials and equipment to religious schools on the rationale adopted in *Meek*—that the secular educational function of a religious school is inseparable from its religious mission. See *Wolman*, 433 U. S., at 250. Indeed, if anything, the *Wolman* footnote confirms the irrationality of the distinction between textbooks and instructional materials and equipment. After the *Wolman* Court acknowledged that its holding with respect to instructional materials and equipment was in tension with *Allen*, the Court explained the continuing validity of *Allen* solely on the basis of *stare decisis:* "*Board of Education* v. *Allen* has remained law, and we now follow as a matter of *stare decisis* the principle that restriction of textbooks to those provided the public schools is sufficient to ensure

that the books will not be used for religious purposes." *Wolman*, *supra*, at 252, n. 18. Thus, the *Wolman* Court never justified the inconsistent treatment it accorded the lending of textbooks and the lending of instructional materials and equipment based on the items' reasonable divertibility.

JUSTICE SOUTER's attempt to defend the divertibility rationale as a viable distinction in our Establishment Clause jurisprudence fares no better. For JUSTICE SOUTER, secular school aid presents constitutional problems not only when it is actually diverted to religious ends, but also when it simply has the capacity for, or presents the possibility of, such diversion. See, *e. g.*, *post*, at 893 (discussing "susceptibility [of secular supplies] to the service of religious ends"). Thus, he explains the *Allen*, *Meek*, and *Wolman* decisions as follows: "While the textbooks had a known and fixed secular content not readily divertible to religious teaching purposes, the adaptable materials did not." *Post*, at 893–894. This view would have come as a surprise to the Court in *Meek*, which expressly conceded that "the material and equipment that are the subjects of the loan . . . are 'self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use.'" 421 U. S., at 365 (quoting *Meek* v. *Pittenger*, 374 F. Supp. 639, 660 (ED Pa. 1974)). Indeed, given the nature of the instructional materials considered in *Meek* and *Wolman*, it is difficult to comprehend how a divertibility rationale could have explained the decisions. The statutes at issue in those cases authorized the lending of "periodicals, photographs, maps, charts, sound recordings, [and] films," *Meek*, *supra*, at 355, and "maps and globes," *Wolman*, *supra*, at 249. There is no plausible basis for saying that these items are somehow more divertible than a textbook given that each of the above items, like a textbook, has a fixed and ascertainable content.

In any event, even if *Meek* and *Wolman* had articulated the divertibility rationale urged by respondents and JUSTICE

Souter, I would still reject it for a more fundamental reason. Stated simply, the theory does not provide a logical distinction between the lending of textbooks and the lending of instructional materials and equipment. An educator can use virtually any instructional tool, whether it has ascertainable content or not, to teach a religious message. In this respect, I agree with the plurality that "it is hard to imagine any book that could not, in even moderately skilled hands, serve to illustrate a religious message." *Ante*, at 823. In today's case, for example, we are asked to draw a constitutional distinction between lending a textbook and lending a library book. Justice Souter's try at justifying that distinction only demonstrates the absurdity on which such a difference must rest. He states that "[a]lthough library books, like textbooks, have fixed content, religious teachers can assign secular library books for religious critique." *Post*, at 903. Regardless of whether that explanation is even correct (for a student surely could be given a religious assignment in connection with a textbook too), it is hardly a distinction on which constitutional law should turn. Moreover, if the mere ability of a teacher to devise a religious lesson involving the secular aid in question suffices to hold the provision of that aid unconstitutional, it is difficult to discern any limiting principle to the divertibility rule. For example, even a publicly financed lunch would apparently be unconstitutional under a divertibility rationale because religious school officials conceivably could use the lunch to lead the students in a blessing over the bread. See Brief for Avi Chai Foundation as *Amicus Curiae* 18.

To the extent Justice Souter believes several related Establishment Clause decisions require application of a divertibility rule in the context of this case, I respectfully disagree. Justice Souter is correct to note our continued recognition of the special dangers associated with direct money grants to religious institutions. See *post*, at 890–893. It does not follow, however, that we should treat as constitu-

tionally suspect any form of secular aid that might conceivably be diverted to a religious use. As the cases JUSTICE SOUTER cites demonstrate, our concern with direct monetary aid is based on more than just diversion. In fact, the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition. See, *e. g.*, *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 668 (1970) ("[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity"). Statements concerning the constitutionally suspect status of direct cash aid, accordingly, provide no justification for applying an absolute rule against divertibility when the aid consists instead of instructional materials and equipment.

JUSTICE SOUTER also relies on our decisions in *Wolman* (to the extent it concerned field-trip transportation for nonpublic schools), *Levitt* v. *Committee for Public Ed. & Religious Liberty*, 413 U. S. 472 (1973), *Tilton* v. *Richardson*, 403 U. S. 672 (1971), and *Bowen.* See *post*, at 893–895. None requires application of a divertibility rule in the context of this case. *Wolman* and *Levitt* were both based on the same presumption that government aid will be used in the inculcation of religion that we have chosen not to apply to textbook lending programs and that we have more generally rejected in recent decisions. Compare *Wolman*, 433 U. S., at 254; *Levitt*, *supra*, at 480, with *supra*, at 851–852; *infra*, at 859. In *Tilton*, we considered a federal statute that authorized grants to universities for the construction of buildings and facilities to be used exclusively for secular educational purposes. See 403 U. S., at 674–675. We held the statute unconstitutional only to the extent that a university's "obligation not to use the facility for sectarian instruction or religious worship . . . appear[ed] to expire at the end of 20 years." *Id.*, at 683. To hold a statute unconstitutional because it lacks a secular content restriction is quite different

from resting on a divertibility rationale. Indeed, the fact that we held the statute constitutional in all other respects is more probative on the divertibility question because it demonstrates our willingness to presume that the university would abide by the secular content restriction during the years the requirement was in effect. In any event, Chapter 2 contains both a secular content restriction, 20 U. S. C. § 7372(a)(1), and a prohibition on the use of aid for religious worship or instruction, § 8897, so *Tilton* provides no basis for upholding respondents' challenge. Finally, our decision in *Bowen* proves only that actual diversion, as opposed to mere divertibility, is constitutionally impermissible. See, *e. g.*, 487 U. S., at 621. Had we believed that the divertibility of secular aid was sufficient to call the aid program into question, there would have been no need for the remand we ordered and no basis for the reversal.

IV

Because divertibility fails to explain the distinction our cases have drawn between textbooks and instructional materials and equipment, there remains the question of which of the two irreconcilable strands of our Establishment Clause jurisprudence we should now follow. Between the two, I would adhere to the rule that we have applied in the context of textbook lending programs: To establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes. See *Meek*, 421 U. S., at 361–362; *Allen*, 392 U. S., at 248. Just as we held in *Agostini* that our more recent cases had undermined the assumptions underlying *Ball* and *Aguilar*, I would now hold that *Agostini* and the cases on which it relied have undermined the assumptions underlying *Meek* and *Wolman*. To be sure, *Agostini* only addressed the specific presumption that public-school employees teaching on the premises of religious schools would inevitably inculcate religion. Nevertheless, I believe that our definitive rejection of that presumption also stood for—or at least strongly

pointed to—the broader proposition that such presumptions of religious indoctrination are normally inappropriate when evaluating neutral school aid programs under the Establishment Clause. In *Agostini*, we repeatedly emphasized that it would be inappropriate to presume inculcation of religion; rather, plaintiffs raising an Establishment Clause challenge must present evidence that the government aid in question has resulted in religious indoctrination. See 521 U. S., at 223–224, 226–227. We specifically relied on our statement in *Zobrest* that a presumption of indoctrination, because it constitutes an absolute bar to the aid in question regardless of the religious school's ability to separate that aid from its religious mission, constitutes a "flat rule, smacking of antiquated notions of 'taint,' [that] would indeed exalt form over substance." 509 U. S., at 13. That reasoning applies with equal force to the presumption in *Meek* and *Ball* concerning instructional materials and equipment. As we explained in *Agostini*, "we have departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid." 521 U. S., at 225.

Respondents contend that *Agostini* should be limited to its facts, and point specifically to the following statement from my separate opinion in *Ball* as the basis for retaining a presumption of religious inculcation for instructional materials and equipment:

> "When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools. This is particularly the case where, as here, religion pervades the curriculum and the teachers are accustomed to bring religion to play in everything they teach." 473 U. S., at 399–400 (concurring in judgment in part and dissenting in part).

Respondents note that in *Agostini* we did not overrule that portion of *Ball* holding the Community Education program unconstitutional. Under that program, the government paid religious school teachers to operate as part-time public teachers at their religious schools by teaching secular classes at the conclusion of the regular schoolday. *Ball*, 473 U. S., at 376–377. Relying on both the majority opinion and my separate opinion in *Ball*, respondents therefore contend that we must presume that religious school teachers will inculcate religion in their students. If that is so, they argue, we must also presume that religious school teachers will be unable to follow secular restrictions on the use of instructional materials and equipment lent to their schools by the government. See Brief for Respondents 26–29.

I disagree, however, that the latter proposition follows from the former. First, as our holding in *Allen* and its reaffirmance in *Meek* and *Wolman* demonstrate, the Court's willingness to assume that religious school instructors will inculcate religion has not caused us to presume also that such instructors will be unable to follow secular restrictions on the use of textbooks. I would similarly reject any such presumption regarding the use of instructional materials and equipment. When a religious school receives textbooks or instructional materials and equipment lent with secular restrictions, the school's teachers need not refrain from teaching religion altogether. Rather, the instructors need only ensure that any such religious teaching is done without the instructional aids provided by the government. We have always been willing to assume that religious school instructors can abide by such restrictions when the aid consists of textbooks, which Justice Brennan described as "surely the heart tools of . . . education." *Meek*, *supra*, at 384 (concurring in part and dissenting in part). The same assumption should extend to instructional materials and equipment.

For the same reason, my position in *Ball* is distinguishable. There, the government paid for religious school instructors

to teach classes supplemental to those offered during the normal schoolday. In that context, I was willing to presume that the religious school teacher who works throughout the day to advance the school's religious mission would also do so, at least to some extent, during the supplemental classes provided at the end of the day. Because the government financed the entirety of such classes, any religious indoctrination taking place therein would be directly attributable to the government. In the instant case, because the Chapter 2 aid concerns only teaching tools that must remain supplementary, the aid constitutes only a portion of the teacher's educational efforts during any single class. In this context, I find it easier to believe that a religious school teacher can abide by the secular restrictions placed on the government assistance. I therefore would not presume that the Chapter 2 aid will advance, or be perceived to advance, the school's religious mission.

V

Respondents do not rest, however, on their divertibility argument alone. Rather, they also contend that the evidence respecting the actual administration of Chapter 2 in Jefferson Parish demonstrates that the program violated the Establishment Clause. First, respondents claim that the program's safeguards are insufficient to uncover instances of actual diversion. Brief for Respondents 37, 42–43, 45–47. Second, they contend that the record shows that some religious schools in Jefferson Parish may have used their Chapter 2 aid to support religious education (*i. e.*, that they diverted the aid). *Id.*, at 36–37. Third, respondents highlight violations of Chapter 2's secular content restrictions. *Id.*, at 39–41. And, finally, they note isolated examples of potential violations of Chapter 2's supplantation restriction. *Id.*, at 43–44. Based on the evidence underlying the first and second claims, the plurality appears to contend that the Chapter 2 program can be upheld only if actual diversion of government aid to the advancement of religion

is permissible under the Establishment Clause. See *ante*, at 832–834. Relying on the evidence underlying all but the last of the above claims, JUSTICE SOUTER concludes that the Chapter 2 program, as applied in Jefferson Parish, violated the Establishment Clause. See *post*, at 902–910. I disagree with both the plurality and JUSTICE SOUTER. The limited evidence amassed by respondents during 4 years of discovery (which began approximately 15 years ago) is at best *de minimis* and therefore insufficient to affect the constitutional inquiry.

The plurality and JUSTICE SOUTER direct the primary thrust of their arguments at the alleged inadequacy of the program's safeguards. Respondents, the plurality, and JUSTICE SOUTER all appear to proceed from the premise that, so long as actual diversion presents a constitutional problem, the government must have a failsafe mechanism capable of detecting *any* instance of diversion. We rejected that very assumption, however, in *Agostini*. There, we explained that because we had "abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that *pervasive* monitoring of Title I teachers is required." 521 U. S., at 234 (emphasis in original). Because I believe that the Court should abandon the presumption adopted in *Meek* and *Wolman* respecting the use of instructional materials and equipment by religious school teachers, I see no constitutional need for *pervasive* monitoring under the Chapter 2 program.

The safeguards employed by the program are constitutionally sufficient. At the federal level, the statute limits aid to "secular, neutral, and nonideological services, materials, and equipment," 20 U. S. C. § 7372(a)(1); requires that the aid only supplement and not supplant funds from non-Federal sources, § 7371(b); and prohibits "any payment . . . for religious worship or instruction," § 8897. At the state level, the Louisiana Department of Education (the relevant SEA for

Louisiana) requires all nonpublic schools to submit signed assurances that they will use Chapter 2 aid only to supplement and not to supplant non-Federal funds, and that the instructional materials and equipment "will only be used for secular, neutral and nonideological purposes." App. 260a–261a; see also *id.*, at 120a. Although there is some dispute concerning the mandatory nature of these assurances, Dan Lewis, the director of Louisiana's Chapter 2 program, testified that all of the State's nonpublic schools had thus far been willing to sign the assurances, and that the State retained the power to cut off aid to any school that breached an assurance. *Id.*, at 122a–123a. The Louisiana SEA also conducts monitoring visits to each of the State's LEA's—and one or two of the nonpublic schools covered by the relevant LEA—once every three years. *Id.*, at 95a–96a. In addition to other tasks performed on such visits, SEA representatives conduct a random review of a school's library books for religious content. *Id.*, at 99a.

At the local level, the Jefferson Parish Public School System (JPPSS) requires nonpublic schools seeking Chapter 2 aid to submit applications, complete with specific project plans, for approval. *Id.*, at 127a; *id.*, at 194a–203a (sample application). The JPPSS then conducts annual monitoring visits to each of the nonpublic schools receiving Chapter 2 aid. *Id.*, at 141a–142a. On each visit, a JPPSS representative meets with a contact person from the nonpublic school and reviews with that person the school's project plan and the manner in which the school has used the Chapter 2 materials and equipment to support its plan. *Id.*, at 142a, 149a. The JPPSS representative also reminds the contact person of the prohibition on the use of Chapter 2 aid for religious purposes, *id.*, at 149a, and conducts a random sample of the school's Chapter 2 materials and equipment to ensure that they are appropriately labeled and that the school has maintained a record of their usage, *id.*, at 142a–144a. (Although the plurality and JUSTICE SOUTER claim that compliance

with the labeling requirement was haphazard, both cite only a statewide monitoring report that includes no specific findings with respect to Jefferson Parish. *Ante*, at 832–833 (citing App. 113a); *post*, at 906 (same).) Finally, the JPPSS representative randomly selects library books the nonpublic school has acquired through Chapter 2 and reviews their content to ensure that they comply with the program's secular content restriction. App. 210a. If the monitoring does not satisfy the JPPSS representative, another visit is scheduled. *Id.*, at 151a–152a. Apart from conducting monitoring visits, the JPPSS reviews Chapter 2 requests filed by participating nonpublic schools. As part of this process, a JPPSS employee examines the titles of requested library books and rejects any book whose title reveals (or suggests) a religious subject matter. *Id.*, at 135a, 137a–138a. As the above description of the JPPSS monitoring process should make clear, Justice Souter's citation of a statewide report finding a lack of monitoring in some Louisiana LEA's is irrelevant as far as Jefferson Parish is concerned. See *post*, at 906 (quoting App. 111a).

Respondents, the plurality, and Justice Souter all fault the above-described safeguards primarily because they depend on the good faith of participating religious school officials. For example, both the plurality and Justice Souter repeatedly cite testimony by state and parish officials acknowledging that the safeguards depend to a certain extent on the religious schools' self-reporting and that, therefore, there is no way for the State or Jefferson Parish to say definitively that no Chapter 2 aid is diverted to religious purposes. See, *e. g.*, *ante*, at 832–833, n. 15; *post*, at 906–907. These admissions, however, do not prove that the safeguards are inadequate. To find that actual diversion will flourish, one must presume bad faith on the part of the religious school officials who report to the JPPSS monitors regarding the use of Chapter 2 aid. I disagree with the plurality and Justice Souter on this point and believe that it is entirely

proper to presume that these school officials will act in good faith. That presumption is especially appropriate in this case, since there is no proof that religious school officials have breached their schools' assurances or failed to tell government officials the truth. Cf. *Tilton*, 403 U. S., at 679 ("A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. . . . But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional").

The evidence proffered by respondents, and relied on by the plurality and JUSTICE SOUTER, concerning actual diversion of Chapter 2 aid in Jefferson Parish is *de minimis*. Respondents first cite the following statement from a Jefferson Parish religious school teacher: "Audio-visual materials are a very necessary and enjoyable tool used when teaching young children. As a second grade teacher I use them in all subjects and see a very positive result." App. 108a. Respondents' only other evidence consists of a chart concerning one Jefferson Parish religious school, which shows that the school's theology department was a significant user of audio-visual equipment. See *id.*, at 206a–208a. Although an accompanying letter indicates that much of the school's equipment was purchased with federal funds, *id.*, at 205a, the chart does not provide a breakdown identifying specific Chapter 2 usage. Indeed, unless we are to relieve respondents of their evidentiary burden and presume a violation of Chapter 2, we should assume that the school used its own equipment in the theology department and the Chapter 2 equipment elsewhere. The more basic point, however, is that neither piece of evidence demonstrates that Chapter 2 aid actually was diverted to religious education. At most, it proves the possibility that, out of the more than 40 nonpublic schools in Jefferson Parish participating in Chapter 2, aid may have been diverted in one school's second-grade class and another school's theology department.

The plurality's insistence that this evidence is somehow substantial flatly contradicts its willingness to disregard similarly insignificant evidence of violations of Chapter 2's supplantation and secular content restrictions. See *ante*, at 815, n. 7 (finding no "material statutory violation" of the supplantation restriction); *ante*, at 835 (characterizing violations of secular content restriction as "scattered" and "*de minimis*"). As I shall explain below, I believe the evidence on all three points is equally insignificant and, therefore, should be treated the same.

Justice Souter also relies on testimony by one religious school principal indicating that a computer lent to her school under Chapter 2 was connected through a network to non-Chapter 2 computers. See *post*, at 910 (citing App. 77a). The principal testified that the Chapter 2 computer would take over the network if another non-Chapter 2 computer were to break down. *Ibid.* To the extent the principal's testimony even proves that Chapter 2 funds were diverted to the school's religious mission, the evidence is hardly compelling.

Justice Souter contends that *any* evidence of actual diversion requires the Court to declare the Chapter 2 program unconstitutional as applied in Jefferson Parish. *Post*, at 909, n. 27. For support, he quotes my concurring opinion in *Bowen* and the statement therein that "*any* use of public funds to promote religious doctrines violates the Establishment Clause." 487 U. S., at 623 (emphasis in original). That principle of course remains good law, but the next sentence in my opinion is more relevant to the case at hand: "*[E]xtensive* violations—if they can be proved in this case—will be highly relevant in shaping an appropriate remedy that ends such abuses." *Ibid.* (emphasis in original). I know of no case in which we have declared an entire aid program unconstitutional on Establishment Clause grounds solely because of violations on the minuscule scale of those at issue here. Yet that is precisely the remedy respondents

requested from the District Court and that they were granted by the Court of Appeals. See App. 51a; *Helms* v. *Picard*, 151 F. 3d 347, 377 (CA5 1998), amended, 165 F. 3d 311, 312 (CA5 1999). While extensive violations might require a remedy along the lines asked for by respondents, no such evidence has been presented here. To the contrary, the presence of so few examples over a period of at least 4 years (15 years ago) tends to show not that the "no-diversion" rules have failed, but that they have worked. Accordingly, I see no reason to affirm the judgment below and thereby declare a properly functioning aid program unconstitutional.

Respondents' next evidentiary argument concerns an admitted violation of Chapter 2's secular content restriction. Over three years, Jefferson Parish religious schools ordered approximately 191 religious library books through Chapter 2. App. 129a–133a. Dan Lewis, the director of Louisiana's Chapter 2 program, testified that he discovered some of the religious books while performing a random check during a state monitoring visit to a Jefferson Parish religious school. *Id.*, at 99a–100a. The discovery prompted the State to notify the JPPSS, which then reexamined book requests dating back to 1982, discovered the 191 books in question, and recalled them. *Id.*, at 130a–133a. This series of events demonstrates not that the Chapter 2 safeguards are inadequate, but rather that the program's monitoring system succeeded. Even if I were instead willing to find this incident to be evidence of a likelihood of future violations, the evidence is insignificant. The 191 books constituted less than one percent of the total allocation of Chapter 2 aid in Jefferson Parish during the relevant years. *Id.*, at 132a. JUSTICE SOUTER understandably concedes that the book incident constitutes "only limited evidence." *Post*, at 909. I agree with the plurality that, like the above evidence of actual diversion, the borrowing of the religious library books constitutes only *de minimis* evidence. See *ante*, at 835.

Respondents' last evidentiary challenge concerns the effectiveness of Chapter 2's supplantation restriction in Jefferson Parish. Although JUSTICE SOUTER does not rest his decision on this point, he does "not[e] the likelihood that unconstitutional supplantation occurred as well." *Post*, at 910, n. 28. I disagree. The evidence cited by respondents and JUSTICE SOUTER is too ambiguous to rest any sound conclusions on and, at best, shows some scattered violations of the statutory supplantation restriction that are too insignificant in aggregate to affect the constitutional inquiry. Indeed, even JUSTICE SOUTER concedes in this respect that "[t]he record is sparse." *Post*, at 911, n. 28.

* * *

Given the important similarities between the Chapter 2 program here and the Title I program at issue in *Agostini*, respondents' Establishment Clause challenge must fail. As in *Agostini*, the Chapter 2 aid is allocated on the basis of neutral, secular criteria; the aid must be supplementary and cannot supplant non-Federal funds; no Chapter 2 funds ever reach the coffers of religious schools; the aid must be secular; any evidence of actual diversion is *de minimis;* and the program includes adequate safeguards. Regardless of whether these factors are constitutional requirements, they are surely sufficient to find that the program at issue here does not have the impermissible effect of advancing religion. For the same reasons, "this carefully constrained program also cannot reasonably be viewed as an endorsement of religion." *Agostini*, 521 U. S., at 235. Accordingly, I concur in the judgment.

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

The First Amendment's Establishment Clause prohibits Congress (and, by incorporation, the States) from making any law respecting an establishment of religion. It has been

held to prohibit not only the institution of an official church, but any government act favoring religion, a particular religion, or for that matter irreligion. Thus, it bars the use of public funds for religious aid.

The establishment prohibition of government religious funding serves more than one end. It is meant to guarantee the right of individual conscience against compulsion, to protect the integrity of religion against the corrosion of secular support, and to preserve the unity of political society against the implied exclusion of the less favored and the antagonism of controversy over public support for religious causes.

These objectives are always in some jeopardy since the substantive principle of no aid to religion is not the only limitation on government action toward religion. Because the First Amendment also bars any prohibition of individual free exercise of religion, and because religious organizations cannot be isolated from the basic government functions that create the civil environment, it is as much necessary as it is difficult to draw lines between forbidden aid and lawful benefit. For more than 50 years, this Court has been attempting to draw these lines. Owing to the variety of factual circumstances in which the lines must be drawn, not all of the points creating the boundary have enjoyed self-evidence.

So far as the line drawn has addressed government aid to education, a few fundamental generalizations are nonetheless possible. There may be no aid supporting a sectarian school's religious exercise or the discharge of its religious mission, while aid of a secular character with no discernible benefit to such a sectarian objective is allowable. Because the religious and secular spheres largely overlap in the life of many such schools, the Court has tried to identify some facts likely to reveal the relative religious or secular intent or effect of the government benefits in particular circumstances. We have asked whether the government is acting neutrally in distributing its money, and about the form of the aid itself, its path from government to religious institution,

its divertibility to religious nurture, its potential for reducing traditional expenditures of religious institutions, and its relative importance to the recipient, among other things.

In all the years of its effort, the Court has isolated no single test of constitutional sufficiency, and the question in every case addresses the substantive principle of no aid: what reasons are there to characterize this benefit as aid to the sectarian school in discharging its religious mission? Particular factual circumstances control, and the answer is a matter of judgment.

In what follows I will flesh out this summary, for this case comes at a time when our judgment requires perspective on how the Establishment Clause has come to be understood and applied. It is not just that a majority today mistakes the significance of facts that have led to conclusions of unconstitutionality in earlier cases, though I believe the Court commits error in failing to recognize the divertibility of funds to the service of religious objectives. What is more important is the view revealed in the plurality opinion, which espouses a new conception of neutrality as a practically sufficient test of constitutionality that would, if adopted by the Court, eliminate enquiry into a law's effects. The plurality position breaks fundamentally with Establishment Clause principle, and with the methodology painstakingly worked out in support of it. I mean to revisit that principle and describe the methodology at some length, lest there be any question about the rupture that the plurality view would cause. From that new view of the law, and from a majority's mistaken application of the old, I respectfully dissent.

I

The prohibition that "Congress shall make no law respecting an establishment of religion," U. S. Const., Amdt. 1, eludes elegant conceptualization simply because the prohibition applies to such distinct phenomena as state churches and aid to religious schools, and as applied to school aid has

prompted challenges to programs ranging from construction subsidies to hearing aids to textbook loans. Any criteria, moreover, must not only define the margins of the establishment prohibition, but must respect the succeeding Clause of the First Amendment guaranteeing religion's free exercise. *Ibid.* It is no wonder that the complementary constitutional provisions and the inexhaustably various circumstances of their applicability have defied any simple test and have instead produced a combination of general rules often in tension at their edges. If coherence is to be had, the Court has to keep in mind the principal objectives served by the Establishment Clause, and its application to school aid, and their recollection may help to explain the misunderstandings that underlie the majority's result in this case.

A

At least three concerns have been expressed since the founding and run throughout our First Amendment jurisprudence. First, compelling an individual to support religion violates the fundamental principle of freedom of conscience. Madison's and Jefferson's now familiar words establish clearly that liberty of personal conviction requires freedom from coercion to support religion,[1] and this means that the government can compel no aid to fund it. Madison put it simply: "[T]he same authority which can force a citizen to

[1] Jefferson's Virginia Bill for Establishing Religious Freedom provided "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . ." Jefferson, A Bill for Establishing Religious Freedom, in 5 The Founder's Constitution 84 (P. Kurland & R. Lerner eds. 1987); see also *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 870–872 (1995) (SOUTER, J., dissenting). We have "previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 13 (1947).

contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment." Memorial and Remonstrance ¶ 3, reprinted in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 64, 65–66 (1947). Any tax to establish religion is antithetical to the command "that the minds of men always be wholly free." *Id.*, at 12 (discussing Madison's Memorial and Remonstrance); *id.*, at 13 (noting Jefferson's belief that "compel[ling] a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; . . . even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern" (internal quotation marks omitted)); see also *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 868–874 (1995) (SOUTER, J., dissenting).

Second, government aid corrupts religion. See *Engel* v. *Vitale*, 370 U. S. 421, 431 (1962) ("[The Establishment Clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion"); *Everson*, *supra*, at 53 (Rutledge, J., dissenting). Madison argued that establishment of religion weakened the beliefs of adherents so favored, strengthened their opponents, and generated "pride and indolence in the Clergy; ignorance and servility in the laity; [and] in both, superstition, bigotry and persecution." Memorial and Remonstrance ¶ 7, quoted in *Everson*, 330 U. S., at 67. "[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." *Ibid.* In a variant of Madison's concern, we have repeatedly noted that a government's favor to a particular religion or sect threatens to taint it with "corrosive secularism." *Lee* v. *Weisman*, 505 U. S. 577, 608 (1992) (internal quotation marks and citations omitted); see also *Illinois ex rel. McCollum* v. *Board*

of Ed. of School Dist. No. 71, Champaign Cty., 333 U. S. 203, 228 (1948).

> "[G]overnment and religion have discrete interests which are mutually best served when each avoids too close a proximity to the other. It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government." *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 259 (1963) (Brennan, J., concurring).

See also *Rosenberger*, *supra*, at 890–891 (SOUTER, J., dissenting).

Third, government establishment of religion is inextricably linked with conflict. *Everson*, *supra*, at 8–11 (relating colonists' understanding of recent history of religious persecution in countries with established religion); *Engel*, *supra*, at 429 (discussing struggle among religions for government approval); *Lemon* v. *Kurtzman*, 403 U. S. 602, 623 (1971). In our own history, the turmoil thus produced has led to a rejection of the idea that government should subsidize religious education, *id.*, at 645–649 (opinion of Brennan, J.) (discussing history of rejection of support for religious schools); *McCollum*, *supra*, at 214–217 (opinion of Frankfurter, J.), a position that illustrates the Court's understanding that any implicit endorsement of religion is unconstitutional, see *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 592–594 (1989).[2]

[2] The plurality mistakes my recognition of this fundamental concern. *Ante*, at 825–826. The Court may well have moved away from considering the political divisiveness threatened by particular instances of aid as a practical criterion for applying the Establishment Clause case by case, but we have never questioned its importance as a motivating concern behind the Establishment Clause, nor could we change history to find that sectarian conflict did not influence the Framers who wrote it.

B

These concerns are reflected in the Court's classic summation delivered in *Everson* v. *Board of Education*, *supra*, its first opinion directly addressing standards governing aid to religious schools:[3]

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" 330 U. S., at 15–16 (quoting *Reynolds* v. *United States*, 98 U. S. 145, 164 (1879)).

The most directly pertinent doctrinal statements here are these: no government "can pass laws which aid one religion

[3] The Court upheld payments by Indian tribes to apparently Roman Catholic schools in *Quick Bear* v. *Leupp*, 210 U. S. 50 (1908), suggesting in dicta that there was no Establishment Clause problem, but it did not squarely face the question. Nor did the Court address a First Amendment challenge to a state program providing textbooks to children in *Cochran* v. *Louisiana Bd. of Ed.*, 281 U. S. 370 (1930); it simply concluded that the program had an adequate public purpose. The Court first squarely faced the issue in *Everson*.

[or] all religions . . . . No tax in any amount . . . can be levied to support any religious activities or institutions . . . whatever form they may adopt to teach . . . religion." 330 U. S., at 16. Thus, the principle of "no aid," with which no one in *Everson* disagreed.[4]

Immediately, however, there was the difficulty over what might amount to "aid" or "support." The problem for the *Everson* Court was not merely the imprecision of the words, but the "other language of the [First Amendment that] commands that [government] cannot hamper its citizens in the free exercise of their own religion," *ibid.*, with the consequence that government must "be a neutral in its relations with groups of religious believers and non-believers," *id.*, at 18. Since withholding some public benefits from religious groups could be said to "hamper" religious exercise indirectly, and extending other benefits said to aid it, an argument-proof formulation of the no-aid principle was impossible, and the Court wisely chose not to attempt any such thing. Instead it gave definitive examples of public benefits provided pervasively throughout society that would be of some value to organized religion but not in a way or to a degree that could sensibly be described as giving it aid or violating the neutrality requirement: there was no Establishment Clause concern with "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks." *Id.*, at 17–18. These "benefits of public welfare legislation," *id.*, at 16, extended in modern times to virtually every member of the population and valuable to every person and association, were the paradigms of advantages that religious organiza-

[4] While *Everson*'s dissenters parted company with the majority over the specific question of school buses, the Court stood as one behind the principle of no aid for religious teaching. 330 U. S., at 15–16; *id.*, at 25–26 (Jackson, J., dissenting); *id.*, at 28–29, 31–32 (Rutledge, J., dissenting).

tions could enjoy consistently with the prohibition against aid, and that governments could extend without deserting their required position of neutrality.

But paradigms are not perfect fits very often, and government spending resists easy classification as between universal general service or subsidy of favoritism. The 5-to-4 division of the *Everson* Court turned on the inevitable question whether reimbursing all parents for the cost of transporting their children to school was close enough to police protection to tolerate its indirect benefit in some degree to religious schools, with the majority in *Everson* thinking the reimbursement statute fell on the lawful side of the line. Although the state scheme reimbursed parents for transporting children to sectarian schools, among others, it gave "no money to the schools. It [did] not support them. Its legislation [did] no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.*, at 18. The dissenters countered with factual analyses showing the limitation of the law's benefits in fact to private school pupils who were Roman Catholics, *id.*, at 20 (Jackson, J., dissenting), and indicating the inseparability of transporting pupils to school from support for the religious instruction that was the school's *raison d'être*, *id.*, at 45–46 (Rutledge, J., dissenting).

Everson is usefully understood in the light of a successor case two decades later, *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236 (1968), in which the challenged government practice was lending textbooks to pupils of schools both public and private, including religious ones (as to which there was no evidence that they had previously supplied books to their classes and some evidence that they had not, *id.*, at 244, n. 6). By the time of *Allen*, the problem of classifying the state benefit, as between aid to religion and general public service consistent with government neutral-

ity, had led to the formulation of a "test" that required secular, primary intent and effect as necessary conditions of any permissible scheme. *Id.*, at 243. Again the Court split, upholding the state law in issue, but with *Everson*'s majority author, Justice Black, now in dissent. What is remarkable about *Allen* today, however, is not so much its division as its methodology, for the consistency in the way the Justices went about deciding the case transcended their different conclusions. Neither side rested on any facile application of the "test" or any simplistic reliance on the generality or even-handedness of the state law. Disagreement concentrated on the true intent inferrable behind the law, the feasibility of distinguishing in fact between religious and secular teaching in church schools, and the reality or sham of lending books to pupils instead of supplying books to schools. The majority, to be sure, cited the provision for books to all schoolchildren, regardless of religion, 392 U. S., at 243, just as the *Everson* majority had spoken of the transportation reimbursement as going to all, 330 U. S., at 16, in each case for the sake of analogy to the provision of police and fire services.[5] But the stress was on the practical significance of the actual benefits received by the schools. As *Everson* had rested on the understanding that no money and no support went to the school, *id.*, at 18, *Allen* emphasized that the savings to parents were devoid of any measurable effect in teaching religion, 392 U. S., at 243–244. Justice Harlan, concurring, summed up the approach with his observations that the required government "[n]eutrality is . . . a coat of many colors," and quoted Justice Goldberg's conclusion, that there was "'no simple and clear measure' . . . by which this or any [religious school aid] case may readily be decided," *id.*, at 249 (quoting *Schempp*, 374 U. S., at 306).

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[5] Indeed, two of the dissenters in *Allen* agreed with the majority on this method of analysis, asking whether the books at issue were similar enough to fire and police protection. See 392 U. S., at 252 (Black, J., dissenting); *id.*, at 272 (Fortas, J., dissenting).

After *Everson* and *Allen*, the state of the law applying the Establishment Clause to public expenditures producing some benefit to religious schools was this:

> 1. Government aid to religion is forbidden, and tax revenue may not be used to support a religious school or religious teaching.
>
> 2. Government provision of such paradigms of universally general welfare benefits as police and fire protection does not count as aid to religion.
>
> 3. Whether a law's benefit is sufficiently close to universally general welfare paradigms to be classified with them, as distinct from religious aid, is a function of the purpose and effect of the challenged law in all its particularity. The judgment is not reducible to the application of any formula. Evenhandedness of distribution as between religious and secular beneficiaries is a relevant factor, but not a sufficiency test of constitutionality. There is no rule of religious equal protection to the effect that any expenditure for the benefit of religious school students is necessarily constitutional so long as public school pupils are favored on ostensibly identical terms.
>
> 4. Government must maintain neutrality as to religion, "neutrality" being a conclusory label for the required position of government as neither aiding religion nor impeding religious exercise by believers. "Neutrality" was not the name of any test to identify permissible action, and in particular, was not synonymous with evenhandedness in conferring benefit on the secular as well as the religious.

Today, the substantive principle of no aid to religious mission remains the governing understanding of the Establishment Clause as applied to public benefits inuring to religious schools. The governing opinions on the subject in the 35 years since *Allen* have never challenged this principle. The

cases have, however, recognized that in actual Establishment Clause litigation over school aid legislation, there is no pure aid to religion and no purely secular welfare benefit; the effects of the laws fall somewhere in between, with the judicial task being to make a realistic allocation between the two possibilities. The Court's decisions demonstrate its repeated attempts to isolate considerations relevant in classifying particular benefits as between those that do not discernibly support or threaten support of a school's religious mission, and those that cross or threaten to cross the line into support for religion.

II

A

The most deceptively familiar of those considerations is "neutrality," the presence or absence of which, in some sense, we have addressed from the moment of *Everson* itself. I say "some sense," for we have used the term in at least three ways in our cases, and an understanding of the term's evolution will help to explain the concept as it is understood today, as well as the limits of its significance in Establishment Clause analysis. "Neutrality" has been employed as a term to describe the requisite state of government equipoise between the forbidden encouragement and discouragement of religion; to characterize a benefit or aid as secular; and to indicate evenhandedness in distributing it.

As already mentioned, the Court first referred to neutrality in *Everson*, simply stating that government is required "to be a neutral" among religions and between religion and nonreligion. 330 U. S., at 18. Although "neutral" may have carried a hint of inaction when we indicated that the First Amendment "does not require the state to be [the] adversary" of religious believers, *ibid.*, or to cut off general government services from religious organizations, *Everson* provided no explicit definition of the term or further indication of what the government was required to do or not do to be

"neutral" toward religion. In practical terms, "neutral" in *Everson* was simply a term for government in its required median position between aiding and handicapping religion. The second major case on aid to religious schools, *Allen*, used "neutrality" to describe an adequate state of balance between government as ally and as adversary to religion, see 392 U. S., at 242 (discussing line between "state neutrality to religion and state support of religion"). The term was not further defined, and a few subsequent school cases used "neutrality" simply to designate the required relationship to religion, without explaining how to attain it. See, *e. g.*, *Tilton* v. *Richardson*, 403 U. S. 672, 677 (1971) (describing cases that "see[k] to define the boundaries of the neutral area between [the Religion Clauses] within which the legislature may legitimately act"); *Roemer* v. *Board of Public Works of Md.*, 426 U. S. 736, 747 (1976) (plurality opinion of Blackmun, J.) ("Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity. Of course, that principle is more easily stated than applied"); see also *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 782 (1973) (describing "neutral posture" toward religion); *Roemer*, *supra*, at 745–746 (opinion of Blackmun, J.) ("The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities"); cf. *Wolman* v. *Walter*, 433 U. S. 229, 254 (1977) (quoting *Lemon* and noting difficulty of religious teachers' remaining "'religiously neutral'").

The Court began to employ "neutrality" in a sense different from equipoise, however, as it explicated the distinction between "religious" and "secular" benefits to religious schools, the latter being in some circumstances permissible. See *infra*, at 884–899 (discussing considerations). Even though both *Everson* and *Allen* had anticipated some such distinction, neither case had used the term "neutral" in this way. In *Everson*, Justice Black indicated that providing

police, fire, and similar government services to religious institutions was permissible, in part because they were "so separate and so indisputably marked off from the religious function." 330 U. S., at 18. *Allen* similarly focused on the fact that the textbooks lent out were "secular" and approved by secular authorities, 392 U. S., at 245, and assumed that the secular textbooks and the secular elements of education they supported were not so intertwined with religious instruction as "in fact [to be] instrumental in the teaching of religion," *id.*, at 248. Such was the Court's premise in *Lemon* for shifting the use of the word "neutral" from labeling the required position of the government to describing a benefit that was nonreligious. We spoke of "[o]ur decisions from *Everson* to *Allen* [as] permitt[ing] the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials," 403 U. S., at 616, and thereafter, we regularly used "neutral" in this second sense of "secular" or "nonreligious." See, *e. g.*, *Tilton*, *supra*, at 687–688 (characterizing subsidized teachers in *Lemon* as "not necessarily religiously neutral," but buildings as "religiously neutral"); *Meek* v. *Pittenger*, 421 U. S. 349, 365–366 (1975) (describing instructional materials as "'secular, nonideological and neutral'" and "wholly neutral"); *id.*, at 372 (describing auxiliary services as "religiously neutral"); *Roemer*, *supra*, at 751 (opinion of Blackmun, J.) (describing *Tilton*'s approved buildings as "neutral or nonideological in nature"); 426 U. S., at 754 (describing *Meek*'s speech and hearing services as "neutral and nonideological"); *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1, 10 (1993) (discussing translator as "neutral service"); *Agostini* v. *Felton*, 521 U. S. 203, 232 (1997) (discussing need to assess whether nature of aid was "neutral and nonideological"); cf. *Levitt* v. *Committee for Public Ed. & Religious Liberty*, 413 U. S. 472, 478 (1973) (noting that District Court approved testing cost reimbursement as payment for services that were "'secular, neutral, or nonideological'" in character, citing *Lemon*, 403 U. S., at

616); *Wolman*, *supra*, at 242 (quoting *Lemon*, *supra*, at 616 (describing permitted services aid as "secular, neutral, or nonideological")).

The shift from equipoise to secular was not, however, our last redefinition, for the Court again transformed the sense of "neutrality" in the 1980's. Reexamining and reinterpreting *Everson* and *Allen*, we began to use the word "neutral" to mean "evenhanded," in the sense of allocating aid on some common basis to religious and secular recipients. Again, neither *Everson* nor *Allen* explicitly used "neutral" in this manner, but just as the label for equipoise had lent itself to referring to the secular characteristic of what a government might provide, it was readily adaptable to referring to the generality of government services, as in *Everson*'s paradigms, to which permissible benefits were compared.

The increased attention to a notion of evenhanded distribution was evident in *Nyquist*, where the Court distinguished the program under consideration from the government services approved in *Allen* and *Everson*, in part because "the class of beneficiaries [in *Everson* and *Allen*] included *all* schoolchildren, those in public as well as those in private schools." 413 U. S., at 782, n. 38. *Nyquist* then reserved the question whether "some form of public assistance . . . made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted" would be permissible. *Id.*, at 783, n. 38 (citations omitted). Subsequent cases continued the focus on the "generality" of the approved government services as an important characteristic. *Meek*, for example, characterized *Everson* and *Allen* as approving "a general program" to pay bus fares and to lend school books, respectively, 421 U. S., at 360; *id.*, at 360, n. 8 (approving two similar "general program[s]" in New York and Pennsylvania), and *Wolman* upheld diagnostic services described as "'general welfare services for children,'" 433 U. S., at 243 (quoting *Meek*, *supra*, at 371, n. 21).

Justice Blackmun, writing in *Roemer*, first called such a "general" or evenhanded program "neutral," in speaking of "facial neutrality" as a relevant consideration in determining whether there was an Establishment Clause violation. "[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all." 426 U. S., at 746–747; see also *id.*, at 746 (discussing buses in *Everson* and school books in *Allen* as examples of "neutrally available" aid). In *Mueller* v. *Allen*, 463 U. S. 388 (1983), the Court adopted the redefinition of neutrality as evenhandedness, citing *Nyquist*, 413 U. S., at 782, n. 38, and alluding to our discussion of equal access in *Widmar* v. *Vincent*, 454 U. S. 263 (1981). The Court upheld a system of tax deductions for sectarian educational expenses, in part because such a "facially neutral law," 463 U. S., at 401, made the deduction available for "*all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools," *id.*, at 397. Subsequent cases carried the point forward. See, *e. g.*, *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481, 487 (1986) (quoting *Nyquist* and characterizing program as making aid "available generally"); *Zobrest*, *supra*, at 8–9 (discussing "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion" and citing *Mueller* and *Witters*); *Agostini*, *supra*, at 231 (discussing aid allocated on the basis of "neutral, secular criteria that neither favor nor disfavor religion, . . . made available to both religious and secular beneficiaries on a nondiscriminatory basis"); see also *Rosenberger*, 515 U. S., at 839 ("[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse").

In sum, "neutrality" originally entered this field of jurisprudence as a conclusory term, a label for the required rela-

tionship between the government and religion as a state of equipoise between government as ally and government as adversary. Reexamining *Everson*'s paradigm cases to derive a prescriptive guideline, we first determined that "neutral" aid was secular, nonideological, or unrelated to religious education. Our subsequent reexamination of *Everson* and *Allen*, beginning in *Nyquist* and culminating in *Mueller* and most recently in *Agostini*, recast neutrality as a concept of "evenhandedness."

There is, of course, good reason for considering the generality of aid and the evenhandedness of its distribution in making close calls between benefits that in purpose or effect support a school's religious mission and those that do not. This is just what *Everson* did. Even when the disputed practice falls short of *Everson*'s paradigms, the breadth of evenhanded distribution is one pointer toward the law's purpose, since on the face of it aid distributed generally and without a religious criterion is less likely to be meant to aid religion than a benefit going only to religious institutions or people. And, depending on the breadth of distribution, looking to evenhandedness is a way of asking whether a benefit can reasonably be seen to aid religion in fact; we do not regard the postal system as aiding religion, even though parochial schools get mail. Given the legitimacy of considering evenhandedness, then, there is no reason to avoid the term "neutrality" to refer to it. But one crucial point must be borne in mind.

In the days when "neutral" was used in *Everson*'s sense of equipoise, neutrality was tantamount to constitutionality; the term was conclusory, but when it applied it meant that the government's position was constitutional under the Establishment Clause. This is not so at all, however, under the most recent use of "neutrality" to refer to generality or evenhandedness of distribution. This kind of neutrality is relevant in judging whether a benefit scheme so characterized should be seen as aiding a sectarian school's religious

mission, but this neutrality is not alone sufficient to qualify the aid as constitutional. It is to be considered only along with other characteristics of aid, its administration, its recipients, or its potential that have been emphasized over the years as indicators of just how religious the intent and effect of a given aid scheme really is. See, *e. g.*, *Tilton*, 403 U. S., at 677–678 (opinion of Burger, C. J.) (acknowledging "no single constitutional caliper"); *Meek*, 421 U. S., at 358–359 (noting considerations as guidelines only and discussing them as a matter of degree); *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 383 (1985) (quoting *Meek*), overruled in part by *Agostini*, 521 U. S., at 203; *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687, 720 (1994) (opinion of O'CONNOR, J.) ("Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test"); *Rosenberger*, 515 U. S., at 847–849 (O'CONNOR, J., concurring) (discussing need for line-drawing); *id.*, at 852 (noting lack of a single "Grand Unified Theory" for Establishment Clause and citing *Kiryas Joel*); cf. *Agostini*, *supra*, at 232–233 (examining a variety of factors). Thus, the basic principle of establishment scrutiny of aid remains the principle as stated in *Everson*, that there may be no public aid to religion or support for the religious mission of any institution.

B

The insufficiency of evenhandedness neutrality as a stand-alone criterion of constitutional intent or effect has been clear from the beginning of our interpretative efforts, for an obvious reason. Evenhandedness in distributing a benefit approaches the equivalence of constitutionality in this area only when the term refers to such universality of distribution that it makes no sense to think of the benefit as going to any discrete group. Conversely, when evenhandedness refers to distribution to limited groups within society, like groups of schools or schoolchildren, it does make sense to regard the benefit as aid to the recipients. See, *e. g.*, *Everson*, 330 U. S.,

at 16 (discussing aid that approaches the "verge" of forbidden territory); *Lemon*, 403 U. S., at 612 ("[W]e can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law"); *Nyquist*, 413 U. S., at 760–761 (noting the "most perplexing questions" presented in this area and acknowledging " 'entangl[ing] precedents' "); *Mueller*, 463 U. S., at 393 (quoting *Lemon*); *Witters*, 474 U. S., at 485 (quoting *Lemon*).

Hence, if we looked no further than evenhandedness, and failed to ask what activities the aid might support, or in fact did support, religious schools could be blessed with government funding as massive as expenditures made for the benefit of their public school counterparts, and religious missions would thrive on public money. This is why the consideration of less than universal neutrality has never been recognized as dispositive and has always been teamed with attention to other facts bearing on the substantive prohibition of support for a school's religious objective.

At least three main lines of enquiry addressed particularly to school aid have emerged to complement evenhandedness neutrality. First, we have noted that two types of aid recipients heighten Establishment Clause concern: pervasively religious schools and primary and secondary religious schools. Second, we have identified two important characteristics of the method of distributing aid: directness or indirectness of distribution and distribution by genuinely independent choice. Third, we have found relevance in at least five characteristics of the aid itself: its religious content; its cash form; its divertibility or actually diversion to religious support; its supplantation of traditional items of religious school expense; and its substantiality.

1

Two types of school aid recipients have raised special concern. First, we have recognized the fact that the overriding religious mission of certain schools, those sometimes called

"pervasively sectarian," is not confined to a discrete element of the curriculum, *Everson*, 330 U. S., at 22–24 (Jackson, J., dissenting); *id.*, at 45–47 (Rutledge, J., dissenting), but permeates their teaching.[6] *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 671 (1970); *Lemon*, *supra*, at 636–637 ("A school which operates to commingle religion with other instruction plainly cannot completely secularize its instruction. Parochial schools, in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching"); see also *Bowen* v. *Kendrick*, 487 U. S. 589, 621–622 (1988) (discussing pervasively sectarian private schools). Based on record evidence and long experience, we have concluded that religious teaching in such schools is at the core of the instructors' individual and personal obligations, cf. Canon 803, § 2, Text & Commentary 568 ("It is necessary that the formation and education given in a Catholic school be based upon the principles of Catholic doctrine; teachers are to be outstanding for their correct doctrine and integrity of life"), and that individual religious teachers will teach religiously.[7] *Lemon*, 403 U. S., at 615–620; *id.*, at 635–

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[6] In fact, religious education in Roman Catholic schools is defined as part of required religious practice; aiding it is thus akin to aiding a church service. See 1983 Code of Canon Law, Canon 798, reprinted in The Code of Canon Law: A Text and Commentary 566 (1985) (hereinafter Text & Commentary) (directing parents to entrust children to Roman Catholic schools or otherwise provide for Roman Catholic education); Canon 800, § 2, Text & Commentary 567 (requiring the faithful to support establishment and maintenance of Roman Catholic schools); Canons 802, 804, Text & Commentary 567, 568 (requiring diocesan bishop to establish and regulate schools "imparting an education imbued with the Christian spirit").

[7] Although the Court no longer assumes that public school teachers assigned to religious schools for limited purposes will teach religiously, see *Agostini* v. *Felton*, 521 U. S. 203, 223–228 (1997), we have never abandoned the presumption that religious teachers will teach just that way. *Lemon* v. *Kurtzman*, 403 U. S. 602, 615–620 (1971); *id.*, at 635–641 (Douglas, J., concurring); *Levitt* v. *Committee for Public Ed. & Religious Liberty*, 413 U. S. 472, 480 (1973); *Meek* v. *Pittenger*, 421 U. S. 349, 369–371 (1975); *Wol-*

641 (Douglas, J., concurring); *Levitt*, 413 U. S., at 480; *Meek*, 421 U. S., at 369–371; *Wolman*, 433 U. S., at 249–250 (discussing nonseverability of religious and secular education); *Ball*, 473 U. S., at 399–400 (O'CONNOR, J., concurring in judgment in part and dissenting in part), overruled in part by *Agostini*, 521 U. S., at 236. As religious teaching cannot be separated from secular education in such schools or by such teachers, we have concluded that direct government subsidies to such schools are prohibited because they will inevitably and impermissibly support religious indoctrination. *Zobrest*, 509 U. S., at 12 (discussing *Meek* and *Ball*).

Second, we have expressed special concern about aid to primary and secondary religious schools. *Tilton*, 403 U. S., at 685–686. On the one hand, we have understood how the youth of the students in such schools makes them highly susceptible to religious indoctrination. *Lemon*, *supra*, at 616 ("This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly"). On the other, we have recognized that the religious element in the education offered in most sectarian primary and secondary schools is far more intertwined with the secular than in university teaching, where the natural and academic skepticism of most older students may separate the two, see *Tilton*, *supra*, at 686–689; *Roemer*, 426 U. S., at 750. Thus, government benefits accruing to these pervasively religious primary and secondary schools raise special dangers of diversion into support for the religious indoctrination of children and the involvement of government in religious training and practice.

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man v. *Walter*, 433 U. S. 229, 249–250 (1977); *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 399–400 (1985) (O'CONNOR, J., concurring in judgment in part and dissenting in part), overruled in part by *Agostini*, *supra*, at 236. Cf. *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 504 (1979) ("The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school").

2

We have also evaluated the portent of support to an organization's religious mission that may be inherent in the method by which aid is granted, finding pertinence in at least two characteristics of distribution. First, we have asked whether aid is direct or indirect, observing distinctions between government schemes with individual beneficiaries and those whose beneficiaries in the first instance might be religious schools. *Everson*, *supra*, at 18 (bus fare supports parents and not schools); *Allen*, 392 U. S., 243–244, and n. 6 (textbooks go to benefit children and parents, not schools); *Lemon*, *supra*, at 621 (invalidating direct aid to schools); *Levitt*, *supra*, at 480, 482 (invalidating direct testing aid to schools); *Witters*, 474 U. S., at 487–488 (evaluating whether aid was a direct subsidy to schools). Direct aid obviously raises greater risks, although recent cases have discounted this risk factor, looking to other features of the distribution mechanism. *Agostini*, *supra*, at 225–226.[8]

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[8] In *Agostini*, the Court indicated that "we have departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid," 521 U. S., at 225, and cited *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481 (1986), and *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1 (1993). However, *Agostini* did not rely on this dictum, instead clearly stating that "[w]hile it is true that individual students may not directly apply for Title I services, it does not follow from this premise that those services are distributed 'directly to the religious schools.' In fact, they are not. No Title I funds ever reach the coffers of religious schools, and Title I services may not be provided to religious schools on a schoolwide basis." 521 U. S., at 228–229 (citations omitted). Until today, this Court has never permitted aid to go directly to schools on a schoolwide basis.

The plurality misreads our precedent in suggesting that we have abandoned directness of distribution as a relevant consideration. See *ante*, at 815–818. In *Wolman*, we stated that nominally describing aid as to students would not bar a court from finding that it actually provided a subsidy to a school, 433 U. S., at 250, but we did not establish that a program giving "direct" aid to schools was therefore permissible. In *Witters*, we made the focus of *Wolman* clear, continuing to examine aid to determine

Second, we have distinguished between indirect aid that reaches religious schools only incidentally as a result of numerous individual choices and aid that is in reality directed to religious schools by the government or in practical terms selected by religious schools themselves. *Mueller*, 463 U. S., at 399; *Witters*, *supra*, at 488; *Zobrest*, *supra*, at 10. In these cases, we have declared the constitutionality of programs providing aid directly to parents or students as tax deductions or scholarship money, where such aid may pay for education at some sectarian institutions, *Mueller*, *supra*, at 399; *Witters*, 474 U. S., at 488, but only as the result of "genuinely independent and private choices of aid recipients," *id.*, at 487. We distinguished this path of aid from the route in *Ball* and *Wolman*, where the opinions indicated that "[w]here . . . no meaningful distinction can be made between aid to the student and aid to the school, the concept of a loan to individuals is a transparent fiction." 474 U. S., at 487, n. 4 (citations and internal quotation marks omitted).[9]

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In addition to the character of the school to which the benefit accrues, and its path from government to school, a number of features of the aid itself have figured in the classifica-

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if it was a "direct subsidy" to a school, 474 U. S., at 487, and distinguishing the aid at issue from impermissible aid in *Ball* and *Wolman* precisely because the designation of the student as recipient in those cases was only nominal. 474 U. S., at 487, n. 4. Our subsequent cases have continued to ask whether government aid programs constituted impermissible "direct subsidies" to religious schools even where they are directed by individual choice. *Zobrest*, *supra*, at 11–13; *Mueller* v. *Allen*, 463 U. S. 388, 399 (1983); *Agostini*, *supra*, at 226.

[9] We have also permitted the government to supply students with public-employee translators, *Zobrest*, *supra*, at 10, and public-employee special education teachers, *Agostini*, *supra*, at 226, 228, who directly provided them with government services in whatever schools those specific students attended, public or nonpublic. I have already noted *Agostini*'s limitations. See n. 8, *supra*.

tions we have made. First, we have barred aid with actual religious content, which would obviously run afoul of the ban on the government's participation in religion, *Everson*, 330 U. S., at 16; *Walz*, 397 U. S., at 668; cf. *Lemon*, 403 U. S., at 617 (discussing variable ideological and religious character of religious teachers compared to fixed content of books). In cases where we have permitted aid, we have regularly characterized it as "neutral" in the sense (noted *supra*, at 879–881) of being without religious content. See, *e. g.*, *Tilton*, 403 U. S., at 688 (characterizing buildings as "religiously neutral"); *Zobrest*, 509 U. S., at 10 (describing translator as "neutral service"); *Agostini*, 521 U. S., at 232 (discussing need to assess whether nature of aid was "neutral and nonideological"). See also *ante*, at 820 (plurality opinion) (barring aid with religious content).[10]

Second, we have long held government aid invalid when circumstances would allow its diversion to religious education. The risk of diversion is obviously high when aid in the form of government funds makes its way into the coffers of religious organizations, and so from the start we have understood the Constitution to bar outright money grants of aid to religion.[11] See *Everson*, 330 U. S., at 16 ("[The State]

[10] I agree with the plurality that the Establishment Clause absolutely prohibits the government from providing aid with clear religious content to religious, or for that matter nonreligious, schools. *Ante*, at 822–825. The plurality, however, misreads our precedent as focusing only on affirmatively religious content. At the very least, a building, for example, has no such content, but we have squarely required the government to ensure that no publicly financed building be diverted to religious use. *Tilton* v. *Richardson*, 403 U. S. 672, 681–684 (1971). See also *Bowen* v. *Kendrick*, 487 U. S. 589, 623 (1988) (O'CONNOR, J., concurring) ("*[A]ny* use of public funds to promote religious doctrines violates the Establishment Clause").

[11] We have similarly noted that paying salaries of parochial school teachers creates too much of a risk that such support will aid the teaching of religion, striking down such programs because of the need for pervasive monitoring that would be required. See *Lemon*, 403 U. S., at 619 ("We do not assume, however, that parochial school teachers will be unsuccessful

cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church"); *id.*, at 18 ("The State contributes no money to the schools. It does not support them"); *Allen*, 392 U. S., at 243–244 ("[N]o funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not schools"); *Walz*, *supra*, at 675 ("Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards"); *Lemon*, *supra*, at 612 (identifying "three main evils" against which Establishment Clause was to protect as "sponsorship, financial support, and active involvement of the sovereign in religious activity," citing *Walz*); 403 U. S., at 621 (distinguishing direct financial aid program from *Everson* and *Allen* and noting problems with required future surveillance); *Nyquist*, 413 U. S., at 762, 774 (striking down "direct money grants" for maintaining buildings because there was no attempt to restrict payments to those expenditures related exclusively to secular purposes); *Levitt*, 413 U. S., at 480, 482 (striking down "direct money grant" for testing expenses);[12] *Hunt* v.

in their attempts to segregate their religious beliefs from their secular educational responsibilities. But the potential for impermissible fostering of religion is present. The [state legislature] has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . . . A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected").

[12] It is true that we called the importance of the cash payment consideration into question in *Committee for Public Ed. and Religious Liberty* v. *Regan*, 444 U. S. 646, 657–659 (1980) (approving program providing religious school with "direct cash reimbursement" for expenses of standardized testing). In that case, we found the other safeguards against the diversion of such funds to religious uses sufficient to allow such aid: "A

McNair, 413 U. S. 734, 745, n. 7 (1973) (noting approved aid is "no expenditure of public funds, either by grant or loan"); *Wolman*, 433 U. S., at 239, and n. 7 (noting that "statute does not authorize any payment to nonpublic school personnel for the costs of administering the tests"); *Agostini*, 521 U. S., at 228–229 (emphasizing that approved services are not "distributed 'directly to the religious schools.' . . . No Title I funds ever reach the coffers of religious schools, and Title I services may not be provided to religious schools on a schoolwide basis" (citations omitted)); *Bowen*, 487 U. S., at 614–615; *Rosenberger*, 515 U. S., at 842 (noting that "we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions"); cf. *Lemon*, 403 U. S., at 619–620 (noting that safeguards and accounting inspections required to prevent government funds from supporting religious education will cause impermissible entanglement); *Roemer*, 426 U. S., at 753–757 (approving segregated funds after finding recipients not pervasively religious); *Ball*, 473 U. S., at 392–393 (noting that "[w]ith but one exception, our subsequent cases have struck down attempts by States to make payments out of

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contrary view would insist on drawing a constitutional distinction between paying the nonpublic school to do the grading and paying state employees or some independent service to perform that task, even though the grading function is the same regardless of who performs it and would not have the primary effect of aiding religion whether or not performed by nonpublic school personnel." *Id.*, at 658. Aside from this isolated circumstance, where we found ironclad guarantees of nondiversion, we have never relaxed our prohibition on direct cash aid to pervasively religious schools, and have in fact continued to acknowledge the concern. See *Agostini*, 521 U. S., at 228–229; cf. *Rosenberger*, 515 U. S., at 842.

The plurality concedes this basic point. See *ante*, at 818–819. Given this, I find any suggestion that this prohibition has been undermined by *Mueller* or *Witters* without foundation. See *ante*, at 819–820, n. 8. Those cases involved entirely different types of aid, namely, tax deductions and individual scholarship aid for university education, see also n. 16, *infra*, and were followed by *Rosenberger* and *Agostini*, which continued to support this absolute restriction.

public tax dollars directly to primary or secondary religious educational institutions"), overruled in part by *Agostini*, *supra*, at 236; *Witters*, 474 U. S., at 487 ("It is equally well-settled . . . that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is that of a direct subsidy to the religious school" (internal quotation marks and citations omitted)); *Rosenberger*, *supra*, at 851–852 (O'CONNOR, J., concurring) (noting that student fee was not a tax).

Divertibility is not, of course, a characteristic of cash alone, and when examining provisions for ostensibly secular supplies we have considered their susceptibility to the service of religious ends.[13] In upholding a scheme to provide students with secular textbooks, we emphasized that "each book loaned must be approved by the public school authorities; only secular books may receive approval." *Allen*, 392 U. S., at 244–245; see also *Meek*, 421 U. S., at 361–362 (opinion of Stewart, J.); *Wolman*, *supra*, at 237–238. By the same token, we could not sustain provisions for instructional materials adaptable to teaching a variety of subjects.[14] *Meek*, *supra*, at 363; *Wolman*, *supra*, at 249–250. While the textbooks had a known and fixed secular content not readily di-

[13] I reject the plurality's argument that divertibility is a boundless principle. *Ante*, at 824–825. Our long experience of evaluating this consideration demonstrates its practical limits. See *infra* this page and 894–895. Moreover, the Establishment Clause charges us with making such enquiries, regardless of their difficulty. See *supra*, at 875–878, 884–885. Finally, the First Amendment's rule permitting only aid with fixed secular content seems no more difficult to apply than the plurality's rule prohibiting only aid with fixed religious content.

[14] Contrary to the plurality's apparent belief, *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993), sheds no light on the question of divertibility and school aid. *Ante*, at 822, n. 9. The Court in that case clearly distinguished the question of afterschool access to public facilities from anything resembling the school aid cases: "The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members." 508 U. S., at 395.

vertible to religious teaching purposes, the adaptable materials did not.[15] So, too, we explained the permissibility of busing on public routes to schools but not busing for field trips designed by religious authorities specifically because the latter trips were components of teaching in a pervasively religious school. Compare *Everson*, 330 U. S., at 17 (noting wholly separate and secular nature of public bus fare to schools), with *Wolman*, 433 U. S., at 254 ("The field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable by-product" (citation omitted)). We likewise were able to uphold underwriting the expenses of standard state testing in religious schools while being forced to strike down aid for testing designed by the school officials, because the latter tests could be used to reinforce religious teaching. Compare *id.*, at 240 ("[T]he State provides both the schools and the school district with the means of ensuring that the minimum standards are met. The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt*"); *Committee for Public Ed. and Religious Liberty* v. *Regan*, 444 U. S. 646, 661–662 (1980) (same), with *Levitt*, 413 U. S., at 480 ("We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church").

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[15] In *Lemon*, we also specifically examined the risk that a government program that paid religious teachers would support religious education; the teachers posed the risk of being unable to separate secular from religious education. Although we invalidated the program on entanglement grounds, we suggested that the monitoring the State had established in that case was actually required to eliminate the risk of diversion. See 403 U. S., at 619; see also n. 11, *supra.*

With the same point in mind, we held that buildings constructed with government grants to universities with religious affiliation must be barred from religious use indefinitely to prevent the diversion of government funds to religious objectives. *Tilton*, 403 U. S., at 683 (plurality opinion) ("If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion. To this extent the Act therefore trespasses on the Religion Clauses"); see also *Hunt*, 413 U. S., at 743–744. We were accordingly constrained to strike down aid for repairing buildings of nonpublic schools because they could be used for religious education. *Nyquist*, 413 U. S., at 776–777.

Divertibility was, again, the issue in an order remanding an as-applied challenge to a grant supporting counseling on teenage sexuality for findings that the aid had not been used to support religious education. *Bowen*, 487 U. S., at 621; see also *id.*, at 623 (O'CONNOR, J., concurring). And the most recent example of attention to the significance of divertibility occurred in our explanation that public school teachers could be assigned to provide limited instruction in religious schools in *Agostini*, 521 U. S., at 223–227, a majority of the Court rejecting the factual assumption that public school teachers could be readily lured into providing religious instruction.[16]

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[16] The plurality is mistaken in its reading of *Zobrest*. See *ante*, at 820–821. *Zobrest* does not reject the principle of divertibility. There the government provided only a translator who was not considered divertible because he did not add to or subtract from the religious message. The Court approved the translator as it would approve a hearing aid, health services, diagnostics, and tests. See *Zobrest*, 509 U. S., at 13, and n. 10. Cf. *Bradfield* v. *Roberts*, 175 U. S. 291, 299–300 (1899); *Wolman*, 433 U. S., at 244. *Zobrest* thus can be thought of as akin to our approval of diagnostic services in *Wolman*, *supra*, at 244, which we considered to have "little or no educational content[,] not [to be] closely associated with the educational mission of the nonpublic school," and not to pose "an impermissible

Third, our cases have recognized the distinction, adopted by statute in the Chapter 2 legislation, between aid that merely supplements and aid that supplants expenditures for offerings at religious schools, the latter being barred. Although we have never adopted the position that any benefit that flows to a religious school is impermissible because it frees up resources for the school to engage in religious indoctrination, *Hunt*, *supra*, at 743, from our first decision holding it permissible to provide textbooks for religious schools we have repeatedly explained the unconstitutionality of aid that supplants an item of the school's traditional expense. See, *e. g.*, *Cochran* v. *Louisiana Bd. of Ed.*, 281 U. S. 370, 375 (1930) (noting that religious schools "are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them" (internal quotation marks omitted)); *Everson*, 330 U. S., at 18 (specifically noting that bus fare program did not support or fund religious schools); *Allen*, 392 U. S., at 244 (stating that "the financial benefit [of providing the textbooks] is to parents and children, not to schools" (footnote omitted)); *id.*,

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risk of the fostering of ideological views." The fact that the dissent saw things otherwise (as the plurality points out, *ante*, at 821) is beside the point here.

Similarly, the plurality is mistaken in reading our holdings in *Mueller* and *Witters*, see *ante*, at 821, to undermine divertibility as a relevant principle. First, these cases approved quite factually distinct types of aid; *Mueller* involving tax deductions, which have a quite separate history of approval, see 463 U. S., at 396, and nn. 5, 6 (citing *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664 (1970)), and *Witters* involving scholarship money distributed to a university, not a primary or secondary school, see *Tilton*, 403 U. S., at 685–686, that was not significant enough as a whole to support that institution, *Witters*, 474 U. S., at 488. Second, in neither case did the program at issue provide direct aid on a schoolwide basis (as Chapter 2 does here); in both we found a distinction based on the genuinely independent, private choices which allocated such very different types of aid (tax deductions and university scholarship money that did not amount to substantial support of the university). See *Mueller*, *supra*, at 399; *Witters*, *supra*, at 488.

at 244, n. 6 (explicitly recognizing that "the record contains no evidence that any of the private schools in appellants' districts previously provided textbooks for their students"); *Lemon*, 403 U. S., at 656 (opinion of Brennan, J.) (noting no aid to schools was involved in *Allen*). We ignored this prohibition only once, in *Regan*, 444 U. S., at 646; see also *ante*, at 16, n. 7, where reimbursement for budgeted expenses of required testing was not struck down, but we then quickly returned to the rule as a guideline for permissible aid.[17] In *Zobrest*, 509 U. S., at 12, the Court specifically distinguished *Meek* and *Ball* by explaining that the invalid programs in those cases "relieved sectarian schools of costs they otherwise would have borne in educating their students." In *Agostini*, the Court made a point of noting that the objects of the aid were "by law supplemental to the regular curricula" and, citing *Zobrest*, explained that the remedial education services did not relieve the religious schools of costs they would otherwise have borne. 521 U. S., at 228 (citing *Zobrest*, *supra*, at 12). The Court explicitly stated that the

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[17] Our departure from this principle in *Regan* is not easily explained, but it is an isolated holding surrounded by otherwise unbroken adherence to the no-supplanting principle. Long after *Regan* we have continued to find the supplement/supplant distinction, like the bar to substantial aid, to be an important consideration. See *Zobrest*, *supra*, at 12; *Agostini*, 521 U. S., at 228; cf. *Witters*, *supra*, at 487–488 (discussing rule against "direct subsidy"). The weight that the plurality places on *Regan* is thus too much for it to bear. See *ante*, at 815, n. 7. Moreover, the apparent object of the *Regan* Court's concern was vindicating the principle that aid with fixed secular content was permissible, distinguishing it from the divertible testing aid in *Levitt*. *Regan*, 444 U. S., at 661–662 (citing *Wolman*, *supra*, at 263); cf. *Levitt*, 413 U. S., at 480. The plurality provides no explanation for our continued reference to the principle of no-supplanting aid in subsequent cases, such as *Zobrest* and *Agostini*, which it finds trustworthy guides elsewhere in its discussion of the First Amendment. See *ante*, at 822–823, 825, 827, 829–832. Nor does the plurality explain why it places so much weight on *Regan*'s apparent departure from the no-supplanting rule while it ignores *Regan*'s core reasoning that the testing aid there was permissible because, in direct contrast to *Levitt*, the aid was not divertible.

services in question did not "supplant the remedial instruction and guidance counseling already provided in New York City's sectarian schools." 521 U. S., at 229.

Finally, we have recognized what is obvious (however imprecise), in holding "substantial" amounts of aid to be unconstitutional whether or not a plaintiff can show that it supplants a specific item of expense a religious school would have borne.[18] In *Meek*, 421 U. S., at 366, we invalidated the loan of instructional materials to religious schools because "faced with the substantial amounts of direct support authorized by [the program], it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and then characterize [the program] as channeling aid to the secular without providing direct aid to the sectarian." *Id.*, at 365. See *id.*, at 366 ("Substantial aid to the educational function of such schools . . . necessarily results in aid to the sectarian school enterprise as a whole"); see also *Nyquist*, 413 U. S., at 783; *Wolman*, 433 U. S., at 250–251. In *Witters*, 474 U. S., at 488, the Court asked whether the aid in question was a direct subsidy to religious schools and addressed the substantiality of the aid obliquely in noting that "nothing in the record indicates that . . . any significant portion of the

[18] I do not read the plurality to question the prohibition on substantial aid. The plurality challenges any rule based on the proportion of aid that a program provides to religious recipients, citing *Witters* and *Agostini*. See *ante*, at 812, n. 6. I reject the plurality's reasoning. The plurality misreads *Witters;* Justice Marshall, writing for the Court in *Witters*, emphasized that only a small amount of aid was provided to religious institutions, 474 U. S., at 488, and no controlling majority rejected the importance of this fact. The plurality also overreads *Agostini*, *supra*, at 229, which simply declined to adopt a rule based on proportionality. Moreover, regardless of whether the proportion of aid actually provided to religious schools is relevant, we have never questioned our holding in *Meek* that substantial aid to religious schools is prohibited.

aid expended under the Washington program as a whole will end up flowing to religious education." In *Zobrest*, *supra*, at 12, the Court spoke of the substantiality test in *Meek*, noting that "[d]isabled children, not sectarian schools, are the primary beneficiaries of the [Individuals with Disabilities Act (IDEA)]; to the extent sectarian schools benefit at all from the IDEA, they are only incidental beneficiaries."

C

This stretch of doctrinal history leaves one point clear beyond peradventure: together with James Madison we have consistently understood the Establishment Clause to impose a substantive prohibition against public aid to religion and, hence, to the religious mission of sectarian schools. Even-handedness neutrality is one, nondispositive pointer toward an intent and (to a lesser degree) probable effect on the permissible side of the line between forbidden aid and general public welfare benefit. Other pointers are facts about the religious mission and education level of benefited schools and their pupils, the pathway by which a benefit travels from public treasury to educational effect, the form and content of the aid, its adaptability to religious ends, and its effects on school budgets. The object of all enquiries into such matters is the same whatever the particular circumstances: is the benefit intended to aid in providing the religious element of the education and is it likely to do so?

The substance of the law has thus not changed since *Everson*. Emphasis on one sort of fact or another has varied depending on the perceived utility of the enquiry, but all that has been added is repeated explanation of relevant considerations, confirming that our predecessors were right in their prophecies that no simple test would emerge to allow easy application of the establishment principle.

The plurality, however, would reject that lesson. The majority misapplies it.

III

A

The nub of the plurality's new position is this:

> "[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. The government, in crafting such an aid program, has had to conclude that a given level of aid is necessary to further that purpose among secular recipients and has provided no more than that same level to religious recipients." *Ante,* at 810 (citation omitted).

As a break with consistent doctrine the plurality's new criterion is unequaled in the history of Establishment Clause interpretation. Simple on its face, it appears to take even-handedness neutrality and in practical terms promote it to a single and sufficient test for the establishment constitutionality of school aid. Even on its own terms, its errors are manifold, and attention to at least three of its mistaken assumptions will show the degree to which the plurality's proposal would replace the principle of no aid with a formula for generous religious support.

First, the plurality treats an external observer's attribution of religious support to the government as the sole impermissible effect of a government aid scheme. See, *e. g.*, *ante,* at 809 ("[N]o one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government"). While perceived state endorsement of religion is undoubtedly a relevant concern under the Establishment Clause, see, *e. g.*, *Allegheny County,* 492 U. S., at 592–594; see also *Capitol Square Review and Advisory Bd.* v. *Pinette,* 515 U. S. 753, 772–774 (1995) (O'CONNOR, J., concurring in part and concurring in

judgment); *id.*, at 786–787 (SOUTER, J., concurring in part and concurring in judgment), it is certainly not the only one. *Everson* made this clear from the start: secret aid to religion by the government is also barred. 330 U. S., at 16. State aid not attributed to the government would still violate a taxpayer's liberty of conscience, threaten to corrupt religion, and generate disputes over aid. In any event, since the same-terms feature of the scheme would, on the plurality's view, rule out the attribution or perception of endorsement, adopting the plurality's rule of facial evenhandedness would convert neutrality into a dispositive criterion of establishment constitutionality and eliminate the effects enquiry directed by *Allen*, *Lemon*, and other cases. Under the plurality's rule of neutrality, if a program met the first part of the *Lemon* enquiry, by declining to define a program's recipients by religion, it would automatically satisfy the second, in supposedly having no impermissible effect of aiding religion.[19]

Second, the plurality apparently assumes as a fact that equal amounts of aid to religious and nonreligious schools will have exclusively secular and equal effects, on both external perception and on incentives to attend different schools. See *ante*, at 809–810, 813–814. But there is no reason to believe that this will be the case; the effects of same-terms aid may not be confined to the secular sphere at all. This is the reason that we have long recognized that unrestricted aid to religious schools will support religious teaching in ad-

[19] Adopting the plurality's rule would permit practically any government aid to religion so long as it could be supplied on terms ostensibly comparable to the terms under which aid was provided to nonreligious recipients. As a principle of constitutional sufficiency, the manipulability of this rule is breathtaking. A legislature would merely need to state a secular objective in order to legalize massive aid to all religions, one religion, or even one sect, to which its largess could be directed through the easy exercise of crafting facially neutral terms under which to offer aid favoring that religious group. Short of formally replacing the Establishment Clause, a more dependable key to the public fisc or a cleaner break with prior law would be difficult to imagine.

dition to secular education, a fact that would be true no matter what the supposedly secular purpose of the law might be.

Third, the plurality assumes that per capita distribution rules safeguard the same principles as independent, private choices. But that is clearly not so. We approved university scholarships in *Witters* because we found them close to giving a government employee a paycheck and allowing him to spend it as he chose, but a per capita aid program is a far cry from awarding scholarships to individuals, one of whom makes an independent private choice. Not the least of the significant differences between per capita aid and aid individually determined and directed is the right and genuine opportunity of the recipient to choose not to give the aid.[20] To hold otherwise would be to license the government to donate funds to churches based on the number of their members, on the patent fiction of independent private choice.

The plurality's mistaken assumptions explain and underscore its sharp break with the Framers' understanding of establishment and this Court's consistent interpretative course. Under the plurality's regime, little would be left of the right of conscience against compelled support for religion; the more massive the aid the more potent would be the influence of the government on the teaching mission; the more generous the support, the more divisive would be the resentments of those resisting religious support, and those religions without school systems ready to claim their fair share.

B

The plurality's conception of evenhandedness does not, however, control the case, whose disposition turns on the misapplication of accepted categories of school aid analysis. The facts most obviously relevant to the Chapter 2 scheme

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[20] Indeed, the opportunity for an individual to choose not to have her religious school receive government aid is just what at least one of the respondents seeks here. See Brief for Respondents 1, and n. 1.

in Jefferson Parish are those showing divertibility and actual diversion in the circumstance of pervasively sectarian religious schools. The type of aid, the structure of the program, and the lack of effective safeguards clearly demonstrate the divertibility of the aid. While little is known about its use, owing to the anemic enforcement system in the parish, even the thin record before us reveals that actual diversion occurred.

The aid that the government provided was highly susceptible to unconstitutional use. Much of the equipment provided under Chapter 2 was not of the type provided for individual students, App. to Pet. for Cert. 140a; App. 262a–278a, but included "slide projectors, movie projectors, overhead projectors, television sets, tape recorders, projection screens, maps, globes, filmstrips, cassettes, computers," and computer software and peripherals, *Helms* v. *Cody*, No. 85–5533, 1990 WL 36124 (ED La., Mar. 27, 1990); App. to Pet. for Cert. 140a; App. 90a, 262a–278a, as well as library books and materials, *id.*, at 56a, 126a, 280a–284a. The videocassette players, overhead projectors, and other instructional aids were of the sort that we have found can easily be used by religious teachers for religious purposes. *Meek*, 421 U. S., at 363; *Wolman*, 433 U. S., at 249–250. The same was true of the computers, which were as readily employable for religious teaching as the other equipment, and presumably as immune to any countervailing safeguard, App. 90a, 118a, 164a–165a. Although library books, like textbooks, have fixed content, religious teachers can assign secular library books for religious critique, and books for libraries may be religious, as any divinity school library would demonstrate. The sheer number and variety of books that could be and were ordered gave ample opportunity for such diversion.

The divertibility thus inherent in the forms of Chapter 2 aid was enhanced by the structure of the program in Jefferson Parish. Requests for specific items under Chapter 2 came not from secular officials, cf. *Allen*, 392 U. S., at 244–

245, but from officials of the religious schools (and even parents of religious school pupils), see *ante*, at 803 (noting that private religious schools submitted their orders to the government for specific requested items); App. 156a–158a. The sectarian schools decided what they wanted and often ordered the supplies, *id.*, at 156a–159a, 171a–172a, to be forwarded directly to themselves, *id.*, at 156a–159a. It was easy to select whatever instructional materials and library books the schools wanted, just as it was easy to employ computers for the support of the religious content of the curriculum infused with religious instruction.

The concern with divertibility thus predicated is underscored by the fact that the religious schools in question here covered the primary and secondary grades, the grades in which the sectarian nature of instruction is characteristically the most pervasive, see *Lemon*, 403 U. S., at 616; cf. *Tilton*, 403 U. S., at 686–689, and in which pupils are the least critical of the schools' religious objectives, see *Lemon*, *supra*, at 616. No one, indeed, disputes the trial judge's findings, based on a detailed record, that the Roman Catholic schools,[21] which made up the majority of the private schools participating,[22] were pervasively sectarian,[23] that

[21] Litigation, discovery, and the opinions below focused almost exclusively on the aid to the 34 Roman Catholic schools. Consequently, I will confine my discussion to that information. Of course, the same concerns would be raised by government aid to religious schools of other faiths that a court found had similar missions of religious education and religious teachers teaching religiously.

[22] The Jefferson Parish Chapter 2 program included 46 nonpublic schools, of which 41 were religiously affiliated. Thirty-four of these were Roman Catholic, seven others were religiously affiliated, and five were not religiously affiliated. App. to Pet. for Cert. 143a–144a.

[23] The trial judge found that the Roman Catholic schools in question operate under the general supervision and authority of the Archbishop of New Orleans and their parish pastors, and are located next to parish churches and sometimes a rectory or convent. *Id.*, at 144a. The schools include religious symbols in their classrooms, App. 75a, require attendance at daily religion classes, *id.*, at 76a, conduct sacramental preparation

their common objective and mission was to engage in religious education,[24] and that their teachers taught religiously,[25] making them precisely the kind of primary and

classes during the schoolday, require attendance at mass, and provide extracurricular religious activities. At least some exercise a religious preference in accepting students and in charging tuition. App. to Pet. for Cert. 145a.

[24] The District Court found that the mission of the Roman Catholic schools is religious education based on the Archdiocese's and the individual schools' published statements of philosophy. For example, the St. Anthony School Handbook, cited by the District Court, reads:

"Catholic education is intended to make men's faith become living, conscious and active through the light of instruction. The Catholic school is the unique setting within which this ideal can be realized in the lives of the Catholic children and young people.

"Only in such a school can they experience learning and living fully integrated in the light of faith. . . . Here, too, instruction in religious truth and values is an integral part of the school program. It is not one more subject along side the rest, but instead it is perceived and functions as the underlying reality in which the student's experiences of learning and living achieve their coherence and their deepest meaning." *Ibid.*

The Handbook of Policies and Regulations for Elementary Schools of the Archdiocese of New Orleans indicates that the operation of the Roman Catholic schools is governed by canon law. It also lists the major objectives of those schools as follows:

"To work closely with the home in educating children towards the fullness of Christian life.

"To specifically teach Catholic principles and Christian values." *Id.*, at 146a.

The mission statements and objectives outlined by the other Roman Catholic schools also support the conclusion that these institutions' primary objective is religious instruction. See also App. 65a, 71a.

[25] The Archdiocese's official policy calls for religious preferences in hiring and the contracts of principals and teachers in its schools contain a provision allowing for termination for lifestyle contrary to the teachings of the Roman Catholic church. App. to Pet. for Cert. 145a. One of the objectives of the handbook is "[t]o encourage teachers to become committed Christians and to develop professional competence." *Id.*, at 146a. Other record evidence supports the conclusion that these religious schoolteachers teach religiously. See, *e. g.*, App. 125a (deposition of president of sectarian high school) ("Our teachers, whether they are religion teachers

secondary religious schools that raise the most serious Establishment Clause concerns. See *Walz*, 397 U. S., at 671; *Hunt*, 413 U. S., at 743; *Lemon*, *supra*, at 636–637. The threat to Establishment Clause values was accordingly at its highest in the circumstances of this case. Such precautionary features as there were in the Jefferson Parish scheme were grossly inadequate to counter the threat. To be sure, the disbursement of the aid was subject to statutory admonitions against diversion, see, *e. g.*, 20 U. S. C. §§ 7332, 8897, and was supposedly subject to a variety of safeguards, see *ante*, at 802–803, 832–834. But the provisions for onsite monitoring visits, labeling of government property, and government oversight cannot be accepted as sufficient in the face of record evidence that the safeguard provisions proved to be empty phrases in Jefferson Parish. Cf. *Agostini*, 521 U. S., at 228–229; *Zobrest*, 509 U. S., at 13 (accepting precautionary provisions in absence of evidence of their uselessness).

The plurality has already noted at length the ineffectiveness of the government's monitoring program. *Ante*, at 832–834; see also App. 111a ("A system to monitor nonpublic schools was often not in operation and therefore the [local educational agency] did not always know: (a) what was purchased or (b) how it was utilized"). Monitors visited a nonpublic school only sporadically, discussed the program with a single contact person, observed nothing more than attempts at recordkeeping, and failed to inform the teachers of the restrictions involved. *Id.*, at 154a–155a. Although Chapter 2 required labeling of government property, it occurred haphazardly at best, *id.*, at 113a, and the government's sole monitoring system for computer use amounted to nothing more

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or not, are certainly instructed that when issues come up in the classroom that have a religious, moral, or value concept, that their answers be consistent with the teachings of the Catholic Church and that they respond in that way to the students, so that there can be opportunities in other classes other than religion where discussion of religio[n] could take place, yes, sir"); *id.*, at 73a, 74a.

than questioning school officials and examining the location of computers at the schools, *id.*, at 118a. No records of software and computer use were kept, and no such recordkeeping was even planned. *Id.*, at 118a, 164a–166a. State and local officials in Jefferson Parish admitted that nothing prevented the Chapter 2 computers from being used for religious instruction, *id.*, at 102a, 118a, 164a–166a, and although they knew of methods of monitoring computer usage, such as locking the computer functions, *id.*, at 165a–166a, they implemented no particular policies, instituted no systems, and employed no technologies to minimize the likelihood of diversion to religious uses,[26] *id.*, at 118a, 165a–166a. The watchdogs did require the religious schools to give not so much as an assurance that they would use Chapter 2 computers solely for secular purposes, *Helms* v. *Picard*, 151 F. 3d 347, 368 (1998), amended, 165 F. 3d 311 (CA5 1999); App. 94a–95a. Government officials themselves admitted that there was no way to tell whether instructional materials had been diverted, *id.*, at 118a, 139a, 144a–145a, and, as the plurality notes, the only screening mechanism in the library book scheme was a review of titles by a single government official, *ante*, at 832–833, n. 15; see App. 137a. The government did not even have a policy on the consequences of noncompliance. *Id.*, at 145a.

The risk of immediate diversion of Chapter 2 benefits had its complement in the risk of future diversion, against which the Jefferson Parish program had absolutely no protection. By statute all purchases with Chapter 2 aid were to remain the property of the United States, 20 U. S. C. § 7372(c)(1), merely being "lent" to the recipient nonpublic schools. In actuality, however, the record indicates that nothing in the

[26] The Government's reliance on U. S. Department of Education Guidance for Title VI of the Elementary and Secondary Education Act (Feb. 1999) is misplaced. See App. to Brief for Secretary of Education 1a. It was not in place when discovery closed in this matter, and merely highlights the reasons for a lack of evidence on diversion or compliance.

Jefferson Parish program stood in the way of giving the Chapter 2 property outright to the religious schools when it became older. Although old equipment remained the property of the local education agency, a local government administrative body, one agency employee testified that there was no set policy for dealing with old computers, which were probably given outright to the religious schools. App. 161a–162a. The witness said that government-funded instructional materials, too, were probably left with the religious schools when they were old, and that it was unclear whether library books were ever to be returned to the government. *Ibid.*

Providing such governmental aid without effective safeguards against future diversion itself offends the Establishment Clause, *Tilton*, 403 U. S., at 682–684; *Nyquist*, 413 U. S., at 776–777, and even without evidence of actual diversion, our cases have repeatedly held that a "substantial risk" of it suffices to invalidate a government aid program on establishment grounds. See, *e. g.*, *Wolman*, 433 U. S., at 254 (invalidating aid for transportation on teacher-accompanied field trips because an "unacceptable risk of fostering of religion" was "an inevitable byproduct"); *Meek*, 421 U. S., at 372 (striking down program because of a "potential for impermissible fostering of religion"); *Levitt*, 413 U. S., at 480 (invalidating aid for tests designed by religious teachers because of "the substantial risk that . . . examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church"); *Lemon*, 403 U. S., at 619 (finding invalid aid with a "potential for impermissible fostering of religion"); cf. *Bowen*, 487 U. S., at 621 (noting that where diversion risk is less clearly made out, a case may be remanded for findings on actual diversion of aid to religious indoctrination); *Regan*, 444 U. S., at 656 (characterizing as "minimal" the chance that state-drafted tests with "complete" safeguards would be adopted to reli-

gious testing). A substantial risk of diversion in this case was more than clear, as the plurality has conceded. The First Amendment was violated.

But the record here goes beyond risk, to instances of actual diversion. What one would expect from such paltry efforts at monitoring and enforcement naturally resulted, and the record strongly suggests that other, undocumented diversions probably occurred as well. First, the record shows actual diversion in the library book program. App. 132a–133a. Although only limited evidence exists, it contrasts starkly with the records of the numerous textbook programs that we have repeatedly upheld, where there was no evidence of any actual diversion. See *Allen*, 392 U. S., at 244–245; *Meek*, *supra*, at 361–362; *Wolman*, *supra*, at 237–238. Here, discovery revealed that under Chapter 2, nonpublic schools requested and the government purchased at least 191 religious books with taxpayer funds by December 1985.[27] App. 133a. Books such as A Child's Book of Prayers, *id.*, at 84a, and The Illustrated Life of Jesus, *id.*, at 132a,

[27] The plurality applies inconsistent standards to the evidence. Although the plurality finds more limited evidence of actual diversion sufficient to support a general finding of diversion in the computer and instructional materials context, even in the face of JUSTICE O'CONNOR's objections, it fails to find a violation of the prohibition against providing aid with religious content based on the more stark, undisputed evidence of religious books. Compare *ante*, at 832–834, and nn. 14–17, with *ante*, at 834–835. As a matter of precedent, the correct evidentiary standard is clearly the former: "*[A]ny* use of public funds to promote religious doctrines violates the Establishment Clause." *Bowen*, 487 U. S., at 623 (O'CONNOR, J., concurring). We have never before found any actual diversion or allowed a risk of it; we have struck down policies that might permit it, *e. g.*, *Tilton*, 403 U. S., at 682–684, or have remanded for specific factual findings about whether diversion occurred, *Bowen*, *supra*, at 621. See *supra*, at 890–895. As a matter of principle, this low threshold is required to safeguard the values of the First Amendment. Madison's words make clear that even a small infringement of the prohibition on compelled aid to religion is odious to the freedom of conscience. No less does it open the door to the threat of corruption or to a return to religious conflict.

were discovered among others that had been ordered under the program. See also *id.*, at 59a–62a.

The evidence persuasively suggests that other aid was actually diverted as well. The principal of one religious school testified, for example, that computers lent with Chapter 2 funds were joined in a network with other non-Chapter 2 computers in some schools, and that religious officials and teachers were allowed to develop their own unregulated software for use on this network. *Id.*, at 77a. She admitted that the Chapter 2 computer took over the support of the computing system whenever there was a breakdown of the master computer purchased with the religious school's own funds. *Ibid.* Moreover, as the plurality observes, *ante*, at 833–834, n. 17, comparing the records of considerable federal funding of audiovisual equipment in religious schools with records of the schools' use of unidentified audiovisual equipment in religion classes strongly suggests that film projectors and videotape machines purchased with public funds were used in religious indoctrination over a period of at least seven years. App. 205a, 210a, 206a–207a; see also *id.*, at 108a (statement of second-grade teacher indicating that she used audiovisual materials in all classes).

Indeed, the plurality readily recognizes that the aid in question here was divertible and that substantial evidence of actual diversion exists. *Ante*, at 832–834, and nn. 14–17. Although JUSTICE O'CONNOR attributes limited significance to the evidence of divertibility and actual diversion, she also recognizes that it exists. *Ante*, at 864–865 (opinion concurring in judgment). The Court has no choice but to hold that the program as applied violated the Establishment Clause.[28]

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[28] Since the divertibility and diversion require a finding of unconstitutionality, I will not explore other grounds, beyond noting the likelihood that unconstitutional supplantation occurred as well. The record demonstrates that Chapter 2 aid impermissibly relieved religious schools of some costs that they otherwise would have borne, and so unconstitutionally sup-

IV

The plurality would break with the law. The majority misapplies it. That misapplication is, however, the only consolation in the case, which reaches an erroneous result but does not stage a doctrinal coup. But there is no mistaking the abandonment of doctrine that would occur if the plurality were to become a majority. It is beyond question that the plurality's notion of evenhandedness neutrality as a practical guarantee of the validity of aid to sectarian schools would be the end of the principle of no aid to the schools' religious mission. And if that were not so obvious it would become so after reflecting on the plurality's thoughts about diversion

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planted support in some budgetary categories. The record of affidavits and evaluation forms by religious schoolteachers and officials indicates that Chapter 2 aid was significant in the development of teaching curriculums, the introduction of new programs, and the support of old ones. App. 105a–108a, 184a–185a. The evidence shows that the concept of supplementing instead of supplanting was poorly understood by the sole government official administering the program, who apparently believed that the bar on supplanting was nothing more than a prohibition on paying for replacements of equipment that religious schools had previously purchased. *Id.*, at 167a. Government officials admitted that there was no way to determine whether payments for materials, equipment, books, or other assistance provided under the program reduced the amount of money budgeted for library and educational equipment, *id.*, at 145a–146a, and the 1985 Monitoring Report shows that the officials of at least one religious school admitted that the government aid was used to create the library, with the school's regular funds, when occasionally available, used merely to supplement the government money, Fine Deposition, *id.*, at 63a. The use records for audiovisual materials at one religious high school revealed that Chapter 2 funds were essential to the school's educational process, *id.*, at 187a, and a different school, as already noted, used a Chapter 2 computer to support its computer network when its own computers failed, *id.*, at 77a. The record is sparse, but these incidents suggest that the constitutional and statutory prohibition on supplanting expenses may have been largely aspirational. It seems that the program in Jefferson Parish violated the statute and ran afoul of the Constitution. Cf. *Nyquist*, 413 U. S., at 783; *Zobrest*, 509 U. S., at 12.

and about giving attention to the pervasiveness of a school's sectarian teaching.

The plurality is candid in pointing out the extent of actual diversion of Chapter 2 aid to religious use in the case before us, *ante,* at 832–834, and n. 17, and equally candid in saying it does not matter, *ante,* at 820–825, 833–834. To the plurality there is nothing wrong with aiding a school's religious mission; the only question is whether religious teaching obtains its tax support under a formally evenhanded criterion of distribution. The principle of no aid to religious teaching has no independent significance.

And if this were not enough to prove that no aid in religious school aid is dead under the plurality's First Amendment, the point is nailed down in the plurality's attack on the legitimacy of considering a school's pervasively sectarian character when judging whether aid to the school is likely to aid its religious mission. *Ante,* at 826–829. The relevance of this consideration is simply a matter of common sense: where religious indoctrination pervades school activities of children and adolescents, it takes great care to be able to aid the school without supporting the doctrinal effort. This is obvious. The plurality nonetheless condemns any enquiry into the pervasiveness of doctrinal content as a remnant of anti-Catholic bigotry (as if evangelical Protestant schools and Orthodox Jewish yeshivas were never pervasively sectarian[29]), and it equates a refusal to aid religious schools with hostility to religion (as if aid to religious teaching were not

[29] Indeed, one group of *amici curiae,* which consists of "religious and educational leaders from a broad range of both Eastern and Western religious traditions, and Methodist, Jewish and Seventh-day Adventist individuals" including "church administrators, administrators of religious elementary and secondary school systems; elementary and secondary school teachers at religious schools; and pastors and laity who serve on church school boards," identifies its members as having "broad experience teaching in and administering pervasively sectarian schools." Brief for Interfaith Religious Liberty Foundation et al. as *Amici Curiae* 1.

opposed in this very case by at least one religious respondent[30] and numerous religious *amici curiae*[31] in a tradition claiming descent from Roger Williams). My concern with these arguments goes not so much to their details[32] as it does to the fact that the plurality's choice to employ imputations of bigotry and irreligion as terms in the Court's debate makes one point clear: that in rejecting the principle of no aid to a school's religious mission the plurality is attacking the most fundamental assumption underlying the Establishment Clause, that government can in fact operate with neutrality in its relation to religion. I believe that it can, and so respectfully dissent.

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[30] One of the respondents describes herself as a "life-long, committed member of the Roman Catholic Church" who "objects to the government providing benefits to her parish school" because "[s]he has seen the chilling effect such entangling government aid has on the religious mission of schools run by her church." Brief for Respondents 1. She has been a member of the church for about 36 years, and six of her children attended different Jefferson Parish Catholic run schools. *Id.*, at 1, n. 1.

[31] *E. g.*, Brief for Baptist Joint Committee on Public Affairs as *Amicus Curiae;* Brief for Interfaith Religious Liberty Foundation et al. as *Amici Curiae;* Brief for National Committee for Public Education and Religious Liberty et al. as *Amici Curiae.*

[32] I do not think it worthwhile to comment at length, for example, on the plurality's clear misunderstanding of our access-to-public-forum cases, such as *Lamb's Chapel* and *Widmar* v. *Vincent*, 454 U. S. 263 (1981), as "decisions that have prohibited governments from discriminating in the distribution of public benefits based on religious status or sincerity," *ante*, at 828, when they were decided on completely different and narrowly limited free-speech grounds. Nor would it be worthwhile here to engage in extended discussion of why the goal of preventing courts from having to "trol[l] through a person's or institution's religious beliefs," *ibid.*, calls for less aid and commingling of government with religion, not for tolerance of their effects.

Syllabus

STENBERG, ATTORNEY GENERAL OF NEBRASKA, ET AL. *v.* CARHART

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

No. 99–830. Argued April 25, 2000—Decided June 28, 2000

The Constitution offers basic protection to a woman's right to choose whether to have an abortion. *Roe* v. *Wade*, 410 U. S. 113; *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833. Before fetal viability, a woman has a right to terminate her pregnancy, *id.*, at 870 (plurality opinion), and a state law is unconstitutional if it imposes on the woman's decision an "undue burden," *i. e.*, if it has the purpose or effect of placing a substantial obstacle in the woman's path, *id.*, at 877. Postviability, the State, in promoting its interest in the potentiality of human life, may regulate, and even proscribe, abortion except where "necessary, in appropriate medical judgment, for the preservation of the [mother's] life or health." *E. g.*, *id.*, at 879. The Nebraska law at issue prohibits any "partial birth abortion" unless that procedure is necessary to save the mother's life. It defines "partial birth abortion" as a procedure in which the doctor "partially delivers vaginally a living unborn child before killing the . . . child," and defines the latter phrase to mean "intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the [abortionist] knows will kill the . . . child and does kill the . . . child." Violation of the law is a felony, and it provides for the automatic revocation of a convicted doctor's state license to practice medicine. Respondent Carhart, a Nebraska physician who performs abortions in a clinical setting, brought this suit seeking a declaration that the statute violates the Federal Constitution. The District Court held the statute unconstitutional. The Eighth Circuit affirmed.

Held: Nebraska's statute criminalizing the performance of "partial birth abortion[s]" violates the Federal Constitution, as interpreted in *Casey* and *Roe*. Pp. 922–946.

(a) Because the statute seeks to ban one abortion method, the Court discusses several different abortion procedures, as described in the evidence below and the medical literature. During a pregnancy's second trimester (12 to 24 weeks), the most common abortion procedure is "dilation and evacuation" (D&E), which involves dilation of the cervix, removal of at least some fetal tissue using nonvacuum surgical instruments, and (after the 15th week) the potential need for instrumental

dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus. When such dismemberment is necessary, it typically occurs as the doctor pulls a portion of the fetus through the cervix into the birth canal. The risks of mortality and complication that accompany D&E are significantly lower than those accompanying induced labor procedures (the next safest midsecond trimester procedures). A variation of D&E, known as "intact D&E," is used after 16 weeks. It involves removing the fetus from the uterus through the cervix "intact," *i. e.*, in one pass rather than several passes. The intact D&E proceeds in one of two ways, depending on whether the fetus presents head first or feet first. The feet-first method is known as "dilation and extraction" (D&X). D&X is ordinarily associated with the term "partial birth abortion." The District Court concluded that clear and convincing evidence established that Carhart's D&X procedure is superior to, and safer than, the D&E and other abortion procedures used during the relevant gestational period in the 10 to 20 cases a year that present to Carhart. Moreover, materials presented at trial emphasize the potential benefits of the D&X procedure in certain cases. Pp. 923–929.

(b) The Nebraska statute lacks the requisite exception "for the preservation of the . . . health of the mother." *Casey*, *supra*, at 879 (plurality opinion). The State may promote but not endanger a woman's health when it regulates the methods of abortion. Pp. 929–938.

(i) The Court rejects Nebraska's contention that there is no need for a health exception here because safe alternatives remain available and a ban on partial birth abortion/D&X would create no risk to women's health. The parties strongly contested this factual question in the District Court; and the findings and evidence support Dr. Carhart. Pp. 931–933.

(ii) Nebraska and its supporting *amici* respond with eight arguments as to why the District Court's findings are irrelevant, wrong, or applicable only in a tiny number of instances. Pp. 933–934.

(iii) The eight arguments are insufficient to demonstrate that Nebraska's law needs no health exception. For one thing, certain of the arguments are beside the point. The D&X procedure's relative rarity (argument (1)) is not highly relevant. The State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it. And the fact that only a "handful" of doctors use the procedure (argument (2)) may reflect the comparative rarity of late second term abortions, the procedure's recent development, the controversy surrounding it, or, as Nebraska suggests, the procedure's lack of utility. For another thing, the record responds to Nebraska's (and *amici's*) medically based arguments. As to argument (3), the District

Court agreed that alternatives such as D&E and induced labor are "safe," but found that the D&X method was *safer* in the circumstances used by Carhart. As to argument (4)—that testimony showed that the statutory ban would not increase a woman's risk of several rare abortion complications—the District Court simply relied on different expert testimony than the State. Argument (5)—the assertion of *amici* Association of American Physicians and Surgeons et al. that elements of the D&X procedure may create special risks—is disputed by Carhart's *amici*, including the American College of Obstetricians and Gynecologists (ACOG), which claims that the suggested alternative procedures involve similar or greater risks of cervical and uterine injury. Nebraska's argument (6) is right—there are no general medical studies documenting the comparative safety of the various abortion procedures. Nor does the Court deny the import of the American Medical Association's (AMA) recommendation (argument (7)) that intact D&X not be used unless alternative procedures pose materially greater risk to the woman. However, the Court cannot read ACOG's qualification that it could not identify a circumstance where D&X was the "only" life- or health-preserving option as if, according to Nebraska's argument (8), it denied the potential health-related need for D&X. ACOG has also asserted that D&X can be the most appropriate abortion procedure and presents a variety of potential safety advantages. Pp. 934–936.

(iv) The upshot is a District Court finding that D&X obviates health risks in certain circumstances, a highly plausible record-based explanation of why that might be so, a division of medical opinion over whether D&X is generally safer, and an absence of controlled medical studies that would help answer these medical questions. Given these circumstances, the Court believes the law requires a health exception. For one thing, the word "necessary" in *Casey*'s phrase "necessary, in appropriate medical judgment, for the . . . health of the mother," 505 U. S., at 879, cannot refer to absolute proof or require unanimity of medical opinion. Doctors often differ in their estimation of comparative health risks and appropriate treatment. And *Casey*'s words "appropriate medical judgment" must embody the judicial need to tolerate responsible differences of medical opinion. For another thing, the division of medical opinion signals uncertainty. If those who believe that D&X is a safer abortion method in certain circumstances turn out to be right, the absence of a health exception will place women at an unnecessary risk. If they are wrong, the exception will simply turn out to have been unnecessary. Pp. 936–938.

(c) The Nebraska statute imposes an "undue burden" on a woman's ability to choose an abortion. See *Casey*, *supra*, at 874 (plurality opinion). Pp. 938–946.

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(i) Nebraska does not deny that the statute imposes an "undue burden" *if* it applies to the more commonly used D&E procedure as well as to D&X. This Court agrees with the Eighth Circuit that the D&E procedure falls within the statutory prohibition of intentionally delivering into the vagina a living fetus, or "a substantial portion thereof," for the purpose of performing a procedure that the perpetrator knows will kill the fetus. Because the evidence makes clear that D&E will often involve a physician pulling an arm, leg, or other "substantial portion" of a still living fetus into the vagina prior to the fetus' death, the statutory terms do not to distinguish between D&X and D&E. The statute's language does not track the medical differences between D&E and D&X, but covers both. Using the law's statutory terms, it is impossible to distinguish between D&E (where a foot or arm is drawn through the cervix) and D&X (where the body up to the head is drawn through the cervix). Both procedures can involve the introduction of a "substantial portion" of a still living fetus, through the cervix, into the vagina—the very feature of an abortion that leads to characterizing such a procedure as involving "partial birth." Pp. 938–940.

(ii) The Court rejects the Nebraska Attorney General's arguments that the state law does differentiate between the two procedures—*i. e.*, that the words "substantial portion" mean "the child up to the head," such that the law is inapplicable where the physician introduces into the birth canal anything less than the entire fetal body—and that the Court must defer to his views. The Court's case law makes clear that the Attorney General's narrowing interpretation cannot be given controlling weight. For one thing, this Court normally follows lower federal-court interpretations of state law, *e. g.*, *McMillian* v. *Monroe County*, 520 U. S. 781, 786, and rarely reviews such an interpretation that is agreed upon by the two lower federal courts. *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 395. Here, the two lower courts both rejected the Attorney General's narrowing interpretation. For another, the Court's precedent warns against accepting as "authoritative" an Attorney General's interpretation of state law where, as here, that interpretation does not bind the state courts or local law enforcement. In Nebraska, elected county attorneys have independent authority to initiate criminal prosecutions. Some present prosecutors (and future Attorneys General) might use the law at issue to pursue physicians who use D&E procedures. Nor can it be said that the lower courts used the wrong legal standard in assessing the Attorney General's interpretation. The Eighth Circuit recognized its duty to give the law a construction that would avoid constitutional doubt, but nonetheless concluded that the Attorney General's interpretation would twist the law's words, giving them a meaning they cannot reasonably bear.

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The Eighth Circuit is far from alone in rejecting such a narrowing interpretation, since 11 of the 12 federal courts that have interpreted on the merits the model statutory language on which the Nebraska law is based have found the language potentially applicable to abortion procedures other than D&X. Regardless, were the Court to grant the Attorney General's views "substantial weight," it would still have to reject his interpretation, for it conflicts with the statutory language. The statutory words, "substantial portion," indicate that the statute does not include the Attorney General's restriction—"the child up to the head." The Nebraska Legislature's debates hurt the Attorney General's argument more than they help it, indicating that as small a portion of the fetus as a foot would constitute a "substantial portion." Even assuming that the distinction the Attorney General seeks to draw between the overall abortion procedure itself and the separate procedure used to kill an unborn child would help him make the D&E/D&X distinction he seeks, there is no language in the statute that supports it. Although adopting his interpretation might avoid the constitutional problem discussed above, the Court lacks power do so where, as here, the narrowing construction is not reasonable and readily apparent. *E. g.*, *Boos* v. *Barry*, 485 U. S. 312, 330. Finally, the Court has never held that a federal litigant must await a state-court construction or the development of an established practice before bringing the federal suit. *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U. S. 750, 770, n. 11. But any authoritative state-court construction is lacking here. The Attorney General neither sought a narrowing interpretation from the Nebraska Supreme Court nor asked the federal courts to certify the interpretive question. Cf. *Arizonans for Official English* v. *Arizona*, 520 U. S. 43. Even were the Court inclined to certify the question now, it could not do so because certification is appropriate only where the statute is "fairly susceptible" to a narrowing construction, see *Houston* v. *Hill*, 482 U. S. 451, 468–471, as is not the case here. Moreover, the Nebraska Supreme Court grants certification only if the certified question is determinative of the cause, see *id.*, at 471, as it would not be here. In sum, because all those who perform abortion procedures using the D&E method must fear prosecution, conviction, and imprisonment, the Nebraska law imposes an undue burden upon a woman's right to make an abortion decision. Pp. 940–946.

192 F. 3d 1142, affirmed.

BREYER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 946. O'CONNOR, J., filed a concurring opinion, *post*, p. 947. GINSBURG, J., filed a concurring

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opinion, in which STEVENS, J., joined, *post*, p. 951. REHNQUIST, C. J., *post*, p. 952, and SCALIA, J., *post*, p. 953, filed dissenting opinions. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 956. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 980.

Don Stenberg, Attorney General of Nebraska, *pro se*, argued the cause for petitioners. With him on the briefs was *L. Steven Grasz*, Deputy Attorney General.

Simon Heller argued the cause for respondent. With him on the brief were *Janet Benshoof*, *Priscilla J. Smith*, *Bonnie Scott Jones*, *Jerry M. Hug*, and *Alan G. Stoler*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Louisiana et al. by *Richard P. Ieyoub*, Attorney General of Louisiana, *Roy A. Mongrue, Jr.*, Assistant Attorney General, *Dorinda C. Bordlee*, Special Assistant Attorney General, *Mike Moore*, Attorney General of Mississippi, *Nikolas T. Nikas*, and *Stephen M. Crampton;* for the State of Texas by *John Cornyn*, Attorney General, *Andy Taylor*, First Assistant Attorney General, *Linda S. Eads*, Deputy Attorney General, *Gregory S. Coleman*, Solicitor General, and *Julie Caruthers Parsley*, Deputy Solicitor General; for the State of Wisconsin by *James E. Doyle*, Attorney General, and *Susan K. Ullman*, Assistant Attorney General; for Agudath Israel of America by *David Zwiebel;* for the American Center for Law and Justice et al. by *Jay Alan Sekulow*, *James M. Henderson, Sr.*, *Walter M. Weber*, *Thomas P. Monaghan*, *Richard Thompson*, and *Edward L. White III;* for the Association of American Physicians and Surgeons et al. by *Teresa Stanton Collett;* for Family First by *Paul Benjamin Linton;* for Feminists for Life of America et al. by *Dwight G. Duncan;* for the Knights of Columbus by *Pat A. Cipollone* and *Carl A. Anderson;* for the National Association of Prolife Nurses, Inc., by *William C. Porth* and *Robert P. George;* for the National Right to Life Committee by *James Bopp, Jr.*, *Richard E. Coleson*, and *Thomas J. Marzen;* for the Rutherford Institute by *Thomas W. Strahan*, *John W. Whitehead*, and *Steven H. Aden;* for the United States Catholic Conference et al. by *Mark E. Chopko* and *Michael F. Moses;* and for Representative Charles T. Canady et al. by *James Bopp, Jr.*, *Richard E. Coleson*, and *Thomas J. Marzen*.

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Waxman*, *Deputy Solicitor General Underwood*, *Paul R. Q. Wolfson*, *Harriet S. Rabb*, *Marcy J. Wilder*, and *Kenneth Y. Choe;* for the State of California by *Bill Lockyer*, Attorney General, *Peter J. Siggins*, Chief Deputy Attorney General, and *Patricia A. Wynne*,

JUSTICE BREYER delivered the opinion of the Court.

We again consider the right to an abortion. We understand the controversial nature of the problem. Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child; they recoil at the thought of a law that would permit it. Other millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering. Taking account of

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Special Assistant Attorney General; for the State of New York et al. by *Eliot Spitzer*, Attorney General of New York, *Preeta D. Bansal*, Solicitor General, and *Jennifer K. Brown*, Assistant Attorney General, *Andrew Ketterer*, Attorney General of Maine, *Hardy Myers*, Attorney General of Oregon, and *William H. Sorrell*, Attorney General of Vermont; for the American Civil Liberties Union et al. by *Catherine Weiss*, *Steven R. Shapiro*, and *Colleen K. Connell;* for the American College of Obstetricians and Gynecologists et al. by *Adam L. Frank*, *A. Stephen Hut, Jr.*, and *Matthew A. Brill;* for the Naral Foundation et al. by *James P. Joseph*, *Nancy L. Perkins*, and *Elizabeth Arndorfer;* for Planned Parenthood of Wisconsin et al. by *Roger K. Evans*, *Eve C. Gartner*, and *Dara Klassel;* for the Religious Coalition for Reproductive Choice et al. by *Carrie Y. Flaxman;* for Seventy-five Organizations Committed to Women's Equality by *Susan Frietsche*, *Carol E. Tracy*, *Martha F. Davis*, *Roslyn Powell*, and *Yolanda S. Wu;* and for Senator Barbara Boxer et al. by *Robert Lewin*, *Kevin J. Curnin*, *Claude G. Szyfer*, and *Robert Abrams*.

Briefs of *amici curiae* were filed by the Commonwealth of Virginia et al. by *Mark L. Earley*, Attorney General of Virginia, *William H. Hurd*, Solicitor General, and *Daniel J. Poynor*, *Alison P. Landry*, and *Anthony P. Meredith*, Assistant Attorneys General, *Claire J. V. Richards*, *James Bopp, Jr.*, *Richard E. Coleson*, *Thomas J. Marzen*, *Richard F. Collier, Jr.*, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Thomas J. Miller* of Iowa, *Jennifer M. Granholm* of Michigan, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *D. Michael Fisher* of Pennsylvania, *Charlie Condon* of South Carolina, *Mark Barnett* of South Dakota, and *Jan Graham* of Utah; and for the Family Research Council by *Teresa R. Wagner*.

these virtually irreconcilable points of view, aware that constitutional law must govern a society whose different members sincerely hold directly opposing views, and considering the matter in light of the Constitution's guarantees of fundamental individual liberty, this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose. *Roe* v. *Wade*, 410 U. S. 113 (1973); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). We shall not revisit those legal principles. Rather, we apply them to the circumstances of this case.

Three established principles determine the issue before us. We shall set them forth in the language of the joint opinion in *Casey*. First, before "viability . . . the woman has a right to choose to terminate her pregnancy." *Id.*, at 870 (plurality opinion).

Second, "a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability" is unconstitutional. *Id.*, at 877. An "undue burden is . . . shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Ibid.*

Third, " 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.' " *Id.*, at 879 (quoting *Roe* v. *Wade*, *supra*, at 164–165).

We apply these principles to a Nebraska law banning "partial birth abortion." The statute reads as follows:

> "No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or aris-

> ing from the pregnancy itself." Neb. Rev. Stat. Ann. § 28–328(1) (Supp. 1999).

The statute defines "partial birth abortion" as:

> "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." § 28–326(9).

It further defines "partially delivers vaginally a living unborn child before killing the unborn child" to mean

> "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." *Ibid.*

The law classifies violation of the statute as a "Class III felony" carrying a prison term of up to 20 years, and a fine of up to $25,000. §§ 28–328(2), 28–105. It also provides for the automatic revocation of a doctor's license to practice medicine in Nebraska. § 28–328(4).

We hold that this statute violates the Constitution.

I

A

Dr. Leroy Carhart is a Nebraska physician who performs abortions in a clinical setting. He brought this lawsuit in Federal District Court seeking a declaration that the Nebraska statute violates the Federal Constitution, and asking for an injunction forbidding its enforcement. After a trial on the merits, during which both sides presented several expert witnesses, the District Court held the statute unconstitutional. 11 F. Supp. 2d 1099 (Neb. 1998). On appeal, the Eighth Circuit affirmed. 192 F. 3d 1142 (1999); cf. *Hope Clinic* v. *Ryan*, 195 F. 3d 857 (CA7 1999) (en banc) (consider-

ing a similar statute, but reaching a different legal conclusion). We granted certiorari to consider the matter.

B

Because Nebraska law seeks to ban one method of aborting a pregnancy, we must describe and then discuss several different abortion procedures. Considering the fact that those procedures seek to terminate a potential human life, our discussion may seem clinically cold or callous to some, perhaps horrifying to others. There is no alternative way, however, to acquaint the reader with the technical distinctions among different abortion methods and related factual matters, upon which the outcome of this case depends. For that reason, drawing upon the findings of the trial court, underlying testimony, and related medical texts, we shall describe the relevant methods of performing abortions in technical detail.

The evidence before the trial court, as supported or supplemented in the literature, indicates the following:

1. About 90% of all abortions performed in the United States take place during the first trimester of pregnancy, before 12 weeks of gestational age. Centers for Disease Control and Prevention, Abortion Surveillance—United States, 1996, p. 41 (July 30, 1999) (hereinafter Abortion Surveillance). During the first trimester, the predominant abortion method is "vacuum aspiration," which involves insertion of a vacuum tube (cannula) into the uterus to evacuate the contents. Such an abortion is typically performed on an outpatient basis under local anesthesia. 11 F. Supp. 2d, at 1102; Obstetrics: Normal & Problem Pregnancies 1253–1254 (S. Gabbe, J. Niebyl, & J. Simpson eds. 3d ed. 1996). Vacuum aspiration is considered particularly safe. The procedure's mortality rates for first trimester abortion are, for example, 5 to 10 times lower than those associated with carrying the fetus to term. Complication rates are also low. *Id.*, at 1251; Lawson et al., Abortion Mortality, United

States, 1972 through 1987, 171 Am. J. Obstet. Gynecol. 1365, 1368 (1994); M. Paul et al., A Clinicians Guide to Medical and Surgical Abortion 108–109 (1999) (hereinafter Medical and Surgical Abortion). As the fetus grows in size, however, the vacuum aspiration method becomes increasingly difficult to use. 11 F. Supp. 2d, at 1102–1103; Obstetrics: Normal & Problem Pregnancies, *supra*, at 1268.

2. Approximately 10% of all abortions are performed during the second trimester of pregnancy (12 to 24 weeks). Abortion Surveillance 41. In the early 1970's, inducing labor through the injection of saline into the uterus was the predominant method of second trimester abortion. *Id.*, at 8; *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 76 (1976). Today, however, the medical profession has switched from medical induction of labor to surgical procedures for most second trimester abortions. The most commonly used procedure is called "dilation and evacuation" (D&E). That procedure (together with a modified form of vacuum aspiration used in the early second trimester) accounts for about 95% of all abortions performed from 12 to 20 weeks of gestational age. Abortion Surveillance 41.

3. D&E "refers generically to transcervical procedures performed at 13 weeks gestation or later." American Medical Association, Report of Board of Trustees on Late-Term Abortion, App. 490 (hereinafter AMA Report). The AMA Report, adopted by the District Court, describes the process as follows.

Between 13 and 15 weeks of gestation:

> "D&E is similar to vacuum aspiration except that the cervix must be dilated more widely because surgical instruments are used to remove larger pieces of tissue. Osmotic dilators are usually used. Intravenous fluids and an analgesic or sedative may be administered. A local anesthetic such as a paracervical block may be administered, dilating agents, if used, are removed and instruments are inserted through the cervix into the

uterus to removal fetal and placental tissue. Because fetal tissue is friable and easily broken, the fetus may not be removed intact. The walls of the uterus are scraped with a curette to ensure that no tissue remains." *Id.*, at 490–491.

After 15 weeks:

"Because the fetus is larger at this stage of gestation (particularly the head), and because bones are more rigid, dismemberment or other destructive procedures are more likely to be required than at earlier gestational ages to remove fetal and placental tissue." *Id.*, at 491.

After 20 weeks:

"Some physicians use intrafetal potassium chloride or digoxin to induce fetal demise prior to a late D&E (after 20 weeks), to facilitate evacuation." *Id.*, at 491–492.

There are variations in D&E operative strategy; compare *ibid.* with W. Hern, Abortion Practice 146–156 (1984), and Medical and Surgical Abortion 133–135. However, the common points are that D&E involves (1) dilation of the cervix; (2) removal of at least some fetal tissue using nonvacuum instruments; and (3) (after the 15th week) the potential need for instrumental disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus.

4. When instrumental disarticulation incident to D&E is necessary, it typically occurs as the doctor pulls a portion of the fetus through the cervix into the birth canal. Dr. Carhart testified at trial as follows:

"Dr. Carhart: . . . 'The dismemberment occurs between the traction of . . . my instrument and the countertraction of the internal os of the cervix . . . .

"Counsel: 'So the dismemberment occurs after you pulled a part of the fetus through the cervix, is that correct?

> "Dr. Carhart: 'Exactly. Because you're using—The cervix has two strictures or two rings, the internal os and the external os . . . that's what's actually doing the dismembering. . . .
>
> "Counsel: 'When we talked before or talked before about a D&E, that is not—where there is not intention to do it intact, do you, in that situation, dismember the fetus in utero first, then remove portions?
>
> "Dr. Carhart: 'I don't think so. . . . I don't know of any way that one could go in and intentionally dismember the fetus in the uterus. . . . It takes something that restricts the motion of the fetus against what you're doing before you're going to get dismemberment.'" 11 F. Supp. 2d, at 1104.

Dr. Carhart's specification of the location of fetal disarticulation is consistent with other sources. See Medical and Surgical Abortion 135; App. in Nos. 98–3245 and 98–3300 (CA8), p. 683, (testimony of Dr. Phillip Stubblefield) ("Q: So you don't actually dismember the fetus in utero, then take the pieces out? A: No").

5. The D&E procedure carries certain risks. The use of instruments within the uterus creates a danger of accidental perforation and damage to neighboring organs. Sharp fetal bone fragments create similar dangers. And fetal tissue accidentally left behind can cause infection and various other complications. See 11 F. Supp. 2d, at 1110; Gynecologic, Obstetric, and Related Surgery 1045 (D. Nichols & D. Clarke-Pearson eds. 2d ed. 2000); F. Cunningham et al., Williams Obstetrics 598 (20th ed. 1997). Nonetheless studies show that the risks of mortality and complication that accompany the D&E procedure between the 12th and 20th weeks of gestation are significantly lower than those accompanying induced labor procedures (the next safest midsecond trimester procedures). See Gynecologic, Obstetric, and Related Surgery, *supra*, at 1046; AMA Report, App. 495, 496; Medical

and Surgical Abortion 139, 142; Lawson, 171 Am. J. Obstet. Gynecol., at 1368.

6. At trial, Dr. Carhart and Dr. Stubblefield described a variation of the D&E procedure, which they referred to as an "intact D&E." See 11 F. Supp. 2d, at 1105, 1111. Like other versions of the D&E technique, it begins with induced dilation of the cervix. The procedure then involves removing the fetus from the uterus through the cervix "intact," *i. e.*, in one pass, rather than in several passes. *Ibid.* It is used after 16 weeks at the earliest, as vacuum aspiration becomes ineffective and the fetal skull becomes too large to pass through the cervix. *Id.*, at 1105. The intact D&E proceeds in one of two ways, depending on the presentation of the fetus. If the fetus presents head first (a vertex presentation), the doctor collapses the skull; and the doctor then extracts the entire fetus through the cervix. If the fetus presents feet first (a breech presentation), the doctor pulls the fetal body through the cervix, collapses the skull, and extracts the fetus through the cervix. *Ibid.* The breech extraction version of the intact D&E is also known commonly as "dilation and extraction," or D&X. *Id.*, at 1112. In the late second trimester, vertex, breech, and traverse/compound (sideways) presentations occur in roughly similar proportions. Medical and Surgical Abortion 135; 11 F. Supp. 2d, at 1108.

7. The intact D&E procedure can also be found described in certain obstetric and abortion clinical textbooks, where two variations are recognized. The first, as just described, calls for the physician to adapt his method for extracting the intact fetus depending on fetal presentation. See Gynecologic, Obstetric, and Related Surgery, *supra*, at 1043; Medical and Surgical Abortion 136–137. This is the method used by Dr. Carhart. See 11 F. Supp. 2d, at 1105. A slightly different version of the intact D&E procedure, associated with Dr. Martin Haskell, calls for conversion to a breech presentation in all cases. See Gynecologic, Obstetric, and Related

Surgery, *supra,* at 1043 (citing M. Haskell, Dilation and Extraction for Late Second Trimester Abortion (1992), in 139 Cong. Rec. 8605 (1993)).

8. The American College of Obstetricians and Gynecologists describes the D&X procedure in a manner corresponding to a breech-conversion intact D&E, including the following steps:

> "1. deliberate dilatation of the cervix, usually over a sequence of days;
>
> "2. instrumental conversion of the fetus to a footling breech;
>
> "3. breech extraction of the body excepting the head; and
>
> "4. partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus." American College of Obstetricians and Gynecologists Executive Board, Statement on Intact Dilation and Extraction (Jan. 12, 1997) (hereinafter ACOG Statement), App. 599–560.

Despite the technical differences we have just described, intact D&E and D&X are sufficiently similar for us to use the terms interchangeably.

9. Dr. Carhart testified he attempts to use the intact D&E procedure during weeks 16 to 20 because (1) it reduces the dangers from sharp bone fragments passing through the cervix, (2) minimizes the number of instrument passes needed for extraction and lessens the likelihood of uterine perforations caused by those instruments, (3) reduces the likelihood of leaving infection-causing fetal and placental tissue in the uterus, and (4) could help to prevent potentially fatal absorption of fetal tissue into the maternal circulation. See 11 F. Supp. 2d, at 1107. The District Court made no findings about the D&X procedure's overall safety. *Id.*, at 1126, n. 39. The District Court concluded, however, that "the evidence is both clear and convincing that Carhart's

D&X procedure is superior to, and safer than, the . . . other abortion procedures used during the relevant gestational period in the 10 to 20 cases a year that present to Dr. Carhart." *Id.*, at 1126.

10. The materials presented at trial referred to the potential benefits of the D&X procedure in circumstances involving nonviable fetuses, such as fetuses with abnormal fluid accumulation in the brain (hydrocephaly). See 11 F. Supp. 2d, at 1107 (quoting AMA Report, App. 492 ("'Intact D&X may be preferred by some physicians, particularly when the fetus has been diagnosed with hydrocephaly or other anomalies incompatible with life outside the womb'")); see also Grimes, The Continuing Need for Late Abortions, 280 JAMA 747, 748 (Aug. 26, 1998) (D&X "may be especially useful in the presence of fetal anomalies, such as hydrocephalus," because its reduction of the cranium allows "a smaller diameter to pass through the cervix, thus reducing risk of cervical injury"). Others have emphasized its potential for women with prior uterine scars, or for women for whom induction of labor would be particularly dangerous. See *Women's Medical Professional Corp.* v. *Voinovich*, 911 F. Supp. 2d 1051, 1067 (SD Ohio 1995); *Evans* v. *Kelley*, 977 F. Supp. 2d 1283, 1296 (ED Mich. 1997).

11. There are no reliable data on the number of D&X abortions performed annually. Estimates have ranged between 640 and 5,000 per year. Compare Henshaw, Abortion Incidence and Services in the United States, 1995–1996, 30 Family Planning Perspectives 263, 268 (1998), with Joint Hearing on S. 6 and H. R. 929 before the Senate Committee on the Judiciary and the Subcommittee on the Constitution of the House Committee on the Judiciary, 105th Cong., 1st Sess., 46 (1997).

II

The question before us is whether Nebraska's statute, making criminal the performance of a "partial birth abortion," violates the Federal Constitution, as interpreted in

Planned Parenthood of Southeastern Pa. v. *Casey*, 505 U. S. 833 (1992), and *Roe* v. *Wade*, 410 U. S. 113 (1973). We conclude that it does for at least two independent reasons. First, the law lacks any exception "'for the preservation of the . . . health of the mother.'" *Casey*, 505 U. S., at 879 (plurality opinion). Second, it "imposes an undue burden on a woman's ability" to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself. *Id.*, at 874. We shall discuss each of these reasons in turn.

A

The *Casey* plurality opinion reiterated what the Court held in *Roe;* that "'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.*'" 505 U. S., at 879 (quoting *Roe*, *supra*, at 164–165) (emphasis added).

The fact that Nebraska's law applies both previability and postviability aggravates the constitutional problem presented. The State's interest in regulating abortion previability is considerably weaker than postviability. See *Casey*, *supra*, at 870. Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation. See *Casey*, *supra*, at 880 (majority opinion) (assuming need for health exception previability); see also *Harris* v. *McRae*, 448 U. S. 297, 316 (1980).

The quoted standard also depends on the state regulations "promoting [the State's] interest in the potentiality of human life." The Nebraska law, of course, does not directly further an interest "in the potentiality of human life" by saving the fetus in question from destruction, as it regulates only a *method* of performing abortion. Nebraska describes its interests differently. It says the law "'show[s] concern for the life of the unborn,'" "prevent[s] cruelty to partially born chil-

dren," and "preserve[s] the integrity of the medical profession." Brief for Petitioners 48. But we cannot see how the interest-related differences could make any difference to the question at hand, namely, the application of the "health" requirement.

Consequently, the governing standard requires an exception "where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother," *Casey*, *supra*, at 879, for this Court has made clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion. *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 768–769 (1986); *Colautti* v. *Franklin*, 439 U. S. 379, 400 (1979); *Danforth*, 428 U. S., at 76–79; *Doe* v. *Bolton*, 410 U. S. 179, 197 (1973).

JUSTICE THOMAS says that the cases just cited limit this principle to situations where the pregnancy *itself* creates a threat to health. See *post*, at 1010. He is wrong. The cited cases, reaffirmed in *Casey*, recognize that a State cannot subject women's health to significant risks both in that context, *and also* where state regulations force women to use riskier methods of abortion. Our cases have repeatedly invalidated statutes that in the process of regulating the *methods* of abortion, imposed significant health risks. They make clear that a risk to a women's health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely. Our holding does not go beyond those cases, as ratified in *Casey*.

1

Nebraska responds that the law does not require a health exception unless there is a need for such an exception. And here there is no such need, it says. It argues that "safe alternatives remain available" and "a ban on partial-birth abortion/D&X would create no risk to the health of women." Brief for Petitioners 29, 40. The problem for Nebraska is

that the parties strongly contested this factual question in the trial court below; and the findings and evidence support Dr. Carhart. The State fails to demonstrate that banning D&X without a health exception may not create significant health risks for women, because the record shows that significant medical authority supports the proposition that in some circumstances, D&X would be the safest procedure.

We shall reiterate in summary form the relevant findings and evidence. On the basis of medical testimony the District Court concluded that "Carhart's D&X procedure is . . . safer tha[n] the D&E and other abortion procedures used during the relevant gestational period in the 10 to 20 cases a year that present to Dr. Carhart." 11 F. Supp. 2d, at 1126. It found that the D&X procedure permits the fetus to pass through the cervix with a minimum of instrumentation. *Ibid.* It thereby

> "reduces operating time, blood loss and risk of infection; reduces complications from bony fragments; reduces instrument-inflicted damage to the uterus and cervix; prevents the most common causes of maternal mortality (DIC and amniotic fluid embolus); and eliminates the possibility of 'horrible complications' arising from retained fetal parts." *Ibid.*

The District Court also noted that a select panel of the American College of Obstetricians and Gynecologists concluded that D&X "'may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman.'" *Id.*, at 1105, n. 10 (quoting ACOG Statement, App. 600–601) (but see an important qualification, *infra*, at 934). With one exception, the federal trial courts that have heard expert evidence on the matter have reached similar factual conclusions. See *Rhode Island Medical Soc.* v. *Whitehouse*, 66 F. Supp. 2d 288, 314 (RI 1999); *A Choice for Women* v. *Butterworth*, 54 F. Supp. 2d 1148, 1153, 1156 (SD Fla. 1998); *Causeway Medical Suite* v. *Foster*, 43 F. Supp. 2d 604, 613–614 (ED La. 1999); *Richmond*

Medical Center for Women v. *Gilmore*, 11 F. Supp. 2d 795, 827, n. 40 (ED Va. 1998); *Hope Clinic* v. *Ryan*, 995 F. Supp. 2d 847, 852 (ND Ill. 1998), vacated, 195 F. 3d 857 (CA7 1999), cert. pending, No. 99–1152; *Voinovich*, 911 F. Supp. 2d, at 1069–1070; *Kelley*, 977 F. Supp. 2d, at 1296; but see *Planned Parenthood of Wis.* v. *Doyle*, 44 F. Supp. 2d 975, 980 (WD Wis.), vacated, 195 F. 3d 857 (CA7 1999).

2

Nebraska, along with supporting *amici*, replies that these findings are irrelevant, wrong, or applicable only in a tiny number of instances. It says (1) that the D&X procedure is "little-used," (2) by only "a handful of doctors." Brief for Petitioners 32. It argues (3) that D&E and labor induction are at all times "safe alternative procedures." *Id.*, at 36. It refers to the testimony of petitioners' medical expert, who testified (4) that the ban would not increase a woman's risk of several rare abortion complications (disseminated intravascular coagulopathy and amniotic fluid embolus), *id.*, at 37; App. 642–644.

The Association of American Physicians and Surgeons et al., *amici* supporting Nebraska, argue (5) that elements of the D&X procedure may create special risks, including cervical incompetence caused by overdilitation, injury caused by conversion of the fetal presentation, and dangers arising from the "blind" use of instrumentation to pierce the fetal skull while lodged in the birth canal. See Brief for Association of American Physicians and Surgeons et al. as *Amici Curiae* 21–23; see also Sprang & Neerhof, Rationale for Banning Abortions Late in Pregnancy, 280 JAMA 744, 746 (Aug. 26, 1998).

Nebraska further emphasizes (6) that there are no medical studies "establishing the safety of the partial-birth abortion/D&X procedure," Brief for Petitioners 39, and "no medical studies comparing the safety of partial-birth abortion/D&X to other abortion procedures," *ibid.* It points to, *id.*, at 35,

(7) an American Medical Association policy statement that "'there does not appear to be any identified situation in which intact D&X is the only appropriate procedure to induce abortion,'" Late Term Pregnancy Termination Techniques, AMA Policy H–5.982 (1997). And it points out (8) that the American College of Obstetricians and Gynecologists qualified its statement that D&X "may be the best or most appropriate procedure," by adding that the panel "could identify no circumstances under which [the D&X] procedure . . . would be the only option to save the life or preserve the health of the woman." App. 600–601.

3

We find these eight arguments insufficient to demonstrate that Nebraska's law needs no health exception. For one thing, certain of the arguments are beside the point. The D&X procedure's relative rarity (argument (1)) is not highly relevant. The D&X is an infrequently used abortion procedure; but the health exception question is whether protecting women's health requires an exception for those infrequent occasions. A rarely used treatment might be necessary to treat a rarely occurring disease that could strike anyone—the State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it. Nor can we know whether the fact that only a "handful" of doctors use the procedure (argument (2)) reflects the comparative rarity of late second term abortions, the procedure's recent development, Gynecologic, Obstetric, and Related Surgery, at 1043, the controversy surrounding it, or, as Nebraska suggests, the procedure's lack of utility.

For another thing, the record responds to Nebraska's (and *amici*'s) medically based arguments. In respect to argument (3), for example, the District Court agreed that alternatives, such as D&E and induced labor, are "safe" but found that the D&X method was significantly *safer* in certain circumstances. 11 F. Supp. 2d, at 1125–1126. In respect to

argument (4), the District Court simply relied on different expert testimony—testimony stating that " '[a]nother advantage of the Intact D&E is that it eliminates the risk of embolism of cerebral tissue into the woman's blood stream.' " *Id.*, at 1124 (quoting Hearing on H. R. 1833 before the Senate Committee on the Judiciary, 104th Cong., 1st Sess., 260 (1995) (statement of W. Hern).

In response to *amici*'s argument (5), the American College of Obstetricians and Gynecologists, in its own *amici* brief, denies that D&X generally poses risks greater than the alternatives. It says that the suggested alternative procedures involve similar or greater risks of cervical and uterine injury, for "D&E procedures, involve similar amounts of dilitation" and "of course childbirth involves even greater cervical dilitation." Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 23. The College points out that Dr. Carhart does not reposition the fetus thereby avoiding any risks stemming from conversion to breech presentation, and that, as compared with D&X, D&E involves the same, if not greater, "blind" use of sharp instruments in the uterine cavity. *Id.*, at 23–24.

We do not quarrel with Nebraska's argument (6), for Nebraska is right. There are no general medical studies documenting comparative safety. Neither do we deny the import of the American Medical Association's statement (argument (7))—even though the State does omit the remainder of that statement: "The AMA recommends that the procedure not be used *unless alternative procedures pose materially greater risk to the woman.*" Late Term Pregnancy Termination Techniques, AMA Policy H–5.982 (emphasis added).

We cannot, however, read the American College of Obstetricians and Gynecologists panel's qualification (that it could not "identify" a circumstance where D&X was the "only" life- or health-preserving option) as if, according to Nebraska's argument (8), it denied the potential health-related need

for D&X. That is because the College writes the following in its *amici* brief:

> "Depending on the physician's skill and experience, the D&X procedure can be the most appropriate abortion procedure for some women in some circumstances. D&X presents a variety of potential safety advantages over other abortion procedures used during the same gestational period. Compared to D&Es involving dismemberment, D&X involves less risk of uterine perforation or cervical laceration because it requires the physician to make fewer passes into the uterus with sharp instruments and reduces the presence of sharp fetal bone fragments that can injure the uterus and cervix. There is also considerable evidence that D&X reduces the risk of retained fetal tissue, a serious abortion complication that can cause maternal death, and that D&X reduces the incidence of a 'free floating' fetal head that can be difficult for a physician to grasp and remove and can thus cause maternal injury. That D&X procedures usually take less time than other abortion methods used at a comparable stage of pregnancy can also have health advantages. The shorter the procedure, the less blood loss, trauma, and exposure to anesthesia. The intuitive safety advantages of intact D&E are supported by clinical experience. Especially for women with particular health conditions, there is medical evidence that D&X may be safer than available alternatives." Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 21–22 (citation and footnotes omitted).

4

The upshot is a District Court finding that D&X significantly obviates health risks in certain circumstances, a highly plausible record-based explanation of why that might be so, a division of opinion among some medical experts over

whether D&X is generally safer, and an absence of controlled medical studies that would help answer these medical questions. Given these medically related evidentiary circumstances, we believe the law requires a health exception.

The word "necessary" in *Casey*'s phrase "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," 505 U. S., at 879 (internal quotation marks omitted), cannot refer to an absolute necessity or to absolute proof. Medical treatments and procedures are often considered appropriate (or inappropriate) in light of estimated comparative health risks (and health benefits) in particular cases. Neither can that phrase require unanimity of medical opinion. Doctors often differ in their estimation of comparative health risks and appropriate treatment. And *Casey*'s words "appropriate medical judgment" must embody the judicial need to tolerate responsible differences of medical opinion—differences of a sort that the American Medical Association and American College of Obstetricians and Gynecologists' statements together indicate are present here.

For another thing, the division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence. That division here involves highly qualified knowledgeable experts on both sides of the issue. Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D&X is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.

In sum, Nebraska has not convinced us that a health exception is "never necessary to preserve the health of

women." Reply Brief for Petitioners 4. Rather, a statute that altogether forbids D&X creates a significant health risk. The statute consequently must contain a health exception. This is not to say, as JUSTICE THOMAS and JUSTICE KENNEDY claim, that a State is prohibited from proscribing an abortion procedure whenever a particular physician deems the procedure preferable. By no means must a State grant physicians "unfettered discretion" in their selection of abortion methods. *Post*, at 969 (KENNEDY, J., dissenting). But where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is "'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" 505 U. S., at 879. Requiring such an exception in this case is no departure from *Casey*, but simply a straightforward application of its holding.

B

The Eighth Circuit found the Nebraska statute unconstitutional because, in *Casey*'s words, it has the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.*, at 877. It thereby places an "undue burden" upon a woman's right to terminate her pregnancy before viability. *Ibid.* Nebraska does not deny that the statute imposes an "undue burden" *if* it applies to the more commonly used D&E procedure as well as to D&X. And we agree with the Eighth Circuit that it does so apply.

Our earlier discussion of the D&E procedure, *supra*, at 924–926, shows that it falls within the statutory prohibition. The statute forbids "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child." Neb. Rev. Stat. Ann. §28–326(9) (Supp. 1999). We

do not understand how one could distinguish, using this language, between D&E (where a foot or arm is drawn through the cervix) and D&X (where the body up to the head is drawn through the cervix). Evidence before the trial court makes clear that D&E will often involve a physician pulling a "substantial portion" of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus. 11 F. Supp. 2d, at 1128; *id.*, at 1128–1130. Indeed D&E involves dismemberment that commonly occurs only when the fetus meets resistance that restricts the motion of the fetus: "The dismemberment occurs between the traction of . . . [the] instrument and the counter-traction of the internal os of the cervix." *Id.*, at 1128. And these events often do not occur until after a portion of a living fetus has been pulled into the vagina. *Id.*, at 1104; see also Medical and Surgical Abortion 135 ("During the mid-second trimester, separation of the fetal corpus may occur when the fetus is drawn into the lower uterine segment, where compression and traction against the endocervix facilitates disarticulation").

Even if the statute's basic aim is to ban D&X, its language makes clear that it also covers a much broader category of procedures. The language does not track the medical differences between D&E and D&X—though it would have been a simple matter, for example, to provide an exception for the performance of D&E and other abortion procedures. *E. g.*, Kan. Stat. Ann. § 65–6721(b)(1) (Supp. 1999). Nor does the statute anywhere suggest that its application turns on whether a portion of the fetus' body is drawn into the vagina as part of a process to extract an intact fetus after collapsing the head as opposed to a process that would dismember the fetus. Thus, the dissenters' argument that the law was generally intended to bar D&X can be both correct and irrelevant. The relevant question is *not* whether the legislature wanted to ban D&X; it is whether the law was intended to apply *only* to D&X. The plain language covers both procedures. A rereading of this opinion, *supra*, at 924–929, as

well as JUSTICE THOMAS' dissent, *post*, at 984–987, will make clear why we can find no difference, in terms of *this* statute, between the D&X procedure as described and the D&E procedure as it might be performed. (In particular, compare *post*, at 984–986 (THOMAS, J., dissenting), with *post*, at 986–989 (THOMAS, J., dissenting).) Both procedures can involve the introduction of a "substantial portion" of a still living fetus, through the cervix, into the vagina—the very feature of an abortion that leads JUSTICE THOMAS to characterize such a procedure as involving "partial birth."

The Nebraska State Attorney General argues that the statute does differentiate between the two procedures. He says that the statutory words "substantial portion" mean "the child up to the head." He consequently denies the statute's application where the physician introduces into the birth canal a fetal arm or leg or anything less than the entire fetal body. Brief for Petitioners 20. He argues further that we must defer to his views about the meaning of the state statute. *Id.*, at 12–13.

We cannot accept the Attorney General's narrowing interpretation of the Nebraska statute. This Court's case law makes clear that we are not to give the Attorney General's interpretative views controlling weight. For one thing, this Court normally follows lower federal-court interpretations of state law. *McMillian* v. *Monroe County*, 520 U. S. 781, 786 (1997); *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 500, n. 9 (1985). It "rarely reviews a construction of state law agreed upon by the two lower federal courts." *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 395 (1988). In this case, the two lower courts have both rejected the Attorney General's narrowing interpretation.

For another, our precedent warns against accepting as "authoritative" an Attorney General's interpretation of state law when "the Attorney General does not bind the state courts or local law enforcement authorities." *Ibid.*

Under Nebraska law, the Attorney General's interpretative views do not bind the state courts. *State* v. *Coffman*, 213 Neb. 560, 561, 330 N. W. 2d 727, 728 (1983) (Attorney General's issued opinions, while entitled to "substantial weight" and "to be respectfully considered," are of "no controlling authority"). Nor apparently do they bind elected county attorneys, to whom Nebraska gives an independent authority to initiate criminal prosecutions. Neb. Rev. Stat. Ann. §§ 23–1201(1), 28–328(5), 84–205(3) (Supp. 1999); cf. *Crandon* v. *United States*, 494 U. S. 152, 177 (1990) (SCALIA, J., concurring in judgment) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference").

Nor can we say that the lower courts used the wrong legal standard in assessing the Attorney General's interpretation. The Eighth Circuit recognized its "duty to give [the law] a construction . . . that would avoid constitutional doubts." 192 F. 3d, at 1150. It nonetheless concluded that the Attorney General's interpretation would "twist the words of the law and give them a meaning they cannot reasonably bear." *Ibid.* The Eighth Circuit is far from alone in rejecting such a narrowing interpretation. The language in question is based on model statutory language (though some States omit any further definition of "partial birth abortion"), which 10 lower federal courts have considered on the merits. All 10 of those courts (including the Eighth Circuit) have found the language potentially applicable to other abortion procedures. See *Planned Parenthood of Greater Iowa, Inc.* v. *Miller*, 195 F. 3d 386 (CA8 1999); *Little Rock Family Planning Services* v. *Jegley*, 192 F. 3d 794, 797–798 (CA8 1999); *Hope Clinic*, 195 F. 3d, at 865–871 (imposing precautionary injunction to prevent application beyond D&X); *id.*, at 885–889 (Posner, C. J., dissenting); *Rhode Island Medical Soc.*, 66 F. Supp. 2d, at 309–310; *Richmond Medical Center for Women*, 55

F. Supp. 2d, at 471; *A Choice for Women*, 54 F. Supp. 2d, at 1155; *Causeway Medical Suite*, 43 F. Supp. 2d, at 614–615; *Planned Parenthood of Central N. J.* v. *Verniero*, 41 F. Supp. 2d 478, 503–504 (NJ 1998); *Eubanks* v. *Stengel*, 28 F. Supp. 2d 1024, 1034–1035 (WD Ky. 1998); *Planned Parenthood of Southern Ariz., Inc.* v. *Woods*, 982 F. Supp. 2d 1369, 1378 (Ariz. 1997); *Kelley*, 977 F. Supp. 2d, at 1317; but cf. *Richmond Medical Center* v. *Gilmore*, 144 F. 3d 326, 330–332 (CA4 1998) (Luttig, J., granting stay).

Regardless, even were we to grant the Attorney General's views "substantial weight," we still have to reject his interpretation, for it conflicts with the statutory language discussed *supra*, at 940. The Attorney General, echoed by the dissents, tries to overcome that language by relying on other language in the statute; in particular, the words "partial birth abortion," a term ordinarily associated with the D&X procedure, and the words "partially delivers vaginally a living unborn child." Neb. Rev. Stat. Ann. §28–326(9) (Supp. 1999). But these words cannot help the Attorney General. They are subject to the statute's further *explicit statutory definition*, specifying that both terms include "delivering into the vagina a living unborn child, or a substantial portion thereof." *Ibid.* When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning. *Meese* v. *Keene*, 481 U. S. 465, 484–485 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term"); *Colautti* v. *Franklin*, 439 U. S., at 392–393, n. 10 ("As a rule, 'a definition which declares what a term "means" . . . excludes any meaning that is not stated' "); *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, 502 (1945); *Fox* v. *Standard Oil Co. of N. J.*, 294 U. S. 87, 95–96 (1935) (Cardozo, J.); see also 2A N. Singer, Sutherland on Statutes and Statutory Construction §47.07, p. 152, and n. 10 (5th ed. 1992) (collecting cases). That is to say, the statute, read "as a whole," *post*, at 998

(THOMAS, J., dissenting), leads the reader to a definition. That definition does not include the Attorney General's restriction—"the child up to the head." Its words, "substantial portion," indicate the contrary.

The Attorney General also points to the Nebraska Legislature's debates, where the term "partial birth abortion" appeared frequently. But those debates hurt his argument more than they help it. Nebraska's legislators focused directly upon the meaning of the word "substantial." One senator asked the bill's sponsor, "[Y]ou said that as small a portion of the fetus as a foot would constitute a substantial portion in your opinion. Is that correct?" The sponsoring senator replied, "Yes, I believe that's correct." App. 452–453; see also *id.*, at 442–443 (same senator explaining "substantial" would "indicate that more than a little bit has been delivered into the vagina," *i. e.*, "[e]nough that would allow for the procedure to end up with the killing of the unborn child"); *id.*, at 404 (rejecting amendment to limit law to D&X). The legislature seems to have wanted to avoid more limiting language lest it become too easy to evade the statute's strictures—a motive that JUSTICE THOMAS well explains. *Post*, at 1001–1003. That goal, however, exacerbates the problem.

The Attorney General, again echoed by the dissents, further argues that the statute "distinguishes between the overall 'abortion procedure' itself and the separate 'procedure' used to kill the unborn child." Brief for Petitioners 16–18; *post*, at 991–992 (opinion of THOMAS, J.), 975–976 (opinion of KENNEDY, J.). Even assuming that the distinction would help the Attorney General make the D&E/D&X distinction he seeks, however, we cannot find any language in the statute that supports it. He wants us to read "procedure" in the statute's last sentence to mean "separate procedure," *i. e.*, the killing of the fetus, as opposed to a whole procedure, *i. e.*, a D&E or D&X abortion. But the critical word "separate" is missing. And the same

word "procedure," in the same subsection and throughout the statute, is used to refer to an entire abortion procedure. Neb. Rev. Stat. Ann. §§28–326(9), 28–328(1)–(4) (Supp. 1999); cf. *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 570 (1995) ("[I]dentical words used in different parts of the same act are intended to have the same meaning" (internal quotation marks omitted)).

The dissenters add that the statutory words "partially delivers" can be read to exclude D&E. *Post,* at 990–991 (opinion of THOMAS, J.), 974 (opinion of KENNEDY, J.). They say that introduction of, say, a limb or both limbs into the vagina does not involve "delivery." But obstetric textbooks and even dictionaries routinely use that term to describe any facilitated removal of tissue from the uterus, not only the removal of an intact fetus. *E. g.*, Obstetrics: Normal & Problem Pregnancies, at 388 (describing "delivery" of fetal membranes, placenta, and umbilical cord in the third stage of labor); B. Maloy, Medical Dictionary for Lawyers 221 (3d ed. 1960) ("Also, the removal of a [fetal] part such as the placenta"); 4 Oxford English Dictionary 422 (2d ed. 1989) (to "deliver" means, *inter alia,* to "disburden (a women) of the foetus"); Webster's Third New International Dictionary (1993) ("[D]elivery" means "the expulsion or extraction of a fetus and its membranes"). In any event, the statute itself specifies that it applies *both* to delivering "an intact unborn child" *or* "a substantial portion thereof." The dissents cannot explain how introduction of a substantial portion of a fetus into the vagina pursuant to D&X is a "delivery," while introduction pursuant to D&E is not.

We are aware that adopting the Attorney General's interpretation might avoid the constitutional problem discussed in this section. But we are "without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." *Boos* v. *Barry,* 485 U. S. 312, 330 (1988); *Gooding* v. *Wilson,* 405 U. S. 518, 520–

521 (1972). For the reasons stated, it is not reasonable to replace the term "substantial portion" with the Attorney General's phrase "body up to the head." See *Almendarez-Torres* v. *United States*, 523 U. S. 224, 237–239 (1998) (statute must be "genuinely susceptible" to two interpretations).

Finally, the law does not require us to certify the state-law question to the Nebraska Supreme Court. Of course, we lack any authoritative state-court construction. But "we have never held that a federal litigant must await a state-court construction or the development of an established practice before bringing the federal suit." *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U. S. 750, 770, n. 11 (1988). The Attorney General did not seek a narrowing interpretation from the Nebraska Supreme Court nor did he ask the federal courts to certify the interpretive question. See Brief for State Appellants in Nos. 98–3245 and 98–3300 (CA8); cf. *Arizonans for Official English* v. *Arizona*, 520 U. S. 43 (1997). Even if we were inclined to certify the question now, we cannot do so. Certification of a question (or abstention) is appropriate only where the statute is "fairly susceptible" to a narrowing construction, see *Houston* v. *Hill*, 482 U. S. 451, 468–471 (1987). We believe it is not. Moreover, the Nebraska Supreme Court grants certification only if the certified question is "determinative of the cause." Neb. Rev. Stat. §24–219 (1995); see also *Houston* v. *Hill*, *supra*, at 471 ("It would be manifestly inappropriate to certify a question in a case where . . . there is no uncertain question of state law whose resolution might affect the pending federal claim"). Here, it would not be determinative, in light of the discussion in Part II–A, *supra*.

In sum, using this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D&E procedures, the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The

result is an undue burden upon a woman's right to make an abortion decision. We must consequently find the statute unconstitutional.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring.

Although much ink is spilled today describing the gruesome nature of late-term abortion procedures, that rhetoric does not provide me a *reason* to believe that the procedure Nebraska here claims it seeks to ban is more brutal, more gruesome, or less respectful of "potential life" than the equally gruesome procedure Nebraska claims it still allows. JUSTICE GINSBURG and Judge Posner have, I believe, correctly diagnosed the underlying reason for the enactment of this legislation—a reason that also explains much of the Court's rhetoric directed at an objective that extends well beyond the narrow issue that this case presents. The rhetoric is almost, but not quite, loud enough to obscure the quiet fact that during the past 27 years, the central holding of *Roe* v. *Wade*, 410 U. S. 113 (1973), has been endorsed by all but 4 of the 17 Justices who have addressed the issue. That holding—that the word "liberty" in the Fourteenth Amendment includes a woman's right to make this difficult and extremely personal decision—makes it impossible for me to understand how a State has any legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman in her exercise of this constitutional liberty. But one need not even approach this view today to conclude that Nebraska's law must fall. For the notion that either of these two equally gruesome procedures performed at this late stage of gestation is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but

not the other, is simply irrational. See U. S. Const., Amdt. 14.

Justice O'Connor, concurring.

The issue of abortion is one of the most contentious and controversial in contemporary American society. It presents extraordinarily difficult questions that, as the Court recognizes, involve "virtually irreconcilable points of view." *Ante*, at 921. The specific question we face today is whether Nebraska's attempt to proscribe a particular method of abortion, commonly known as "partial birth abortion," is constitutional. For the reasons stated in the Court's opinion, I agree that Nebraska's statute cannot be reconciled with our decision in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), and is therefore unconstitutional. I write separately to emphasize the following points.

First, the Nebraska statute is inconsistent with *Casey* because it lacks an exception for those instances when the banned procedure is necessary to preserve the health of the mother. See *id.*, at 879 (plurality opinion). Importantly, Nebraska's own statutory scheme underscores this constitutional infirmity. As we held in *Casey*, prior to viability "the woman has a right to choose to terminate her pregnancy." *Id.*, at 870. After the fetus has become viable, States may substantially regulate and even proscribe abortion, but any such regulation or proscription must contain an exception for instances "'where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" *Id.*, at 879 (quoting *Roe* v. *Wade*, 410 U. S. 113, 165 (1973)). Nebraska has recognized this constitutional limitation in its separate statute generally proscribing postviability abortions. See Neb. Rev. Stat. Ann. §28–329 (Supp. 1999). That statute provides that "[n]o abortion shall be performed after the time at which, in the sound medical judgment of the attending physician, the unborn child clearly appears to have reached viability, *except when necessary to*

preserve the life or health of the mother." *Ibid.* (emphasis added). Because even a postviability proscription of abortion would be invalid absent a health exception, Nebraska's ban on previability partial birth abortions, under the circumstances presented here, must include a health exception as well, since the State's interest in regulating abortions before viability is "considerably weaker" than after viability. *Ante*, at 930. The statute at issue here, however, only excepts those procedures "necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury." Neb. Rev. Stat. Ann. §28–328(1) (Supp. 1999). This lack of a health exception necessarily renders the statute unconstitutional.

Contrary to the assertions of JUSTICE KENNEDY and JUSTICE THOMAS, the need for a health exception does not arise from "the individual views of Dr. Carhart and his supporters." *Post*, at 969 (KENNEDY, J., dissenting); see also *post*, at 1012–1013 (THOMAS, J., dissenting). Rather, as the majority explains, where, as here, "a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view," *ante*, at 937, then Nebraska cannot say that the procedure will not, in some circumstances, be "necessary to preserve the life or health of the mother." Accordingly, our precedent requires that the statute include a health exception.

Second, Nebraska's statute is unconstitutional on the alternative and independent ground that it imposes an undue burden on a woman's right to choose to terminate her pregnancy before viability. Nebraska's ban covers not just the dilation and extraction (D&X) procedure, but also the dilation and evacuation (D&E) procedure, "the most commonly used method for performing previability second trimester abortions." *Ante*, at 945. The statute defines the banned procedure as "deliberately and intentionally delivering into the vagina a living unborn child, *or a substantial portion*

thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." Neb. Rev. Stat. Ann. § 28–326(9) (Supp. 1999) (emphasis added). As the Court explains, the medical evidence establishes that the D&E procedure is included in this definition. Thus, it is not possible to interpret the statute's language as applying only to the D&X procedure. Moreover, it is significant that both the District Court and the Court of Appeals interpreted the statute as prohibiting abortions performed using the D&E method as well as the D&X method. See 192 F. 3d 1142, 1150 (CA8 1999); 11 F. Supp. 2d 1099, 1127–1131 (Neb. 1998). We have stated on several occasions that we ordinarily defer to the construction of a state statute given it by the lower federal courts unless such a construction amounts to plain error. See, *e. g.*, *Bishop* v. *Wood*, 426 U. S. 341, 346 (1976) ("[T]his Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion"); *The Tungus* v. *Skovgaard*, 358 U. S. 588, 596 (1959). Such deference is not unique to the abortion context, but applies generally to state statutes addressing all areas of the law. See, *e. g.*, *UNUM Life Ins. Co. of America* v. *Ward*, 526 U. S. 358, 368 (1999) ("notice-prejudice" rule in state insurance law); *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 499 (1985) (moral nuisance law); *Runyon* v. *McCrary*, 427 U. S. 160, 181 (1976) (statute of limitations for personal injury actions); *Bishop* v. *Wood*, *supra*, at 346, n. 10 (city employment ordinance). Given this construction, the statute is impermissible. Indeed, Nebraska conceded at oral argument that "the State could not prohibit the D&E procedure." Tr. of Oral Arg. 10. By proscribing the most commonly used method for previability second trimester abortions, see *ante*, at 924, the statute creates a "substantial obstacle to a woman seeking an abortion," *Casey*, *supra*, at 884, and therefore imposes

an undue burden on a woman's right to terminate her pregnancy prior to viability.

It is important to note that, unlike Nebraska, some other States have enacted statutes more narrowly tailored to proscribing the D&X procedure alone. Some of those statutes have done so by specifically excluding from their coverage the most common methods of abortion, such as the D&E and vacuum aspiration procedures. For example, the Kansas statute states that its ban does not apply to the "(A) [s]uction curettage abortion procedure; (B) suction aspiration abortion procedure; or (C) dilation and evacuation abortion procedure involving dismemberment of the fetus prior to removal from the body of the pregnant woman." Kan. Stat. Ann. § 65–6721(b)(2) (Supp. 1998). The Utah statute similarly provides that its prohibition "does not include the dilation and evacuation procedure involving dismemberment prior to removal, the suction curettage procedure, or the suction aspiration procedure for abortion." Utah Code Ann. § 76–7–310.5(1)(a) (1999). Likewise, the Montana statute defines the banned procedure as one in which "(A) the living fetus is removed intact from the uterus until only the head remains in the uterus; (B) all or a part of the intracranial contents of the fetus are evacuated; (C) the head of the fetus is compressed; and (D) following fetal demise, the fetus is removed from the birth canal." Mont. Code Ann. § 50–20–401(3)(c)(ii) (Supp. 1999). By restricting their prohibitions to the D&X procedure exclusively, the Kansas, Utah, and Montana statutes avoid a principal defect of the Nebraska law.

If Nebraska's statute limited its application to the D&X procedure and included an exception for the life and health of the mother, the question presented would be quite different from the one we face today. As we held in *Casey*, an abortion regulation constitutes an undue burden if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."

505 U. S., at 877. If there were adequate alternative methods for a woman safely to obtain an abortion before viability, it is unlikely that prohibiting the D&X procedure alone would "amount in practical terms to a substantial obstacle to a woman seeking an abortion." *Id.*, at 884. Thus, a ban on partial birth abortion that only proscribed the D&X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view.

Nebraska's statute, however, does not meet these criteria. It contains no exception for when the procedure, in appropriate medical judgment, is necessary to preserve the health of the mother; and it proscribes not only the D&X procedure but also the D&E procedure, the most commonly used method for previability second trimester abortions, thus making it an undue burden on a woman's right to terminate her pregnancy. For these reasons, I agree with the Court that Nebraska's law is unconstitutional.

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, concurring.

I write separately only to stress that amidst all the emotional uproar caused by an abortion case, we should not lose sight of the character of Nebraska's "partial birth abortion" law. As the Court observes, this law does not save any fetus from destruction, for it targets only "a *method* of performing abortion." *Ante*, at 930. Nor does the statute seek to protect the lives or health of pregnant women. Moreover, as JUSTICE STEVENS points out, *ante*, at 946 (concurring opinion), the most common method of performing previability second trimester abortions is no less distressing or susceptible to gruesome description. Seventh Circuit Chief Judge Posner correspondingly observed, regarding similar bans in Wisconsin and Illinois, that the law prohibits the D&X procedure "not because the procedure kills the fetus, not because it risks worse complications for the woman

than alternative procedures would do, not because it is a crueler or more painful or more disgusting method of terminating a pregnancy." *Hope Clinic* v. *Ryan*, 195 F. 3d 857, 881 (CA7 1999) (dissenting opinion). Rather, Chief Judge Posner commented, the law prohibits the procedure because the state legislators seek to chip away at the private choice shielded by *Roe* v. *Wade*, 410 U. S. 113 (1973), even as modified by *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). 195 F. 3d, at 880–882.

A state regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" violates the Constitution. *Casey*, 505 U. S., at 877 (plurality opinion). Such an obstacle exists if the State stops a woman from choosing the procedure her doctor "reasonably believes will best protect the woman in [the] exercise of [her] constitutional liberty." *Ante*, at 946 (STEVENS, J., concurring); see *Casey*, 505 U. S., at 877 ("means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it"). Again as stated by Chief Judge Posner, "if a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue." *Hope Clinic*, 195 F. 3d, at 881.

CHIEF JUSTICE REHNQUIST, dissenting.

I did not join the joint opinion in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), and continue to believe that case is wrongly decided. Despite my disagreement with the opinion, under the rule laid down in *Marks* v. *United States*, 430 U. S. 188, 193 (1977), the *Casey* joint opinion represents the holding of the Court in that case. I believe JUSTICE KENNEDY and JUSTICE THOMAS have correctly applied *Casey*'s principles and join their dissenting opinions.

JUSTICE SCALIA, dissenting.

I am optimistic enough to believe that, one day, *Stenberg* v. *Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*. The method of killing a human child—one cannot even accurately say an entirely unborn human child—proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion. And the Court must know (as most state legislatures banning this procedure have concluded) that demanding a "health exception"—which requires the abortionist to assure himself that, in his expert medical judgment, this method is, in the case at hand, marginally safer than others (how can one prove the contrary beyond a reasonable doubt?)—is to give live-birth abortion free rein. The notion that the Constitution of the United States, designed, among other things, "to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity," prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.

Even so, I had not intended to write separately here until the focus of the other separate writings (including the one I have joined) gave me cause to fear that this case might be taken to stand for an error different from the one that it actually exemplifies. Because of the Court's practice of publishing dissents in the order of the seniority of their authors, this writing will appear in the United States Reports before those others, but the reader will not comprehend what follows unless he reads them first.

* * *

The two lengthy dissents in this case have, appropriately enough, set out to establish that today's result does not follow from this Court's most recent pronouncement on the matter of abortion, *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). It would be unfortunate, how-

ever, if those who disagree with the result were induced to regard it as merely a regrettable misapplication of *Casey*. It is not that, but is *Casey*'s logical and entirely predictable consequence. To be sure, the Court's construction of this statute so as to make it include procedures other than live-birth abortion involves not only a disregard of fair meaning, but an abandonment of the principle that even ambiguous statutes should be interpreted in such fashion as to render them valid rather than void. *Casey* does not permit *that* jurisprudential novelty—which must be chalked up to the Court's inclination to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue. It is of a piece, in other words, with *Hill* v. *Colorado*, *ante*, p. 703, also decided today.

But the Court gives a second and independent reason for invalidating this humane (not to say antibarbarian) law: That it fails to allow an exception for the situation in which the abortionist believes that this live-birth method of destroying the child might be safer for the woman. (As pointed out by JUSTICE THOMAS, and elaborated upon by JUSTICE KENNEDY, there is no good reason to believe this is ever the case, but—who knows?—it sometime *might* be.)

I have joined JUSTICE THOMAS's dissent because I agree that today's decision is an "unprecedented expansio[n]" of our prior cases, *post*, at 1012, "is not mandated" by *Casey*'s "undue-burden" test, *post*, at 1010, and can even be called (though this pushes me to the limit of my belief) "obviously irreconcilable with *Casey*'s explication of what its undue-burden standard requires," *post*, at 983. But I never put much stock in *Casey*'s explication of the inexplicable. In the last analysis, my judgment that *Casey* does not support today's tragic result can be traced to the fact that what I consider to be an "undue burden" is different from what the majority considers to be an "undue burden"—a conclusion that cannot be demonstrated true or false by factual inquiry or legal reasoning. It is a value judgment, dependent upon how much one respects (or believes society ought to respect)

the life of a partially delivered fetus, and how much one respects (or believes society ought to respect) the freedom of the woman who gave it life to kill it. Evidently, the five Justices in today's majority value the former less, or the latter more, (or both), than the four of us in dissent. Case closed. There is no cause for anyone who believes in *Casey* to feel betrayed by this outcome. It has been arrived at by precisely the process *Casey* promised—a democratic vote by nine lawyers, not on the question whether the text of the Constitution has anything to say about this subject (it obviously does not); nor even on the question (also appropriate for lawyers) whether the legal traditions of the American people would have sustained such a limitation upon abortion (they obviously would); but upon the pure policy question whether this limitation upon abortion is "undue"—*i. e.*, goes too far.

In my dissent in *Casey*, I wrote that the "undue burden" test made law by the joint opinion created a standard that was "as doubtful in application as it is unprincipled in origin," *Casey*, 505 U. S., at 985; "hopelessly unworkable in practice," *id.*, at 986; "ultimately standardless," *id.*, at 987. Today's decision is the proof. As long as we are debating this issue of necessity for a health-of-the-mother exception on the basis of *Casey*, it is really quite impossible for us dissenters to contend that the majority is *wrong* on the law—any more than it could be said that one is *wrong in law* to support or oppose the death penalty, or to support or oppose mandatory minimum sentences. The most that we can honestly say is that we disagree with the majority on their policy-judgment-couched-as-law. And those who believe that a 5-to-4 vote on a policy matter by unelected lawyers should not overcome the judgment of 30 state legislatures have a problem, not with the *application* of *Casey*, but with its *existence*. *Casey* must be overruled.

While I am in an I-told-you-so mood, I must recall my bemusement, in *Casey*, at the majority opinion's expressed be-

lief that *Roe* v. *Wade*, 410 U. S. 133 (1973), had "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," *Casey*, 505 U. S., at 867, and that the decision in *Casey* would ratify that happy truce. It seemed to me, quite to the contrary, that "*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since"; and that, "by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana*, that the Court's new majority decrees." *Id.*, at 995–996. Today's decision, that the Constitution of the United States prevents the prohibition of a horrible mode of abortion, will be greeted by a firestorm of criticism—as well it should. I cannot understand why those who *acknowledge* that, in the opening words of JUSTICE O'CONNOR's concurrence, "[t]he issue of abortion is one of the most contentious and controversial in contemporary American society," *ante*, at 947, persist in the belief that this Court, armed with neither constitutional text nor accepted tradition, can resolve that contention and controversy rather than be consumed by it. If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed. *Casey* must be overruled.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE joins, dissenting.

For close to two decades after *Roe* v. *Wade*, 410 U. S. 113 (1973), the Court gave but slight weight to the interests of the separate States when their legislatures sought to address persisting concerns raised by the existence of a woman's right to elect an abortion in defined circumstances. When the Court reaffirmed the essential holding of *Roe*, a central premise was that the States retain a critical and legitimate

role in legislating on the subject of abortion, as limited by the woman's right the Court restated and again guaranteed. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). The political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential. *Id.*, at 871 (plurality opinion). The State's constitutional authority is a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the attainment of some degree of consensus.

The Court's decision today, in my submission, repudiates this understanding by invalidating a statute advancing critical state interests, even though the law denies no woman the right to choose an abortion and places no undue burden upon the right. The legislation is well within the State's competence to enact. Having concluded Nebraska's law survives the scrutiny dictated by a proper understanding of *Casey*, I dissent from the judgment invalidating it.

I

The Court's failure to accord any weight to Nebraska's interest in prohibiting partial birth abortion is erroneous and undermines its discussion and holding. The Court's approach in this regard is revealed by its description of the abortion methods at issue, which the Court is correct to describe as "clinically cold or callous." *Ante,* at 923. The majority views the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending human life. Words invoked by the majority, such as "transcervical procedures," "[o]smotic dilators," "instrumental disarticulation," and "paracervical block," may be accurate and are to some extent necessary, *ante,* at 924–925; but for citizens who seek to know why laws on this subject have been enacted across the Nation, the words are insufficient. Repeated references

to sources understandable only to a trained physician may obscure matters for persons not trained in medical terminology. Thus it seems necessary at the outset to set forth what may happen during an abortion.

The person challenging Nebraska's law is Dr. Leroy Carhart, a physician who received his medical degree from Hahnemann Hospital and University in 1973. App. 29. Dr. Carhart performs the procedures in a clinic in Nebraska, *id.*, at 30, and will also travel to Ohio to perform abortions there, *id.*, at 86. Dr. Carhart has no specialty certifications in a field related to childbirth or abortion and lacks admitting privileges at any hospital. *Id.*, at 82, 83. He performs abortions throughout pregnancy, including when he is unsure whether the fetus is viable. *Id.*, at 116. In contrast to the physicians who provided expert testimony in this case (who are board certified instructors at leading medical education institutions and members of the American Board of Obstetricians and Gynecologists), Dr. Carhart performs the partial birth abortion procedure (D&X) that Nebraska seeks to ban. He also performs the other method of abortion at issue in the case, the D&E.

As described by Dr. Carhart, the D&E procedure requires the abortionist to use instruments to grasp a portion (such as a foot or hand) of a developed and living fetus and drag the grasped portion out of the uterus into the vagina. *Id.*, at 61. Dr. Carhart uses the traction created by the opening between the uterus and vagina to dismember the fetus, tearing the grasped portion away from the remainder of the body. *Ibid.* The traction between the uterus and vagina is essential to the procedure because attempting to abort a fetus without using that traction is described by Dr. Carhart as "pulling the cat's tail" or "drag[ging] a string across the floor, you'll just keep dragging it. It's not until something grabs the other end that you are going to develop traction." *Id.*, at 62. The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from

limb. *Id.*, at 63. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off. Dr. Carhart agreed that "[w]hen you pull out a piece of the fetus, let's say, an arm or a leg and remove that, at the time just prior to removal of the portion of the fetus, . . . the fetus [is] alive." *Id.*, at 62. Dr. Carhart has observed fetal heartbeat via ultrasound with "extensive parts of the fetus removed," *id.*, at 64, and testified that mere dismemberment of a limb does not always cause death because he knows of a physician who removed the arm of a fetus only to have the fetus go on to be born "as a living child with one arm." *Id.*, at 63. At the conclusion of a D&E abortion no intact fetus remains. In Dr. Carhart's words, the abortionist is left with "a tray full of pieces." *Id.*, at 125.

The other procedure implicated today is called "partial birth abortion" or the D&X. The D&X can be used, as a general matter, after 19 weeks' gestation because the fetus has become so developed that it may survive intact partial delivery from the uterus into the vagina. *Id.*, at 61. In the D&X, the abortionist initiates the woman's natural delivery process by causing the cervix of the woman to be dilated, sometimes over a sequence of days. *Id.*, at 492. The fetus' arms and legs are delivered outside the uterus while the fetus is alive; witnesses to the procedure report seeing the body of the fetus moving outside the woman's body. Brief for Petitioners 4. At this point, the abortion procedure has the appearance of a live birth. As stated by one group of physicians, "[a]s the physician manually performs breech extraction of the body of a live fetus, excepting the head, she continues in the apparent role of an obstetrician delivering a child." Brief for Association of American Physicians and Surgeons et al. as *Amici Curiae* 27. With only the head of the fetus remaining in utero, the abortionist tears open the skull. According to Dr. Martin Haskell, a leading proponent of the procedure, the appropriate instrument to be used at

this stage of the abortion is a pair of scissors. M. Haskell, Dilation and Extraction for Late Second Trimester Abortion (1992), in 139 Cong. Rec. 8605 (1993). Witnesses report observing the portion of the fetus outside the woman react to the skull penetration. Brief for Petitioners 4. The abortionist then inserts a suction tube and vacuums out the developing brain and other matter found within the skull. The process of making the size of the fetus' head smaller is given the clinically neutral term "reduction procedure." 11 F. Supp. 2d 1099, 1106 (Neb. 1998). Brain death does not occur until after the skull invasion, and, according to Dr. Carhart, the heart of the fetus may continue to beat for minutes after the contents of the skull are vacuumed out. App. 58. The abortionist next completes the delivery of a dead fetus, intact except for the damage to the head and the missing contents of the skull.

Of the two described procedures, Nebraska seeks only to ban the D&X. In light of the description of the D&X procedure, it should go without saying that Nebraska's ban on partial birth abortion furthers purposes States are entitled to pursue. Dr. Carhart nevertheless maintains the State has no legitimate interest in forbidding the D&X. As he interprets the controlling cases in this Court, the only two interests the State may advance through regulation of abortion are in the health of the woman who is considering the procedure and in the life of the fetus she carries. Brief for Respondent 45. The Court, as I read its opinion, accedes to his views, misunderstanding *Casey* and the authorities it confirmed.

Casey held that cases decided in the wake of *Roe* v. *Wade*, 410 U. S. 113 (1973), had "given [state interests] too little acknowledgment and implementation." 505 U. S., at 871 (plurality opinion). The decision turned aside any contention that a person has the "right to decide whether to have an abortion without 'interference from the State,'" *id.*, at 875, and rejected a strict scrutiny standard of review as "in-

compatible with the recognition that there is a substantial state interest in potential life throughout pregnancy." *Id.*, at 876. "The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted." *Ibid.* We held it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion. *Id.*, at 877.

Casey is premised on the States having an important constitutional role in defining their interests in the abortion debate. It is only with this principle in mind that Nebraska's interests can be given proper weight. The State's brief describes its interests as including concern for the life of the unborn and "for the partially-born," in preserving the integrity of the medical profession, and in "erecting a barrier to infanticide." Brief for Petitioners 48–49. A review of *Casey* demonstrates the legitimacy of these policies. The Court should say so.

States may take sides in the abortion debate and come down on the side of life, even life in the unborn:

> "Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [a woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself." 505 U. S., at 872 (plurality opinion).

States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus. Abortion, *Casey* held, has consequences beyond the woman and her fetus. The States' interests in reg-

ulating are of concomitant extension. *Casey* recognized that abortion is "fraught with consequences for . . . the persons who perform and assist in the procedure [and for] society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life." *Id.*, at 852 (majority opinion).

A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others. *Ibid.; Washington* v. *Glucksberg*, 521 U. S. 702, 730–734 (1997).

Casey demonstrates that the interests asserted by the State are legitimate and recognized by law. It is argued, however, that a ban on the D&X does not further these interests. This is because, the reasoning continues, the D&E method, which Nebraska claims to be beyond its intent to regulate, can still be used to abort a fetus and is no less dehumanizing than the D&X method. While not adopting the argument in express terms, the Court indicates tacit approval of it by refusing to reject it in a forthright manner. Rendering express what is only implicit in the majority opinion, JUSTICE STEVENS and JUSTICE GINSBURG are forthright in declaring that the two procedures are indistinguishable and that Nebraska has acted both irrationally and without a proper purpose in enacting the law. The issue is not whether members of the judiciary can see a difference between the two procedures. It is whether Nebraska can. The Court's refusal to recognize Nebraska's right to declare a moral difference between the procedures is a dispiriting disclosure of the illogic and illegitimacy of the Court's approach to the entire case.

Nebraska was entitled to find the existence of a consequential moral difference between the procedures. We are referred to substantial medical authority that D&X perverts

the natural birth process to a greater degree than D&E, commandeering the live birth process until the skull is pierced. American Medical Association (AMA) publications describe the D&X abortion method as "ethically wrong." AMA Board of Trustees Factsheet on HR 1122 (June 1997), in App. to Brief for Association of American Physicians and Surgeons et al. as *Amici Curiae* 1 (AMA Factsheet). The D&X differs from the D&E because in the D&X the fetus is "killed *outside* of the womb" where the fetus has "an autonomy which separates it from the right of the woman to choose treatments for her own body." *Ibid.;* see also App. 639–640; Brief for Association of American Physicians and Surgeons et al. as *Amici Curiae* 27 ("Intact D&X is aberrant and troubling because the technique confuses the disparate role of a physician in childbirth and abortion in such a way as to blur the medical, legal, and ethical line between infanticide and abortion"). Witnesses to the procedure relate that the fingers and feet of the fetus are moving prior to the piercing of the skull; when the scissors are inserted in the back of the head, the fetus' body, wholly outside the woman's body and alive, reacts as though startled and goes limp. D&X's stronger resemblance to infanticide means Nebraska could conclude the procedure presents a greater risk of disrespect for life and a consequent greater risk to the profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect. The Court is without authority to second-guess this conclusion.

Those who oppose abortion would agree, indeed would insist, that both procedures are subject to the most severe moral condemnation, condemnation reserved for the most repulsive human conduct. This is not inconsistent, however, with the further proposition that as an ethical and moral matter D&X is distinct from D&E and is a more serious concern for medical ethics and the morality of the larger society the medical profession must serve. Nebraska must obey the legal regime which has declared the right of the woman to

have an abortion before viability. Yet it retains its power to adopt regulations which do not impose an undue burden on the woman's right. By its regulation, Nebraska instructs all participants in the abortion process, including the mother, of its moral judgment that all life, including the life of the unborn, is to be respected. The participants, Nebraska has determined, cannot be indifferent to the procedure used and must refrain from using the natural delivery process to kill the fetus. The differentiation between the procedures is itself a moral statement, serving to promote respect for human life; and if the woman and her physician in contemplating the moral consequences of the prohibited procedure conclude that grave moral consequences pertain to the permitted abortion process as well, the choice to elect or not to elect abortion is more informed; and the policy of promoting respect for life is advanced.

It ill-serves the Court, its institutional position, and the constitutional sources it seeks to invoke to refuse to issue a forthright affirmation of Nebraska's right to declare that critical moral differences exist between the two procedures. The natural birth process has been appropriated; yet the Court refuses to hear the State's voice in defining its interests in its law. The Court's holding contradicts *Casey*'s assurance that the State's constitutional position in the realm of promoting respect for life is more than marginal.

II

Demonstrating a further and basic misunderstanding of *Casey*, the Court holds the ban on the D&X procedure fails because it does not include an exception permitting an abortionist to perform a D&X whenever he believes it will best preserve the health of the woman. Casting aside the views of distinguished physicians and the statements of leading medical organizations, the Court awards each physician a veto power over the State's judgment that the procedures should not be performed. Dr. Carhart has made the medical

judgment to use the D&X procedure in every case, regardless of indications, after 15 weeks' gestation. 11 F. Supp. 2d, at 1105. Requiring Nebraska to defer to Dr. Carhart's judgment is no different from forbidding Nebraska from enacting a ban at all; for it is now Dr. Leroy Carhart who sets abortion policy for the State of Nebraska, not the legislature or the people. *Casey* does not give precedence to the views of a single physician or a group of physicians regarding the relative safety of a particular procedure.

I am in full agreement with JUSTICE THOMAS that the appropriate *Casey* inquiry is not, as the Court would have it, whether the State is preventing an abortionist from doing something that, in his medical judgment, he believes to be the most appropriate course of treatment. *Post*, at 1009–1013. *Casey* addressed the question "whether the State can resolve . . . philosophic questions [about abortion] in such a definitive way that a woman lacks all choice in the matter." 505 U. S., at 850. We decided the issue against the State, holding that a woman cannot be deprived of the opportunity to make reproductive decisions. *Id.*, at 860. *Casey* made it quite evident, however, that the State has substantial concerns for childbirth and the life of the unborn and may enact laws "which in no real sense depriv[e] women of the ultimate decision." *Id.*, at 875 (plurality opinion). Laws having the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" are prohibited. *Id.*, at 877. Nebraska's law does not have this purpose or effect.

The holding of *Casey*, allowing a woman to elect abortion in defined circumstances, is not in question here. Nebraska, however, was entitled to conclude that its ban, while advancing important interests regarding the sanctity of life, deprived no woman of a safe abortion and therefore did not impose a substantial obstacle on the rights of any woman. The American College of Obstetricians and Gynecologists (ACOG) "could identify no circumstances under which [D&X]

would be the only option to save the life or preserve the health of the woman." App. 600–601. The AMA agrees, stating the "AMA's expert panel, which included an ACOG representative, could not find 'any' identified circumstance where it was 'the only appropriate alternative.'" AMA Factsheet 1. The Court's conclusion that the D&X is the safest method requires it to replace the words "may be" with the word "is" in the following sentence from ACOG's position statement: "An intact D&X, however, may be the best or most appropriate procedure in a particular circumstance." App. 600–601.

No studies support the contention that the D&X abortion method is safer than other abortion methods. Brief for Respondent 36, n. 41. Leading proponents of the procedure acknowledge that the D&X has "disadvantages" versus other methods because it requires a high degree of surgical skill to pierce the skull with a sharp instrument in a blind procedure. Haskell, 139 Cong. Rec. 8605 (1993). Other doctors point to complications that may arise from the D&X. Brief for American Physicians and Surgeons et al. as *Amici Curiae* 21–23; App. 186. A leading physician, Frank Boehm, M. D., who has performed and supervised abortions as director of the Fetal Intensive Care Unit and the Maternal/Fetal Medicine Division at Vanderbilt University Hospital, has refused to support use of the D&X, both because no medical need for the procedure exists and because of ethical concerns. *Id.*, at 636, 639–640, 656–657. Dr. Boehm, a fellow of ACOG, *id.*, at 565, supports abortion rights and has provided sworn testimony in opposition to previous state attempts to regulate abortion. *Id.*, at 608–614.

The Court cannot conclude the D&X is part of standard medical practice. It is telling that no expert called by Dr. Carhart, and no expert testifying in favor of the procedure, had in fact performed a partial birth abortion in his or her medical practice. *E. g.*, *id.*, at 308 (testimony of Dr. Phillip Stubblefield). In this respect their opinions were

courtroom conversions of uncertain reliability. Litigation in other jurisdictions establishes that physicians do not adopt the D&X procedure as part of standard medical practice. *E. g.*, *Richmond Medical Center for Women* v. *Gilmore*, 144 F. 3d 326, 328 (CA4 1998); *Hope Clinic* v. *Ryan*, 195 F. 3d 857, 871 (CA7 1999); see also App. 603–604. It is quite wrong for the Court to conclude, as it seems to have done here, that Dr. Carhart conforms his practice to the proper standard of care because he has incorporated the procedure into his practice. Neither Dr. Boehm nor Dr. Carhart's lead expert, Dr. Stubblefield (the chairman of the Department of Obstetrics and Gynecology at Boston University School of Medicine and director of obstetrics and gynecology for the Boston Medical Center), has done so.

Substantial evidence supports Nebraska's conclusion that its law denies no woman a safe abortion. The most to be said for the D&X is it may present an unquantified lower risk of complication for a particular patient but that other proven safe procedures remain available even for this patient. Under these circumstances, the Court is wrong to limit its inquiry to the relative physical safety of the two procedures, with the slightest potential difference requiring the invalidation of the law. As JUSTICE O'CONNOR explained in an earlier case, the State may regulate based on matters beyond "what various medical organizations have to say about the *physical* safety of a particular procedure." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 467 (1983) (dissenting opinion). Where the difference in physical safety is, at best, marginal, the State may take into account the grave moral issues presented by a new abortion method. See *Casey*, 505 U. S., at 880 (requiring a regulation to impose a "significant threat to the life or health of a woman" before its application would impose an undue burden (internal quotation marks omitted)). Dr. Carhart does not decide to use the D&X based on a conclusion that it is best for a particular woman. Unsubstantiated and gen-

eralized health differences which are, at best, marginal, do not amount to a substantial obstacle to the abortion right. *Id.*, at 874, 876 (plurality opinion). It is also important to recognize that the D&X is effective only when the fetus is close to viable or, in fact, viable; thus the State is regulating the process at the point where its interest in life is nearing its peak.

Courts are ill-equipped to evaluate the relative worth of particular surgical procedures. The legislatures of the several States have superior factfinding capabilities in this regard. In an earlier case, JUSTICE O'CONNOR had explained that the general rule extends to abortion cases, writing that the Court is not suited to be "the Nation's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." 462 U. S., at 456 (dissenting opinion) (internal quotation marks omitted). "Irrespective of the difficulty of the task, legislatures, with their superior factfinding capabilities, are certainly better able to make the necessary judgments than are courts." *Id.*, at 456, n. 4. Nebraska's judgment here must stand.

In deferring to the physician's judgment, the Court turns back to cases decided in the wake of *Roe*, cases which gave a physician's treatment decisions controlling weight. Before it was repudiated by *Casey*, the approach of deferring to physicians had reached its apex in *Akron*, *supra*, where the Court held an informed consent requirement was unconstitutional. The law challenged in *Akron* required the abortionist to inform the woman of the status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide assistance and information. *Id.*, at 442. The physician was also required to advise the woman of the risks associated with the abortion technique to be employed and other information. *Ibid.* The law was invalidated based on the physi-

cian's right to practice medicine in the way he or she saw fit; for, according to the *Akron* Court, "[i]t remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." *Id.*, at 443. Dispositive for the Court was that the law was an "intrusion upon the discretion of the pregnant woman's physician." *Id.*, at 445. The physician was placed in an "undesired and uncomfortable straitjacket." *Ibid.* (internal quotation marks omitted). The Court's decision today echoes the *Akron* Court's deference to a physician's right to practice medicine in the way he or she sees fit.

The Court, of course, does not wish to cite *Akron;* yet the Court's holding is indistinguishable from the reasoning in *Akron* that *Casey* repudiated. No doubt exists that today's holding is based on a physician-first view which finds its primary support in that now-discredited case. Rather than exalting the right of a physician to practice medicine with unfettered discretion, *Casey* recognized: "Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position." 505 U. S., at 884 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.). *Casey* discussed the informed consent requirement struck down in *Akron* and held *Akron* was wrong. The doctor-patient relation was only "entitled to the same solicitude it receives in other contexts." 505 U. S., at 884. The standard of medical practice cannot depend on the individual views of Dr. Carhart and his supporters. The question here is whether there was substantial and objective medical evidence to demonstrate the State had considerable support for its conclusion that the ban created a substantial risk to no woman's health. *Casey* recognized the point, holding the physician's ability to practice medicine was "subject to reasonable . . . regulation by the State" and would receive the "same solicitude it receives in other contexts." *Ibid.* In other contexts, the State is enti-

tled to make judgments where high medical authority is in disagreement.

The Court fails to acknowledge substantial authority allowing the State to take sides in a medical debate, even when fundamental liberty interests are at stake and even when leading members of the profession disagree with the conclusions drawn by the legislature. In *Kansas* v. *Hendricks*, 521 U. S. 346 (1997), we held that disagreements among medical professionals "do not tie the State's hands in setting the bounds of . . . laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude." *Id.*, at 360, n. 3. Instead, courts must exercise caution (rather than require deference to the physician's treatment decision) when medical uncertainty is present. *Ibid.* ("[W]hen a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation' ") (quoting *Jones* v. *United States*, 463 U. S. 354, 370 (1983)); see also *Collins* v. *Texas*, 223 U. S. 288, 297–298 (1912) (Holmes, J.) (declaring the "right of the state to adopt a policy even upon medical matters concerning which there is difference of opinion and dispute"); *Lambert* v. *Yellowley*, 272 U. S. 581, 596–597 (1926) (rejecting claim of distinguished physician because "[h]igh medical authority being in conflict . . . , it would, indeed, be strange if Congress lacked the power [to act]"); *Marshall* v. *United States*, 414 U. S. 417, 427 (1974) (recognizing "there is no agreement among members of the medical profession" (internal quotation marks omitted)); *United States* v. *Rutherford*, 442 U. S. 544 (1979) (discussing regulatory approval process for certain drugs).

Instructive is *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905), where the defendant was convicted because he refused to undergo a smallpox vaccination. The defendant claimed the mandatory vaccination violated his liberty to "care for his own body and health in such way as to him

seems best." *Id.*, at 26. He offered to prove that members of the medical profession took the position that the vaccination was of no value and, in fact, was harmful. *Id.*, at 30. The Court rejected the claim, establishing beyond doubt the right of the legislature to resolve matters upon which physicians disagreed:

> "Those offers [of proof by the defendant] in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority. We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety." *Ibid.*

The *Jacobson* Court quoted with approval a recent state-court decision which observed, in words having full application today:

> "The fact that the belief is not universal [in the medical community] is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that

> the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to common belief of the people, are adapted to [address medical matters]. In a free country, where government is by the people, through their chosen representatives, practical legislation admits of no other standard of action.'" *Id.*, at 35 (quoting *Viemester* v. *White*, 179 N. Y. 235, 241, 72 N. E. 97, 99 (1904)).

JUSTICE O'CONNOR assures the people of Nebraska they are free to redraft the law to include an exception permitting the D&X to be performed when "the procedure, in appropriate medical judgment, is necessary to preserve the health of the mother." *Ante*, at 951. The assurance is meaningless. She has joined an opinion which accepts that Dr. Carhart exercises "appropriate medical judgment" in using the D&X for every patient in every procedure, regardless of indications, after 15 weeks' gestation. *Ante*, at 937 (requiring any health exception to "tolerate responsible differences of medical opinion" which "are present here"). A ban which depends on the "appropriate medical judgment" of Dr. Carhart is no ban at all. He will be unaffected by any new legislation. This, of course, is the vice of a health exception resting in the physician's discretion.

In light of divided medical opinion on the propriety of the partial birth abortion technique (both in terms of physical safety and ethical practice) and the vital interests asserted by Nebraska in its law, one is left to ask what the first Justice Harlan asked: "Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature?" *Jacobson*, *supra*, at 31. The answer is none.

III

The Court's next holding is that Nebraska's ban forbids both the D&X procedure and the more common D&E proce-

dure. In so ruling the Court misapplies settled doctrines of statutory construction and contradicts *Casey*'s premise that the States have a vital constitutional position in the abortion debate. I agree with the careful statutory analysis conducted by JUSTICE THOMAS, *post*, at 989–1005. Like the ruling requiring a physician veto, requiring a State to meet unattainable standards of statutory draftsmanship in order to have its voice heard on this grave and difficult subject is no different from foreclosing state participation altogether.

Nebraska's statute provides:

> "No partial birth abortion shall be performed in this state unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." Neb. Rev. Stat. Ann. § 28–328(1) (Supp. 1999).

The statute defines "partial birth abortion" as

> "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." § 28–326(9).

It further defines "partially delivers vaginally a living unborn child before killing the unborn child" to mean

> "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." *Ibid.*

The text demonstrates the law applies only to the D&X procedure. Nebraska's intention is demonstrated at three points in the statutory language: references to "partial-birth abortion" and to the "delivery" of a fetus; and the require-

ment that the delivery occur "before" the performance of the death-causing procedure.

The term "partial birth abortion" means an abortion performed using the D&X method as described above. The Court of Appeals acknowledged the term "is commonly understood to refer to a particular procedure known as intact dilation and extraction (D&X)." *Little Rock Family Planning Servs.* v. *Jegley*, 192 F. 3d 794, 795 (CA8 1999). Dr. Carhart's own lead expert, Dr. Phillip Stubblefield, prefaced his description of the D&X procedure by describing it as the procedure "which, in the lay press, has been called a partial-birth abortion." App. 271–272. And the AMA has declared: "The 'partial birth abortion' legislation is by its very name aimed exclusively [at the D&X.] There is no other abortion procedure which could be confused with that description." AMA Factsheet 3. A commonsense understanding of the statute's reference to "partial-birth abortion" demonstrates its intended reach and provides all citizens the fair warning required by the law. *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931).

The statute's intended scope is demonstrated by its requirement that the banned procedure include a partial "delivery" of the fetus into the vagina and the completion of a "delivery" at the end of the procedure. Only removal of an intact fetus can be described as a "delivery" of a fetus and only the D&X involves an intact fetus. In a D&E, portions of the fetus are pulled into the vagina with the intention of dismembering the fetus by using the traction at the opening between the uterus and vagina. This cannot be considered a delivery of a portion of a fetus. In Dr. Carhart's own words, the D&E leaves the abortionist with a "tray full of pieces," App. 125, at the end of the procedure. Even if it could be argued, as the majority does, *ante*, at 944, that dragging a portion of an intact fetus into the vagina as the first step of a D&E is a delivery of that portion of an intact fetus, the D&E still does not involve "completing the deliv-

ery" of an intact fetus. Whatever the statutory term "completing the delivery" of an unborn child means, it cannot mean, as the Court would have it, placing fetal remains on a tray. See *Planned Parenthood of Wis.* v. *Doyle*, 9 F. Supp. 2d 1033, 1041 (WD Wis. 1998) (the statute is "readily applied to the partial delivery of an intact child but hardly applicable to the delivery of dismembered body parts").

Medical descriptions of the abortion procedures confirm the point, for it is only the description of the D&X that invokes the word "delivery." App. 600. The United States, as *amicus*, cannot bring itself to describe the D&E as involving a "delivery," instead substituting the word "emerges" to describe how the fetus is brought into the vagina in a D&E. Brief for United States as *Amicus Curiae* 10. The Court, in a similar admission, uses the words "a physician pulling" a portion of a fetus, *ante*, at 939, rather than a "physician delivering" a portion of a fetus; yet only a procedure involving a delivery is banned by the law. Of all the definitions of "delivery" provided by the Court, *ante*, at 944, not one supports (or, more important for statutory construction purposes, requires) the conclusion that the statutory term "completing the delivery" refers to the placement of dismembered body parts on a tray rather than the removal of an intact fetus from the woman's body.

The operation of Nebraska's law is further defined by the requirement that the fetus be partially delivered into the vagina "before" the abortionist kills it. The partial delivery must be undertaken "for the purpose of performing a procedure that the person . . . knows will kill the unborn child." Neb. Rev. Stat. Ann. §28–326(9) (Supp. 1999). The law is most naturally read to require the death of the fetus to take place in two steps: First the fetus must be partially delivered into the vagina and then the defendant must perform a death-causing procedure. In a D&E, forcing the fetus into the vagina (the pulling of extremities off the body in the process of extracting the body parts from the uterus into the

vagina) is also the procedure that kills the fetus. *Richmond Medical Center for Women* v. *Gilmore*, 144 F. 3d, at 330 (order of Luttig, J.). In a D&X, the fetus is partially delivered into the vagina before a separate procedure (the so-called "reduction procedure") is performed in order to kill the fetus.

The majority rejects this argument based on its conclusion that the word "procedure" must "refer to an entire abortion procedure" each time it is used. *Ante*, at 944. This interpretation makes no sense. It would require us to conclude that the Nebraska Legislature considered the "entire abortion procedure" to take place after the abortionist has already delivered into the vagina a living unborn child, or a substantial portion thereof. Neb. Rev. Stat. Ann. §28–326(9) (Supp. 1999). All medical authorities agree, however, that the entire abortion procedure begins several days before this stage, with the dilation of the cervix. The majority asks us, in effect, to replace the words "for the purpose of performing" with the words "in the course of performing" in the portion of §28–326(9) quoted in the preceding paragraph. The reference to "procedure" refers to the separate death-causing procedure that is unique to the D&X.

In light of the statutory text, the commonsense understanding must be that the statute covers only the D&X. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 698 (1973). The AMA does not disagree. It writes: "The partial birth abortion legislation is by its very name aimed exclusively at a procedure by which a living fetus is intentionally and deliberately given partial birth and delivered for the purpose of killing it. There is no other abortion procedure which could be confused with that description." AMA Factsheet 3 (internal quotation marks omitted). *Casey* disavows strict scrutiny review; and Nebraska must be afforded leeway when attempting to regulate the medical profession. See *Kansas* v. *Hendricks*, 521 U. S., at 359 ("[W]e have traditionally left to legislators the task of defining terms of a medical

nature that have legal significance"). To hold the statute covers the D&E, the Court must disagree with the AMA and disregard the known intent of the legislature, adequately expressed in the statute.

Strained statutory constructions in abortion cases are not new, for JUSTICE O'CONNOR identified years ago "an unprecedented canon of construction under which in cases involving abortion, a permissible reading of a statute is to be avoided at all costs." *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 829 (1986) (dissenting opinion) (internal quotation marks omitted). *Casey* banished this doctrine from our jurisprudence; yet the Court today reinvigorates it and, in the process, ignores its obligation to interpret the law in a manner to validate it, not render it void. *E. g.*, *Johnson* v. *Robison*, 415 U. S. 361, 366–367 (1974); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). Avoidance of unconstitutional constructions is discussed only in two sentences of the Court's analysis and dismissed as inapplicable because the statute is not susceptible to the construction offered by the Nebraska Attorney General. *Ante*, at 944–945. For the reasons here discussed, the statute is susceptible to the construction; and the Court is required to adopt it.

The Court and JUSTICE O'CONNOR seek to shield themselves from criticism by citing the interpretations of the partial birth abortion statutes offered by some other federal courts. *Ante*, at 941–942. On this issue of nationwide importance, these courts have no special competence; and of appellate courts to consider similar statutes, a majority have, in contrast to the Court, declared that the law could be interpreted to cover only the D&X. See *Hope Clinic*, 195 F. 3d, at 865–871; *Richmond Medical Center*, *supra*, at 330–332 (order of Luttig, J.). Thirty States have enacted similar laws. It is an abdication of responsibility for the Court to suggest its hands are tied by decisions which paid scant at-

tention to *Casey*'s recognition of the State's authority and misapplied the doctrine of construing statutes to avoid constitutional difficulty. Further, the leading case describing the deference argument, *Frisby* v. *Schultz*, 487 U. S. 474, 483 (1988), declined to defer to a lower court construction of the state statute at issue in the case. As *Frisby* observed, the "lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." See also *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 514 (1989) (opinion of REHNQUIST, C. J.); *id.*, at 525 (O'CONNOR, J., concurring in part and concurring in judgment).

The majority and, even more so, the concurring opinion by JUSTICE O'CONNOR, ignore the settled rule against deciding unnecessary constitutional questions. The State of Nebraska conceded, under its understanding of *Casey*, that if this law must be interpreted to bar D&E as well as D&X it is unconstitutional. Since the majority concludes this is indeed the case, that should have been the end of the matter. Yet the Court and JUSTICE O'CONNOR go much further. They conclude that the statute requires a health exception which, for all practical purposes and certainly in the circumstances of this case, allows the physician to make the determination in his own professional judgment. This is an immense constitutional holding. It is unnecessary; and, for the reasons I have sought to explain, it is incorrect. While it is not clear which of the two halves of the majority opinion is *dictum*, both are wrong.

The United States District Court in this case leaped to prevent the law from being enforced, granting an injunction before it was applied or interpreted by Nebraska. Cf. *Hill* v. *Colorado*, *ante*, p. 703. In so doing, the court excluded from the abortion debate not just the Nebraska legislative branch but the State's executive and judiciary as well. The law was enjoined before the chief law enforcement officer

of the State, its Attorney General, had any opportunity to interpret it. The federal court then ignored the representations made by that officer during this litigation. In like manner, Nebraska's courts will be given no opportunity to define the contours of the law, although by all indications those courts would give the statute a more narrow construction than the one so eagerly adopted by the Court today. *E. g., Stenberg* v. *Moore*, 258 Neb. 199, 206, 602 N. W. 2d 465, 472 (1995). Thus the court denied each branch of Nebraska's government any role in the interpretation or enforcement of the statute. This cannot be what *Casey* meant when it said we would be more solicitous of state attempts to vindicate interests related to abortion. *Casey* did not assume this state of affairs.

IV

Ignoring substantial medical and ethical opinion, the Court substitutes its own judgment for the judgment of Nebraska and some 30 other States and sweeps the law away. The Court's holding stems from misunderstanding the record, misinterpretation of *Casey*, outright refusal to respect the law of a State, and statutory construction in conflict with settled rules. The decision nullifies a law expressing the will of the people of Nebraska that medical procedures must be governed by moral principles having their foundation in the intrinsic value of human life, including the life of the unborn. Through their law the people of Nebraska were forthright in confronting an issue of immense moral consequence. The State chose to forbid a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life, while the State still protected the woman's autonomous right of choice as reaffirmed in *Casey*. The Court closes its eyes to these profound concerns.

From the decision, the reasoning, and the judgment, I dissent.

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

In 1973, this Court struck down an Act of the Texas Legislature that had been in effect since 1857, thereby rendering unconstitutional abortion statutes in dozens of States. *Roe* v. *Wade*, 410 U. S. 113, 119. As some of my colleagues on the Court, past and present, ably demonstrated, that decision was grievously wrong. See, *e. g.*, *Doe* v. *Bolton*, 410 U. S. 179, 221–223 (1973) (White, J., dissenting); *Roe* v. *Wade*, *supra*, at 171–178 (REHNQUIST, J., dissenting). Abortion is a unique act, in which a woman's exercise of control over her own body ends, depending on one's view, human life or potential human life. Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother. Although a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so.

In the years following *Roe*, this Court applied, and, worse, extended, that decision to strike down numerous state statutes that purportedly threatened a woman's ability to obtain an abortion. The Court voided parental consent laws, see *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 75 (1976), legislation requiring that second-trimester abortions take place in hospitals, see *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 431 (1983), and even a requirement that both parents of a minor be notified before their child has an abortion, see *Hodgson* v. *Minnesota*, 497 U. S. 417, 455 (1990). It was only a slight exaggeration when this Court described, in 1976, a right to abortion "without interference from the State." *Danforth*, *supra*, at 61. The Court's expansive application of *Roe* in this period, even more than *Roe* itself, was fairly described as the "unrestrained imposition of [the Court's] own, extraconstitutional value preferences" on the American people. *Thornburgh* v.

American College of Obstetricians and Gynecologists, 476 U. S. 747, 794 (1986) (White, J., dissenting).

It appeared that this era of Court-mandated abortion on demand had come to an end, first with our decision in *Webster* v. *Reproductive Health Services*, 492 U. S. 490 (1989), see *id.*, at 557 (Blackmun, J., concurring in part and dissenting in part) (lamenting that the plurality had "discard[ed]" *Roe*), and then finally (or so we were told) in our decision in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). Although in *Casey* the separate opinions of THE CHIEF JUSTICE and JUSTICE SCALIA urging the Court to overrule *Roe* did not command a majority, seven Members of that Court, including six Members sitting today, acknowledged that States have a legitimate role in regulating abortion and recognized the States' interest in respecting fetal life at all stages of development. See 505 U. S., at 877 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.); *id.*, at 944 (REHNQUIST, C. J., joined by White, SCALIA, and THOMAS, JJ., concurring in judgment in part and dissenting in part); *id.*, at 979 (SCALIA, J., joined by REHNQUIST, C. J., and White and THOMAS, JJ., concurring in judgment in part and dissenting in part). The plurality authored by JUSTICES O'CONNOR, KENNEDY, and SOUTER concluded that prior case law "went too far" in "undervalu[ing] the State's interest in potential life" and in "striking down . . . some abortion regulations which in no real sense deprived women of the ultimate decision." *Id.*, at 875.[1] *Roe* and subsequent cases, according to the plurality, had wrongly "treat[ed] all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted," a treatment that was "incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy." *Id.*, at 876. Accordingly, the plurality held that so

[1] Unless otherwise noted, all subsequent cites of *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), are to the joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.

long as state regulation of abortion furthers legitimate interests—that is, interests not designed to strike at the right itself—the regulation is invalid only if it imposes an undue burden on a woman's ability to obtain an abortion, meaning that it places a *substantial obstacle* in the woman's path. *Id.*, at 874, 877.

My views on the merits of the *Casey* plurality have been fully articulated by others. *Id.*, at 944 (REHNQUIST, C. J., concurring in judgment in part and dissenting in part); *id.*, at 979 (SCALIA, J., concurring in judgment in part and dissenting in part). I will not restate those views here, except to note that the *Casey* plurality opinion was constructed by its authors out of whole cloth. The standard set forth in the *Casey* plurality has no historical or doctrinal pedigree. The standard is a product of its authors' own philosophical views about abortion, and it should go without saying that it has no origins in or relationship to the Constitution and is, consequently, as illegitimate as the standard it purported to replace. Even assuming, however, as I will for the remainder of this dissent, that *Casey*'s fabricated undue-burden standard merits adherence (which it does not), today's decision is extraordinary. Today, the Court inexplicably holds that the States cannot constitutionally prohibit a method of abortion that millions find hard to distinguish from infanticide and that the Court hesitates even to describe. *Ante,* at 923. This holding cannot be reconciled with *Casey*'s undue-burden standard, as that standard was explained to us by the authors of the plurality opinion, and the majority hardly pretends otherwise. In striking down this statute—which expresses a profound and legitimate respect for fetal life and which leaves unimpeded several other safe forms of abortion—the majority opinion gives the lie to the promise of *Casey* that regulations that do no more than "express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose" whether or not to have an abortion. 505

U. S., at 877. Today's decision is so obviously irreconcilable with *Casey*'s explication of what its undue-burden standard requires, let alone the Constitution, that it should be seen for what it is, a reinstitution of the pre-*Webster* abortion-on-demand era in which the mere invocation of "abortion rights" trumps any contrary societal interest. If this statute is unconstitutional under *Casey*, then *Casey* meant nothing at all, and the Court should candidly admit it.

To reach its decision, the majority must take a series of indefensible steps. The majority must first disregard the principles that this Court follows in every context but abortion: We interpret statutes according to their plain meaning, and we do not strike down statutes susceptible of a narrowing construction. The majority also must disregard the very constitutional standard it purports to employ, and then displace the considered judgment of the people of Nebraska and 29 other States. The majority's decision is lamentable, because of the result the majority reaches, the illogical steps the majority takes to reach it, and because it portends a return to an era I had thought we had at last abandoned.

I

In the almost 30 years since *Roe*, this Court has never described the various methods of aborting a second- or third-trimester fetus. From reading the majority's sanitized description, one would think that this case involves state regulation of a widely accepted routine medical procedure. Nothing could be further from the truth. The most widely used method of abortion during this stage of pregnancy is so gruesome that its use can be traumatic even for the physicians and medical staff who perform it. See App. 656 (testimony of Dr. Boehm); W. Hern, Abortion Practice 134 (1990). And the particular procedure at issue in this case, "partial birth abortion," so closely borders on infanticide that 30 States have attempted to ban it. I will begin with a discussion of the methods of abortion available to

women late in their pregnancies before addressing the statutory and constitutional questions involved.[2]

1. The primary form of abortion used at or after 16 weeks' gestation is known as "dilation and evacuation" or "D&E." 11 F. Supp. 2d 1099, 1103, 1129 (Neb. 1998). When performed during that stage of pregnancy, the D&E procedure requires the physician to dilate the woman's cervix and then extract the fetus from her uterus with forceps. *Id.*, at 1103; App. 490 (American Medical Association (AMA), Report of the Board of Trustees on Late-Term Abortion). Because of the fetus' size at this stage, the physician generally removes the fetus by dismembering the fetus one piece at a time.[3] 11 F. Supp. 2d, at 1103–1104. The doctor grabs a fetal extremity, such as an arm or a leg, with forceps and "pulls it through the cervical os . . . tearing . . . fetal parts from the fetal body . . . by means of traction." *Id.*, at 1104. See App. 55 (testimony of Dr. Carhart). In other words, the physician will grasp the fetal parts and "basically tear off pieces of the fetus and pull them out." *Id.*, at 267 (testimony of Dr. Stubblefield). See also *id.*, at 149 (testimony of

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[2] In 1996, the most recent year for which abortion statistics are available from the Centers for Disease Control and Prevention, there were approximately 1,221,585 abortions performed in the United States. Centers for Disease Control and Prevention, Abortion Surveillance—United States, 1996, p. 1 (July 30, 1999). Of these abortions, about 67,000—5.5%—were performed in or after the 16th week of gestation, that is, from the middle of the second trimester through the third trimester. *Id.*, at 5. The majority apparently accepts that none of the abortion procedures used for pregnancies in earlier stages of gestation, including "dilation and evacuation" (D&E) as it is practiced between 13 and 15 weeks' gestation, would be compromised by the statute. See *ante*, at 938–940 (concluding that the statute could be interpreted to apply to instrumental dismemberment procedures used in a later term D&E). Therefore, only the methods of abortion available to women in this later stage of pregnancy are at issue in this case.

[3] At 16 weeks' gestation, the average fetus is approximately six inches long. By 20 weeks' gestation, the fetus is approximately eight inches long. K. Moore & T. Persaud, The Developing Human 112 (6th ed. 1998).

Dr. Hodgson) ("[Y]ou grasp the fetal parts, and you often don't know what they are, and you try to pull it down, and its . . . simply all there is to it"). The fetus will die from blood loss, either because the physician has separated the umbilical cord prior to beginning the procedure or because the fetus loses blood as its limbs are removed. *Id.*, at 62–64 (testimony of Dr. Carhart); *id.*, at 151 (testimony of Dr. Hodgson).[4] When all of the fetus' limbs have been removed and only the head is left in utero, the physician will then collapse the skull and pull it through the cervical canal. *Id.*, at 106 (testimony of Dr. Carhart); *id.*, at 297 (testimony of Dr. Stubblefield); *Causeway Medical Suite* v. *Foster*, 43 F. Supp. 2d 604, 608 (ED La. 1999). At the end of the procedure, the physician is left, in respondent's words, with a "tray full of pieces." App. 125 (testimony of Dr. Carhart).

2. Some abortions after the 15th week are performed using a method of abortion known as induction. 11 F. Supp. 2d, at 1108; App. 492 (AMA, Report of the Board of Trustees on Late-Term Abortion). In an induction procedure, the amniotic sac is injected with an abortifacient such as a saline solution or a solution that contains prostaglandin. 11 F. Supp. 2d, at 1108. Uterine contractions typically follow, causing the fetus to be expelled. *Ibid.*

3. A third form of abortion for use during or after 16 weeks' gestation is referred to by some medical professionals as "intact D&E." There are two variations of this method, both of which require the physician to dilate the woman's cervix. Gynecologic, Obstetric, and Related Surgery 1043 (D. Nichols & D. Clarke-Pearson eds., 2d ed. 2000); App. 271 (testimony of Dr. Stubblefield). The first variation is used only in vertex presentations, that is, when the fetal head is presented first. To perform a vertex-presentation intact D&E, the doctor will insert an instrument into the fetus'

[4] Past the 20th week of gestation, respondent attempts to induce fetal death by injection prior to beginning the procedure in patients. 11 F. Supp. 2d, at 1106; App. 64.

skull while the fetus is still in utero and remove the brain and other intracranial contents. 11 F. Supp. 2d, at 1111; Gynecologic, Obstetric, and Related Surgery, *supra*, at 1043; App. 271 (testimony of Dr. Stubblefield). When the fetal skull collapses, the physician will remove the fetus.

The second variation of intact D&E is the procedure commonly known as "partial birth abortion."[5] 11 F. Supp. 2d, at 1106; Gynecologic, Obstetric, and Related Surgery, *supra*, at 1043; App. 271 (testimony of Dr. Stubblefield). This procedure, which is used only rarely, is performed on mid- to late-second-trimester (and sometimes third-trimester) fetuses.[6] Although there are variations, it is generally per-

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[5] There is a disagreement among the parties regarding the appropriate term for this procedure. Congress and numerous state legislatures, including Nebraska's, have described this procedure as "partial birth abortion," reflecting the fact that the fetus is all but born when the physician causes its death. See *infra* this page and 987. Respondent prefers to refer generically to "intact dilation and evacuation" or "intact D&E" without reference to whether the fetus is presented head first or feet first. One of the doctors who developed the procedure, Martin Haskell, described it as "Dilation and Extraction" or "D&X." See The Partial-Birth Abortion Ban Act of 1995, Hearing on H. R. 1833 before the Senate Committee on the Judiciary, 104th Cong., 1st Sess., 5 (1995) (hereinafter H. R. 1833 Hearing). The Executive Board of the American College of Obstetricians and Gynecologists (ACOG) refers to the procedure by the hybrid term "intact dilation and extraction" or "intact D&X," see App. 599 (ACOG Executive Board, Statement on Intact Dilation and Extraction (Jan. 12, 1997)), which term was adopted by the AMA, see *id.*, at 492 (AMA, Report of the Board of Trustees on Late-Term Abortion). I will use the term "partial birth abortion" to describe the procedure because it is the legal term preferred by 28 state legislatures, including the State of Nebraska, and by the United States Congress. As I will discuss, see *infra*, at 999–1001, there is no justification for the majority's preference for the terms "breech-conversion intact D&E" and "D&X" other than the desire to make this procedure appear to be medically sanctioned.

[6] There is apparently no general understanding of which women are appropriate candidates for the procedure. Respondent uses the procedure on women at 16 to 20 weeks' gestation. 11 F. Supp. 2d, at 1105. The doctor who developed the procedure, Dr. Martin Haskell, indicated that he

formed as follows: After dilating the cervix, the physician will grab the fetus by its feet and pull the fetal body out of the uterus into the vaginal cavity. 11 F. Supp. 2d, at 1106. At this stage of development, the head is the largest part of the body. Assuming the physician has performed the dilation procedure correctly, the head will be held inside the uterus by the woman's cervix. *Ibid.;* H. R. 1833 Hearing 8. While the fetus is stuck in this position, dangling partly out of the woman's body, and just a few inches from a completed birth, the physician uses an instrument such as a pair of scissors to tear or perforate the skull. 11 F. Supp. 2d, at 1106; App. 664 (testimony of Dr. Boehm); Joint Hearing on S. 6 and H. R. 929 before the Senate Committee on the Judiciary and the Subcommittee on the Constitution of the House Committee on the Judiciary, 105th Cong., 1st Sess., 45 (1995) (hereinafter S. 6 and H. R. 929 Joint Hearing). The physician will then either crush the skull or will use a vacuum to remove the brain and other intracranial contents from the fetal skull, collapse the fetus' head, and pull the fetus from the uterus. 11 F. Supp. 2d, at 1106.[7]

Use of the partial birth abortion procedure achieved prominence as a national issue after it was publicly described by Dr. Martin Haskell, in a paper entitled "Dilation and Extraction for Late Second Trimester Abortion," at the National Abortion Federation's September 1992 Risk Management Seminar. In that paper, Dr. Haskell described his version of the procedure as follows:

> "With a lower [fetal] extremity in the vagina, the surgeon uses his fingers to deliver the opposite lower

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performed the procedure on patients 20 through 24 weeks and on certain patients 25 through 26 weeks. See H. R. 1833 Hearing 36.

[7] There are, in addition, two forms of abortion that are used only rarely: hysterotomy, a procedure resembling a Caesarean section, requires the surgical delivery of the fetus through an incision on the uterine wall, and hysterectomy. 11 F. Supp. 2d, at 1109.

> extremity, then the torso, the shoulders and the upper extremities.
>
> "The skull lodges at the internal cervical os. Usually there is not enough dilation for it to pass through. The fetus is oriented dorsum or spine up.
>
> "At this point, the right-handed surgeon slides the fingers of the left hand along the back of the fetus and 'hooks' the shoulders of the fetus with the index and ring fingers (palm down).
>
> "[T]he surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger.
>
> "[T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.
>
> "The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient." H. R. 1833 Hearing 3, 8–9.

In cases in which the physician inadvertently dilates the woman to too great a degree, the physician will have to hold the fetus inside the woman so that he can perform the procedure. *Id.*, at 80 (statement of Pamela Smith, M. D.) ("In these procedures, one basically relies on cervical entrapment of the head, along with a firm grip, to help keep the baby in place while the practitioner plunges a pair of scissors into the base of the baby's skull"). See also S. 6 and H. R. 929 Joint Hearing 45 ("I could put dilapan in for four or five days and say I'm doing a D&E procedure and the fetus could just fall out. But that's not really the point. The point here is you're attempting to do an abortion . . . . Not to see how do

I manipulate the situation so that I get a live birth instead") (quoting Dr. Haskell).

II

Nebraska, along with 29 other States, has attempted to ban the partial birth abortion procedure. Although the Nebraska statute purports to prohibit only "partial birth abortion," a phrase which is commonly used, as I mentioned, to refer to the breech extraction version of intact D&E, the majority concludes that this statute could also be read in some future case to prohibit ordinary D&E, the first procedure described above. According to the majority, such an application would pose a substantial obstacle to some women seeking abortions and, therefore, the statute is unconstitutional. The majority errs with its very first step. I think it is clear that the Nebraska statute does not prohibit the D&E procedure. The Nebraska partial birth abortion statute at issue in this case reads as follows:

> "No partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." Neb. Rev. Stat. Ann. §28–328(1) (Supp. 1999).

"Partial birth abortion" is defined in the statute as

> "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such

procedure knows will kill the unborn child and does kill the unborn child." §28–326(9).

A

Starting with the statutory definition of "partial birth abortion," I think it highly doubtful that the statute could be applied to ordinary D&E. First, the Nebraska statute applies only if the physician "partially *delivers* vaginally a living unborn child," which phrase is defined to mean "deliberately and intentionally *delivering* into the vagina a living unborn child, or a substantial portion thereof." §28–326(9) (emphases added). When read in context, the term "partially delivers" cannot be fairly interpreted to include removing pieces of an unborn child from the uterus one at a time.

The word "deliver," particularly delivery of an "unborn child," refers to the process of "assist[ing] in giving birth," which suggests removing an intact unborn child from the womb, rather than pieces of a child. See Webster's Ninth New Collegiate Dictionary 336 (1991) (defining "deliver" as "to assist in giving birth; to aid in the birth of"); Stedman's Medical Dictionary 409 (26th ed. 1995) ("To assist a woman in childbirth"). Without question, one does not "deliver" a child when one removes the child from the uterus piece by piece, as in a D&E. Rather, in the words of respondent and his experts, one "remove[s]" or "dismember[s]" the child in a D&E. App. 45, 55 (testimony of Dr. Carhart) (referring to the act of removing the fetus in a D&E); *id.*, at 150 (testimony of Dr. Hodgson) (same); *id.*, at 267 (testimony of Dr. Stubblefield) (physician "dismember[s]" the fetus). See also H. R. 1833 Hearing 3, 8 (Dr. Haskell describing "delivery" of part of the fetus during a D&X). The majority cites sources using the terms "deliver" and "delivery" to refer to removal of the fetus and the placenta during birth. But these sources also presume an intact fetus, rather than dismembered fetal parts. See Obstetrics: Normal & Problem Pregnancies 388 (S. Gabbe, J. Niebyl, & J. Simpson eds., 3d

ed. 1996) ("After delivery [of infant and placenta], the placenta, cord, and membranes should be examined"); 4 Oxford English Dictionary 421, 422 (2d ed. 1989) ("To disburden (a woman) of the foetus, to bring to childbirth"); B. Maloy, Medical Dictionary for Lawyers 221 (2d ed. 1989) ("To aid in the process of childbirth; to bring forth; to deliver the fetus, placenta"). The majority has pointed to no source in which "delivery" is used to refer to removal of first a fetal arm, then a leg, then the torso, etc. In fact, even the majority describes the D&E procedure without using the word "deliver" to refer to the removal of fetal tissue from the uterus. See *ante*, at 939 ("*pulling* a 'substantial portion' of a still living fetus" (emphasis added)); *ibid.* ("portion of a living fetus has been *pulled* into the vagina" (emphasis added)). No one, including the majority, understands the act of pulling off a part of a fetus to be a "delivery."

To make the statute's meaning even more clear, the statute applies only if the physician "partially delivers vaginally a living unborn child *before* killing the unborn child and completing the delivery." The statute defines this phrase to mean that the physician must complete the delivery "*for the purpose of* performing a procedure" that will kill the unborn child. It is clear from these phrases that the procedure that kills the fetus must be subsequent to, and therefore separate from, the "partia[l] deliver[y]" or the "deliver[y] into the vagina" of "a living unborn child or substantial portion thereof." In other words, even if one assumes, *arguendo*, that dismemberment—the act of grasping a fetal arm or leg and pulling until it comes off, leaving the remaining part of the fetal body still in the uterus—is a kind of "delivery," it does not take place "before" the death-causing procedure or "for the purpose of performing" the death-causing procedure; it *is* the death-causing procedure. Under the majority's view, D&E is covered by the statute because when the doctor pulls on a fetal foot until it tears off he has "delivered" a substantial portion of the unborn child and has performed

a procedure known to cause death. But, significantly, the physician has not "delivered" the child *before* performing the death-causing procedure or "for the purpose of" performing the death-causing procedure; the dismemberment "delivery" is itself the act that causes the fetus' death.[8]

Moreover, even if removal of a fetal foot or arm from the uterus incidental to severing it from the rest of the fetal body could amount to delivery *before*, or *for the purpose of*, performing a death-causing procedure, the delivery would not be of an "unborn child, or a substantial portion thereof." And even supposing that a fetal foot or arm could conceivably be a "substantial portion" of an unborn child, both the common understanding of "partial birth abortion" and the principle that statutes will be interpreted to avoid constitutional difficulties would require one to read "substantial" otherwise. See *infra,* at 996–997.

B

Although I think that the text of § 28–326(9) forecloses any application of the Nebraska statute to the D&E procedure, even if there were any ambiguity, the ambiguity would be conclusively resolved by reading the definition in light of the fact that the Nebraska statute, by its own terms, applies only to "partial birth abortion," § 28–328(1). By ordinary rules of statutory interpretation, we should resolve any ambiguity in the specific statutory definition to comport with the common understanding of "partial birth abortion," for that term itself, no less than the specific definition, is part of the stat-

[8] The majority argues that the statute does not explicitly require that the death-causing procedure be separate from the overall abortion procedure. That is beside the point; under the statute the death-causing procedure must be separate from the *delivery.* Moreover, it is incorrect to state that the statute contemplates only one "procedure." The statute clearly uses the term "procedure" to refer to both the overall abortion procedure ("partial birth abortion" is "an abortion procedure") as well as to a component of the overall abortion procedure ("for the purpose of performing a procedure . . . that will kill the unborn child").

ute. *United States* v. *Morton*, 467 U. S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole").[9]

"Partial birth abortion" is a term that has been used by a majority of state legislatures, the United States Congress, medical journals, physicians, reporters, even judges, and has never, as far as I am aware, been used to refer to the D&E procedure. The number of instances in which "partial birth abortion" has been equated with the breech extraction form of intact D&E (otherwise known as "D&X")[10] and explicitly contrasted with D&E, are numerous. I will limit myself to just a few examples.

First, numerous medical authorities have equated "partial birth abortion" with D&X. The AMA has done so and has recognized that the procedure is "different from other destructive abortion techniques because the fetus . . . is killed *outside* of the womb." AMA Board of Trustees Factsheet on H. R. 1122 (June 1997), in App. to Brief for Association of American Physicians and Surgeons et al. as *Amici Curiae* 1. Medical literature has also equated "partial birth abortion" with D&X as distinguished from D&E. See Gynecologic, Obstetric, and Related Surgery, at 1043; Sprang & Neerhof, Rationale for Banning Abortions Late in Pregnancy, 280 JAMA 744 (Aug. 26, 1998); Bopp & Cook, Partial Birth Abortion: The Final Frontier of Abortion Jurisprudence, 14 Issues in Law and Medicine 3 (1998). Physicians have equated "partial birth abortion" with D&X. See *Planned Parenthood* v. *Doyle*, 44 F. Supp. 2d 975, 999 (WD Wis. 1999) (citing testimony); *Richmond Medical Center for Women* v. *Gil-*

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[9] It is certainly true that an undefined term must be construed in accordance with its ordinary and plain meaning. *FDIC* v. *Meyer*, 510 U. S. 471, 476 (1994). But this does not mean that the ordinary and plain meaning of a term is wholly irrelevant when that term is defined.

[10] As noted, see n. 5, *supra*, there is no consensus regarding which of these terms is appropriate to describe the procedure. I assume, as the majority does, that the terms are, for purposes here, interchangeable.

more, 55 F. Supp. 2d 441, 455 (ED Va. 1999) (citing testimony). Even respondent's expert, Dr. Phillip Stubblefield, acknowledged that breech extraction intact D&E is referred to in the lay press as "partial birth abortion." App. 271.

Second, the lower courts have repeatedly acknowledged that "partial birth abortion" is commonly understood to mean D&X. See *Little Rock Family Planning Services* v. *Jegley*, 192 F. 3d 794, 795 (CA8 1999) ("The term 'partial-birth abortion,' . . . is commonly understood to refer to a particular procedure also known as intact dilation and extraction"); *Planned Parenthood of Greater Iowa, Inc.* v. *Miller*, 195 F. 3d 386, 387 (CA8 1999) ("The [Iowa] Act prohibits 'partial-birth abortion,' a term commonly understood to refer to a procedure called a dilation and extraction (D&X)"). The District Court in this case noted that "[p]artial-birth abortions" are "known medically as intact dilation and extraction or D&X." 11 F. Supp. 2d, at 1121, n. 26. Even the majority notes that "partial birth abortion" is a term "ordinarily associated with the D&X procedure." *Ante*, at 942.

Third, the term "partial birth abortion" has been used in state legislation on 28 occasions and by Congress twice. The term "partial birth abortion" was adopted by Congress in both 1995 and 1997 in two separate pieces of legislation prohibiting the procedure.[11] In considering the legislation,

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[11] Congressional legislation prohibiting the procedure was first introduced in June 1995, with the introduction of the Partial Birth Abortion Ban Act, H. R. 1833. This measure, which was sponsored by 165 individual House Members, passed both Houses by wide margins, 141 Cong. Rec. 35892 (1995); 142 Cong. Rec. 31169 (1996), but was vetoed by President Clinton, see *id.*, at 7467. The House voted to override the veto on September 19, 1996, see *id.*, at 23851; however, the Senate failed to override by a margin of 13 votes, see *id.*, at 25829. In the next Congress, 181 individual House cosponsors reintroduced the Partial Birth Abortion Ban Act as H. R. 929, which was later replaced in the House with H. R. 1122. See H. R. 1122, 105th Cong., 1st Sess. (1997). The House and Senate again adopted the legislation, as amended, by wide margins. See 143

Congress conducted numerous hearings and debates on the issue, which repeatedly described "partial birth abortion" as a procedure distinct from D&E. The Congressional Record contained numerous references to Dr. Haskell's procedure. See, *e. g.*, H. R. 1833 Hearing 3, 17, 52, 77; S. 6 and H. R. 929 Joint Hearing 45. Since that time, debates have taken place in state legislatures across the country, 30 of which have voted to prohibit the procedure. With only two exceptions, the legislatures that voted to ban the procedure referred to it as "partial birth abortion."[12] These debates also referred to Dr. Haskell's procedure as D&X. Both the evidence before the legislators and the legislators themselves equated "partial birth abortion" with D&X. The fact that 28 States adopted legislation banning "partial birth abortion," defined it in a way similar or identical to Nebraska's definition,[13] and,

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Cong. Rec. H1230 (Mar. 20, 1997); *id.*, at S4715 (May 20, 1997). President Clinton again vetoed the bill. See *id.*, at H8891 (Oct. 10, 1997). Again, the veto override passed in the House and fell short in the Senate. See 144 Cong. Rec. H6213 (July 23, 1998); *id.*, at S10564 (Sept. 18, 1998).

[12] Consistent with the practice of Dr. Haskell (an Ohio practitioner), Ohio referred to the procedure as "dilation and extraction," defined as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain." Ohio Rev. Code Ann. § 2919.15(A) (1997). Missouri refers to the killing of a "partially-born" infant as "infanticide." Mo. Stat. Ann. § 565.300 (Vernon Supp. 2000).

[13] For the most part, these States defined the term "partial birth abortion" using language similar to that in the 1995 proposed congressional legislation, that is "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." See H. R. 1833 Hearing 210. See, *e. g.*, Alaska Stat. Ann. § 18.16.050 (1998); Ariz. Rev. Stat. Ann. § 13–3603.01 (Supp. 1999); Ark. Code Ann. § 5–61–202 (1997); Fla. Stat. § 390.011 (Supp. 2000); Ill. Comp. Stat., ch. 720, § 513/5 (1999); Ind. Code Ann. § 16–18–2–267.5 (West Supp. 1999); Mich. Comp. Laws Ann. § 333.17016(5)(c) (West Supp. 2000); Miss. Code Ann. § 41–41–73(2)(a) (Supp. 1998); S. C. Code Ann. § 44–41–85(A)(1) (1999 Cum. Supp.). Other States, including Nebraska, see Neb. Rev. Stat. Ann. § 28–326 (Supp. 1999), defined "partial-birth abortion" using language similar to that used in the 1997 proposed congressional

in doing so, repeatedly referred to the breech extraction form of intact D&E and repeatedly distinguished it from ordinary D&E, makes it inconceivable that the term "partial birth abortion" could reasonably be interpreted to mean D&E.

C

Were there any doubt remaining whether the statute could apply to a D&E procedure, that doubt is no ground for invalidating the statute. Rather, we are bound to first consider whether a construction of the statute is fairly possible that would avoid the constitutional question. *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 216 (1975) ("[A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts"); *Frisby* v. *Schultz*, 487 U. S. 474, 482 (1988) ("The precise scope of the ban is not further described within the text of the ordinance, but in our view the ordinance is readily subject to a narrowing construction that avoids constitutional difficulties"). This principle is, as JUSTICE O'CONNOR has said, so "well-established" that failure to apply is "plain error." *Id.*, at 483. Although our interpretation of a Nebraska law is of course not binding on Nebraska courts, it is clear, as *Erznoznik* and *Frisby* demonstrate, that, absent a conflicting interpretation by Nebraska (and there is none here), we should, if the text permits, adopt such a construction.

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legislation, which retained the definition of partial birth abortion used in the 1995 bill, that is "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery," but further defined that phrase to mean "deliberately and intentionally delivers into the vagina a living fetus, or a substantial portion there of, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus." See Partial Birth Abortion Ban Act of 1997, H. R. 1122, 105th Cong., 1st Sess. (1997). See, *e. g.*, Idaho Code § 18–613(a) (Supp. 1999); Iowa Code Ann. § 707.8A(1)(c) (Supp. 1999); N. J. Stat. Ann. § 2A:65A–6(e) (West Supp. 2000); Okla. Stat. Ann., Tit. 21, § 684 (Supp. 2000); R. I. Gen. Laws § 23–4.12–1 (Supp. 1999); Tenn. Code Ann. § 39–15–209(a)(1) (1997).

The majority contends that application of the Nebraska statute to D&E would pose constitutional difficulties because it would eliminate the most common form of second-trimester abortions. To the extent that the majority's contention is true, there is no doubt that the Nebraska statute is susceptible of a narrowing construction by Nebraska courts that would preserve a physicians' ability to perform D&E. See *State* v. *Carpenter*, 250 Neb. 427, 434, 551 N. W. 2d 518, 524 (1996) ("A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done"). For example, the statute requires that the physician "deliberately and intentionally delive[r] into the vagina a living unborn child, or a substantial portion thereof," before performing a death-causing procedure. The term "substantial portion" is susceptible to a narrowing construction that would exclude the D&E procedure. One definition of the word "substantial" is "being largely but not wholly that which is specified." Webster's Ninth New Collegiate Dictionary, at 1176. See *Pierce* v. *Underwood*, 487 U. S. 552, 564 (1988) (describing different meanings of the term "substantial"). In other words, "substantial" can mean "almost all" of the thing denominated. If nothing else, a court could construe the statute to require that the fetus be "largely, but not wholly," delivered out of the uterus before the physician performs a procedure that he knows will kill the unborn child. Or, as I have discussed, a court could (and should) construe "for the purpose of performing a procedure" to mean "for the purpose of performing a separate procedure."

III

The majority and JUSTICE O'CONNOR reject the plain language of the statutory definition, refuse to read that definition in light of the statutory reference to "partial birth abortion," and ignore the doctrine of constitutional avoidance. In so doing, they offer scant statutory analysis of their own. See *ante*, at 938–940 (majority opinion); cf. *ante*, at 940–945

(majority opinion); *ante,* at 948–949 (O'CONNOR, J., concurring). In their brief analyses, the majority and JUSTICE O'CONNOR disregard all of the statutory language except for the final definitional sentence, thereby violating the fundamental canon of construction that statutes are to be read as a whole. *United States* v. *Morton,* 467 U. S., at 828 ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole. Thus, the words [in question] must be read in light of the immediately following phrase") (footnote omitted)); *United States* v. *Heirs of Boisdoré,* 8 How. 113, 122 (1849) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy"); *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 575 (1995) ("[A] word is known by the company it keeps").[14] In lieu of analyzing the statute as a whole, the majority and JUSTICE O'CONNOR

[14] The majority argues that its approach is supported by *Meese* v. *Keene,* 481 U. S. 465, 487 (1987), in which the Court stated that "the statutory definition of [a] term excludes unstated meanings of that term." But this case provides no support for the approach adopted by the majority and JUSTICE O'CONNOR. In *Meese,* the Court addressed a statute that used the term "political propaganda." *Id.*, at 470. The Court noted that there were two commonly understood meanings to the term "political propaganda," *id.*, at 477, and, not surprisingly, chose the definition that was most consistent with the statutory definition, *id.*, at 485. Nowhere did the Court suggest that, because "political propaganda" was defined in the statute, the commonly understood meanings of that term were irrelevant. Indeed, a significant portion of the Court's opinion was devoted to describing the effect of Congress' use of that term. *Id.*, at 477–479, 483–484. So too, *Colautti* v. *Franklin*, 439 U. S. 379, 392–393, n. 10 (1979), and *Western Union Telegraph Co.* v. *Lenroot,* 323 U. S. 490 (1945), support the proposition that when there are two possible interpretations of a term, and only one comports with the statutory definition, the term should not be read to include the unstated meaning. But here, there is only one possible interpretation of "partial birth abortion"—the majority can cite no authority using that term to describe D&E—and so there is no justification for the majority's willingness to entirely disregard the statute's use of that term.

offer five principal arguments for their interpretation of the statute. I will address them in turn.

First, the majority appears to accept, if only obliquely, an argument made by respondent: If the term "partial birth abortion" refers to only the breech extraction form of intact D&E, or D&X, the Nebraska Legislature should have used the medical nomenclature. See *ante*, at 943 (noting that the Nebraska Legislature rejected an amendment that would replace "partial birth abortion" with "dilation and extraction"); Brief for Respondent 4–5, 24.

There is, of course, no requirement that a legislature use terminology accepted by the medical community. A legislature could, no doubt, draft a statute using the term "heart attack" even if the medical community preferred "myocardial infarction." Legislatures, in fact, sometimes use medical terms in ways that conflict with their clinical definitions, see, *e. g.*, *Barber* v. *Director*, 43 F. 3d 899, 901 (CA4 1995) (noting that the medical definition of "pneumoconiosis" is only a subset of the afflictions that fall within the definition of "pneumoconiosis" in the Black Lung Act), a practice that is unremarkable so long as the legal term is adequately defined. We have never, until today, suggested that legislature may only use words accepted by every individual physician. Rather, "we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Kansas* v. *Hendricks*, 521 U. S. 346, 359 (1997). And we have noted that "[o]ften, those definitions do not fit precisely with the definitions employed by the medical community." *Ibid.*

Further, it is simply not true that the many legislatures, including Nebraska's, that prohibited "partial birth abortion" chose to use a term known only in the vernacular in place of a term with an accepted clinical meaning. When the Partial-Birth Abortion Ban Act of 1995 was introduced in Congress, the term "dilation and extraction" did not appear in any medical dictionary. See, *e. g.*, Dorland's Illustrated

Medical Dictionary 470 (28th ed. 1994); Stedman's Medical Dictionary, at 485; Miller-Keane Encyclopedia & Dictionary of Medicine, Nursing, & Allied Health 460 (6th ed. 1997); The Sloane-Dorland Annotated Medical-Legal Dictionary 204 (1987); I. Dox, J. Melloni, & G. Eisher, The HarperCollins Illustrated Medical Dictionary 131 (1993). The term did not appear in descriptions of abortion methods in leading medical textbooks. See, *e. g.*, G. Cunningham et al., Williams Obstetrics 579–605 (20th ed. 1997); Obstetrics: Normal & Problem Pregnancies, at 1249–1279; W. Hern, Abortion Practice (1990). Abortion reference books also omitted any reference to the term. See, *e. g.*, Modern Methods of Inducing Abortion (D. Baird, D. Grimes, & P. Van Look eds. 1995); E. Glick, Surgical Abortion (1998).[15]

Not only did D&X have no medical meaning at the time, but the term is ambiguous on its face. "Dilation and extraction" would, on its face, accurately describe any procedure in which the woman is "dilated" and the fetus "extracted," including D&E. See *supra*, at 984–985. In contrast, "partial birth abortion" has the advantage of faithfully describing the procedure the legislature meant to address because the fact that a fetus is "partially born" during the procedure is indisputable. The term "partial birth abortion" is completely accurate and descriptive, which is perhaps the reason why the majority finds it objectionable. Only a desire to find fault at any cost could explain the Court's willingness to penalize the Nebraska Legislature for failing to replace a

[15] Nor, for that matter, did the terms "intact dilation and extraction" or "intact dilation and evacuation" appear in textbooks or medical dictionaries. See *supra*, at 999 and this page. In fact, respondent's preferred term "intact D&E" would compound, rather than remedy, any confusion regarding the statute's meaning. As is evident from the majority opinion, there is no consensus on what this term means. Compare *ante*, at 927 (describing "intact D&E" to refer to both breech and vertex presentation procedures), with App. 6 (testimony of Dr. Henshaw) (using "intact D&E" to mean only breech procedure), with *id.*, at 275 (testimony of Dr. Stubblefield) (using "intact D&E" to refer to delivery of fetus that has died in utero).

descriptive term with a vague one. There is, therefore, nothing to the majority's argument that the Nebraska Legislature is at fault for declining to use the term "dilation and extraction."[16]

Second, the majority faults the Nebraska Legislature for failing to "track the medical differences between D&E and D&X" and for failing to "suggest that its application turns on whether a portion of the fetus' body is drawn into the vagina as part of a process to extract an intact fetus after collapsing the head as opposed to a process that would dismember the fetus." *Ante*, at 939. I have already explained why the Nebraska statute reflects the medical differences between D&X and D&E. To the extent the majority means that the Nebraska Legislature should have "tracked the medical differences" by adopting one of the informal definitions of D&X, this argument is without merit; none of these definitions would have been effective to accomplish the State's purpose of preventing abortions of partially born fetuses. Take, for example, ACOG's informal definition of the term "intact D&X." According to ACOG, an "intact D&X" consists of the following four steps: (1) deliberate dilation of

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[16] The fact that the statutory term "partial birth abortion" may express a political or moral judgment, whereas "dilation and extraction" does not, is irrelevant. It is certainly true that technical terms are frequently empty of normative content. (Of course, the decision to use a technical term can itself be normative. See *ante*, *passim* (majority opinion)). But, so long as statutory terms are adequately defined, there is no requirement that Congress or state legislatures draft statutes using morally agnostic terminology. See, *e. g.*, 18 U. S. C. § 922(v) (making it unlawful to "manufacture, transfer, or possess a semiautomatic assault weapon"); Kobayashi & Olson et al., *In re 101 California Street:* A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of "Assault Weapons," 8 Stan. L. & Pol'y Rev. 41, 43 (1997) ("Prior to 1989, the term 'assault weapon' did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of 'assault rifles' so as to allow an attack on as many additional firearms as possible on the basis of undefined 'evil' appearance"). See also *Meese*, 481 U. S., at 484–485.

the cervix, usually over a sequence of days; (2) instrumental conversion of the fetus to a footling breach; (3) breech extraction of the body excepting the head; and (4) partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus. App. 599–600 (ACOG Executive Board, Statement on Intact Dilation and Extraction (Jan. 12, 1997)). ACOG emphasizes that "unless all four elements are present in sequence, the procedure is not an intact D&X." *Id.*, at 600. Had Nebraska adopted a statute prohibiting "intact D&X," and defined it along the lines of the ACOG definition, physicians attempting to perform abortions on partially born fetuses could have easily evaded the statute. Any doctor wishing to perform a partial birth abortion procedure could simply avoid liability under such a statute by performing the procedure, as respondent does, only when the fetus is presented feet first, thereby avoiding the necessity of "conversion of the fetus to a footling breech." *Id.*, at 599. Or, a doctor could convert the fetus without instruments. Or, the doctor could cause the fetus' death before "partial evacuation of the intracranial contents," *id.*, at 600, by plunging scissors into the fetus' heart, for example. A doctor could even attempt to evade the statute by chopping off two fetal toes prior to completing delivery, preventing the State from arguing that the fetus was "otherwise intact." Presumably, however, Nebraska, and the many other legislative bodies that adopted partial birth abortion bans, were not concerned with whether death was inflicted by injury to the brain or the heart, whether the fetus was converted with or without instruments, or whether the fetus died with its toes attached. These legislative bodies were, I presume, concerned with whether the child was partially born before the physician caused its death. The legislatures' evident concern was with permitting a procedure that resembles infanticide and threatens to dehumanize the fetus. They, therefore, presumably declined to adopt a

ban only on "intact D&X," as defined by ACOG, because it would have been ineffective to that purpose. Again, the majority is faulting Nebraska for a legitimate legislative calculation.

Third, the majority and JUSTICE O'CONNOR argue that this Court generally defers to lower federal courts' interpretations of state law. *Ante*, at 940 (majority opinion); *ante*, at 949 (O'CONNOR, J., concurring). However, a decision drafted by JUSTICE O'CONNOR, which she inexplicably fails to discuss, *Frisby* v. *Schultz*, 487 U. S. 474 (1988), makes clear why deference is inappropriate here. As JUSTICE O'CONNOR explained in that case:

> "[W]hile we ordinarily defer to lower court constructions of state statutes, we do not invariably do so. We are particularly reluctant to defer when the lower courts have fallen into plain error, which is precisely the situation presented here. To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Id.*, at 483 (citations omitted).

Frisby, then, identifies exactly why the lower courts' opinions here are not entitled to deference: The lower courts failed to identify the narrower construction that, consistent with the text, would avoid any constitutional difficulties.

Fourth, the majority speculates that some Nebraska prosecutor may attempt to stretch the statute to apply it to D&E. But a state statute is not unconstitutional on its face merely because we can imagine an aggressive prosecutor who would attempt an overly aggressive application of the statute. We have noted that "'[w]ords inevitably contain germs of uncertainty.'" *Broadrick* v. *Oklahoma*, 413 U. S. 601, 608 (1973). We do not give statutes the broadest definition imaginable. Rather, we ask whether "the ordinary

person exercising ordinary common sense can sufficiently understand and comply with [the statute]." *Ibid. (*quoting *Civil Service Comm'n* v. *Letter Carriers,* 413 U. S. 548, 579 (1973)). While a creative legal mind might be able to stretch the plain language of the Nebraska statute to apply to D&E, "citizens who desire to obey the statute will have no difficulty in understanding it." *Colten* v. *Kentucky,* 407 U. S. 104, 110 (1972) (internal quotation marks omitted).

Finally, the majority discusses at some length the reasons it will not defer to the interpretation of the statute proffered by the Nebraska Attorney General, despite the Attorney General's repeated representations to this Court that his State will not apply the partial birth abortion statute to D&E. See Brief for Petitioners 11–13; Tr. of Oral Arg. 10–11. The fact that the Court declines to defer to the interpretation of the Attorney General is not, however, a reason to give the statute a contrary representation. Even without according the Attorney General's view any particular respect, we should agree with his interpretation because it is undoubtedly the correct one. Moreover, JUSTICE O'CONNOR has noted that the Court should adopt a narrow interpretation of a state statute when it is supported by the principle that statutes will be interpreted to avoid constitutional difficulties as well as by "the representations of counsel . . . at oral argument." *Frisby* v. *Schultz, supra,* at 483. Such an approach is particularly appropriate in this case because, as the majority notes, Nebraska courts accord the Nebraska Attorney General's interpretations of state statutes "substantial weight." See *State* v. *Coffman,* 213 Neb. 560, 561, 330 N. W. 2d 727, 728 (1983). Therefore, any renegade prosecutor bringing criminal charges against a physician for performing a D&E would find himself confronted with a contrary interpretation of the statute by the Nebraska Attorney General, and, I assume, a judge who both possessed common

sense and was aware of the rule of lenity. See *State* v. *White*, 254 Neb. 566, 575, 577 N. W. 2d 741, 747 (1998).[17]

IV

Having resolved that Nebraska's partial birth abortion statute permits doctors to perform D&E abortions, the question remains whether a State can constitutionally prohibit the partial birth abortion procedure without a health exception. Although the majority and JUSTICE O'CONNOR purport to rely on the standard articulated in the *Casey* plurality in concluding that a State may not, they in fact disregard it entirely.

A

Though JUSTICES O'CONNOR, KENNEDY, and SOUTER declined in *Casey*, on the ground of *stare decisis*, to reconsider whether abortion enjoys any constitutional protection, 505 U. S., at 844–846, 854–869 (majority opinion); *id.*, at 871 (plurality opinion), *Casey* professed to be, in part, a repudiation of *Roe* and its progeny. The *Casey* plurality expressly noted that prior case law had undervalued the State's interest in potential life, 505 U. S., at 875–876, and had invalidated regulations of abortion that "in no real sense deprived women of the ultimate decision," *id.*, at 875. See *id.*, at 871 ("*Roe* v. *Wade* speaks with clarity in establishing . . . the State's 'important and legitimate interest in potential life.' That por-

[17] The majority relies on JUSTICE SCALIA's observation in *Crandon* v. *United States*, 494 U. S. 152 (1990), that "we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." *Id.*, at 177. But JUSTICE SCALIA was commenting on the United States Attorney General's overly broad interpretation of a federal statute, deference to which, as he said, would "turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Id.*, at 178. Here, the Nebraska Attorney General has adopted a *narrow* view of a criminal statute, one that comports with the rule of lenity (not to mention the statute's plain meaning).

tion of the decision in *Roe* has been given too little acknowledgment" (citation omitted)). The plurality repeatedly recognized the States' weighty interest in this area. See *id.*, at 877 ("State . . . may express profound respect for the life of the unborn"); *id.*, at 878 ("the State's profound interest in potential life"); *id.*, at 850 (majority opinion) ("profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage"). And, the plurality expressed repeatedly the States' legitimate role in regulating abortion procedures. See *id.*, at 876 ("The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted"); *id.*, at 875 ("Not all governmental intrusion [with abortion] is of necessity unwarranted"). According to the plurality: "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.*, at 874.

The *Casey* plurality therefore adopted the standard: "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Ibid.* A regulation imposes an "undue burden" only if it "has the effect of placing a substantial obstacle in the path of a woman's choice." *Id.*, at 877.

B

There is no question that the State of Nebraska has a valid interest—one not designed to strike at the right itself—in prohibiting partial birth abortion. *Casey* itself noted that States may "express profound respect for the life of the unborn." *Ibid.* States may, without a doubt, express this profound respect by prohibiting a procedure that approaches infanticide, and thereby dehumanizes the fetus and trivializes human life. The AMA has recognized that this procedure is "ethically different from other destructive abortion

techniques because the fetus, normally twenty weeks or longer in gestation, is killed *outside* the womb. The 'partial birth' gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body." AMA Board of Trustees Factsheet on H. R. 1122 (June 1997), in App. to Brief for Association of American Physicians and Surgeons et al. as *Amici Curiae* 1. Thirty States have concurred with this view.

Although the description of this procedure set forth above should be sufficient to demonstrate the resemblance between the partial birth abortion procedure and infanticide, the testimony of one nurse who observed a partial birth abortion procedure makes the point even more vividly:

> "The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.
>
> "The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp." H. R. 1833 Hearing 18 (statement of Brenda Pratt Shafer).

The question whether States have a legitimate interest in banning the procedure does not require additional authority. See *ante*, at 961–964 (KENNEDY, J., dissenting).[18] In a civi-

[18] I read the majority opinion to concede, if only implicitly, that the State has a legitimate interest in banning this dehumanizing procedure. The threshold question under *Casey* is whether the abortion regulation serves a legitimate state interest. 505 U. S. 833 (1992). Only if the statute serves a legitimate state interest is it necessary to consider whether the regulation imposes a substantial obstacle to women seeking an abortion. *Ibid.* The fact that the majority considers whether Nebraska's statute creates a substantial obstacle suggests that the Members of the majority other than JUSTICE STEVENS and JUSTICE GINSBURG have rejected respondent's threshold argument that the statute serves no legitimate state purpose.

lized society, the answer is too obvious, and the contrary arguments too offensive, to merit further discussion. But see *ante*, at 946–947 (STEVENS, J., concurring) (arguing that the decision of 30 States to ban the partial birth abortion procedure was "simply irrational" because other forms of abortion were "equally gruesome"); *ante*, at 951–952 (GINSBURG, J., concurring) (similar).[19]

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[19] JUSTICE GINSBURG seems to suggest that even if the Nebraska statute does not impose an undue burden on women seeking abortions, the statute is unconstitutional because it has the *purpose* of imposing an undue burden. JUSTICE GINSBURG's view is, apparently, that we can presume an unconstitutional purpose because the regulation is not designed to save any fetus from "destruction" or protect the health of pregnant women and so must, therefore, be designed to "chip away at . . . *Roe*." *Ante*, at 952. This is a strange claim to make with respect to legislation that was enacted in 30 individual States and was enacted in Nebraska by a vote of 45 to 1, Nebraska Legislative Journal, 95th Leg., 1st Sess., 2609 (1997). Moreover, in support of her assertion that the Nebraska Legislature acted with an unconstitutional purpose, JUSTICE GINSBURG is apparently unable to muster a single shred of evidence that the Nebraska legislation was enacted to prevent women from obtaining abortions (a purpose to which it would be entirely ineffective), let alone the kind of persuasive proof we would require before concluding that a legislature acted with an unconstitutional intent. In fact, as far as I can tell, JUSTICE GINSBURG's views regarding the motives of the Nebraska Legislature derive from the views of a dissenting Court of Appeals judge discussing the motives of legislators of other States. JUSTICE GINSBURG's presumption is, in addition, squarely inconsistent with *Casey*, which stated that States may enact legislation to "express profound respect for the life of the unborn," 505 U. S., at 877, and with our opinion in *Mazurek* v. *Armstrong*, 520 U. S. 968 (1997) *(per curiam)*, in which we stated:

"[E]ven assuming . . . that a legislative *purpose* to interfere with the constitutionally protected right to abortion without the *effect* of interfering with that right . . . could render the Montana law invalid—there is no basis for finding a vitiating legislative purpose here. We do not assume unconstitutional legislative intent even when statutes produce harmful results, see, *e. g.*, *Washington* v. *Davis*, 426 U. S. 229, 246 (1976); much less do we assume it when the results are harmless." *Id.*, at 972 (emphases in original).

C

The next question, therefore, is whether the Nebraska statute is unconstitutional because it does not contain an exception that would allow use of the procedure whenever "'"necessary, in appropriate medical judgment, for the preservation of the . . . health of the mother."'" *Ante*, at 930 (majority opinion) (quoting *Casey*, 505 U. S., at 879, in turn quoting *Roe*, 410 U. S., at 164–165) (emphasis deleted). According to the majority, such a health exception is required here because there is a "division of opinion among some medical experts over whether D&X is generally safer [than D&E], and an absence of controlled medical studies that would help answer these medical questions." *Ante*, at 936–937. In other words, unless a State can conclusively establish that an abortion procedure is no safer than other procedures, the State cannot regulate that procedure without including a health exception. JUSTICE O'CONNOR agrees. *Ante*, at 947–948 (concurring opinion). The rule set forth by the majority and JUSTICE O'CONNOR dramatically expands on our prior abortion cases and threatens to undo *any* state regulation of abortion procedures.

The majority and JUSTICE O'CONNOR suggest that their rule is dictated by a straightforward application of *Roe* and *Casey*. *Ante*, at 929–930 (majority opinion); *ante*, at 947–948 (O'CONNOR, J., concurring). But that is simply not true. In *Roe* and *Casey*, the Court stated that the State may "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe*, *supra*, at 165; *Casey*, 505 U. S., at 879. *Casey* said that a health exception must be available if "*continuing her pregnancy* would constitute a threat" to the woman. *Id.*, at 880 (majority opinion) (emphasis added). Under these cases, if a State seeks to prohibit abortion, even if only temporarily or under particular circumstances, as *Casey* says that it may, *id.*, at 879 (plu-

rality opinion), the State must make an exception for cases in which the life or health of the mother is endangered by continuing the pregnancy. These cases addressed only the situation in which a woman must obtain an abortion because of some threat to her health from continued pregnancy. But *Roe* and *Casey* say nothing at all about cases in which a physician considers one prohibited method of abortion to be preferable to permissible methods. Today's majority and JUSTICE O'CONNOR twist *Roe* and *Casey* to apply to the situation in which a woman desires—for whatever reason—an abortion and wishes to obtain the abortion by some particular method. See *ante*, at 929–931 (majority opinion); *ante*, at 947–948 (concurring opinion). In other words, the majority and JUSTICE O'CONNOR fail to distinguish between cases in which health concerns require a woman to obtain an abortion and cases in which health concerns cause a woman who desires an abortion (for whatever reason) to prefer one method over another.

It is clear that the Court's understanding of when a health exception is required is not mandated by our prior cases. In fact, we have, post-*Casey*, approved regulations of methods of conducting abortion despite the lack of a health exception. *Mazurek* v. *Armstrong*, 520 U. S. 968, 971 (1997) *(per curiam)* (reversing Court of Appeals holding that plaintiffs challenging requirement that only physicians perform abortions had a "'fair chance of success'"); *id.*, at 979 (STEVENS, J., dissenting) (arguing that the regulation was designed to make abortion more difficult). And one can think of vast bodies of law regulating abortion that are valid, one would hope, despite the lack of health exceptions. For example, physicians are presumably prohibited from using abortifacients that have not been approved by the Food and Drug Administration even if some physicians reasonably believe

that these abortifacients would be safer for women than existing abortifacients.[20]

The majority effectively concedes that *Casey* provides no support for its broad health exception rule by relying on pre-*Casey* authority, see *ante*, at 931, including a case that was specifically disapproved of in *Casey* for giving too little weight to the State's interest in fetal life. See *Casey*, *supra*, at 869, 882 (overruling the parts of *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986), that were "inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn," 505 U. S., at 870); *id.*, at 893 (majority opinion) (relying on *Thornburgh*, *supra*, at 783 (Burger, C. J., dissenting), for the proposition that the Court was expanding on *Roe* in that case). Indeed, JUSTICE O'CONNOR, who joins the Court's opinion, was on the Court for *Thornburgh* and was in dissent, arguing that, under the undue-burden standard, the statute at issue was constitutional. See 476 U. S., at 828–832 (arguing that the challenged state statute was not "unduly burdensome"). The majority's resort to this case proves my point that the holding today assumes that the standard set forth in the *Casey* joint opinion is no longer governing.

And even if I were to assume that the pre-*Casey* standards govern, the cases cited by the majority provide no support for the proposition that the partial birth abortion ban must

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[20] As I discuss below, the only question after *Casey* is whether a ban on partial birth abortion without a health exception imposes an "undue burden" on a woman seeking an abortion, meaning that it creates a "substantial obstacle" for the woman. I assume that the Court does not discuss the health risks with respect to undue burden, and instead suggests that health risks are relevant to the necessity of a health exception, because a marginal increase in safety risk for some women is clearly not an undue burden within the meaning of *Casey*. At bottom, the majority is using the health exception language to water down *Casey*'s undue-burden standard.

include a health exception because some doctors believe that partial birth abortion is safer. In *Thornburgh*, *Danforth*, and *Doe*, the Court addressed health exceptions for cases in which *continued pregnancy* would pose a risk to the woman. *Thornburgh*, *supra*, at 770; *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52 (1976); *Doe* v. *Bolton*, 410 U. S., at 197. And in *Colautti* v. *Franklin*, 439 U. S. 379 (1979), the Court explicitly declined to address whether a State can constitutionally require a tradeoff between the woman's health and that of the fetus. The broad rule articulated by the majority and by JUSTICE O'CONNOR are unprecedented expansions of this Court's already expansive pre-*Casey* jurisprudence.

As if this state of affairs were not bad enough, the majority expands the health exception rule articulated in *Casey* in one additional and equally pernicious way. Although *Roe* and *Casey* mandated a health exception for cases in which abortion is "necessary" for a woman's health, the majority concludes that a procedure is "necessary" if it has any comparative health benefits. *Ante*, at 937. In other words, according to the majority, so long as a doctor can point to support in the profession for his (or the woman's) preferred procedure, it is "necessary" and the physician is entitled to perform it. *Ibid.* See also *ante*, at 952 (GINSBURG, J., concurring) (arguing that a State cannot constitutionally "sto[p] a woman from choosing the procedure her doctor 'reasonably believes' " is in her best interest). But such a health exception requirement eviscerates *Casey*'s undue-burden standard and imposes unfettered abortion on demand. The exception entirely swallows the rule. In effect, no regulation of abortion procedures is permitted because there will always be *some* support for a procedure and there will always be some doctors who conclude that the procedure is preferable. If Nebraska reenacts its partial birth abortion ban with a health exception, the State will not be able to prevent physicians like Dr. Carhart from using partial birth abortion as a routine abortion procedure. This Court has now expressed

its own conclusion that there is "highly plausible" support for the view that partial birth abortion is safer, which, in the majority's view, means that the procedure is therefore "necessary." *Ante*, at 937. Any doctor who wishes to perform such a procedure under the new statute will be able to do so with impunity. Therefore, JUSTICE O'CONNOR's assurance that the constitutional failings of Nebraska's statute can be easily fixed, *ante*, at 950–951, is illusory. The majority's insistence on a health exception is a fig leaf barely covering its hostility to any abortion regulation by the States—a hostility that *Casey* purported to reject.[21]

D

The majority assiduously avoids addressing the *actual* standard articulated in *Casey*—whether prohibiting partial birth abortion without a health exception poses a substantial obstacle to obtaining an abortion. 505 U. S., at 877. And for good reason: Such an obstacle does not exist. There are two essential reasons why the Court cannot identify a substantial obstacle. First, the Court cannot identify any real, much less substantial, barrier to any woman's ability to obtain an abortion. And second, the Court cannot demonstrate that any such obstacle would affect a sufficient number of women to justify invalidating the statute on its face.

1

The *Casey* joint opinion makes clear that the Court should not strike down state regulations of abortion based on the

[21] The majority's conclusion that health exceptions are required whenever there is any support for use of a procedure is particularly troubling because the majority does not indicate whether an exception for physical health only is required, or whether the exception would have to account for "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well being of the patient." *Doe* v. *Bolton*, 410 U. S. 179, 192 (1973). See also *Voinovich* v. *Women's Medical Professional Corp.*, 523 U. S. 1036, 1037 (1998) (THOMAS, J., joined by REHNQUIST, C. J., and SCALIA, J., dissenting from denial of certiorari).

fact that some women might face a marginally higher health risk from the regulation. In *Casey*, the Court upheld a 24-hour waiting period even though the Court credited evidence that for some women the delay would, in practice, be much longer than 24 hours, and even though it was undisputed that any delay in obtaining an abortion would impose additional health risks. *Id.*, at 887; *id.*, at 937 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part) ("The District Court found that the mandatory 24-hour delay could lead to delays in excess of 24 hours, thus increasing health risks"). Although some women would be able to avoid the waiting period because of a "medical emergency," the medical emergency exception in the statute was limited to those women for whom delay would create "serious risk of substantial and irreversible impairment of a major bodily function." *Id.*, at 902 (appendix to joint opinion) (internal quotation marks omitted). Without question, there were women for whom the regulation would impose some additional health risk who would not fall within the medical emergency exception. The Court concluded, despite the certainty of this increased risk, that there was no showing that the burden on any of the women was substantial. *Id.*, at 887.

The only case in which this Court has overturned a State's attempt to prohibit a particular form of abortion also demonstrates that a marginal increase in health risks is not sufficient to create an undue burden. In *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52 (1976), the Court struck down a state regulation because the State had outlawed the method of abortion used in 70% of abortions and because alternative methods were, the Court emphasized, "significantly more dangerous and critical" than the prohibited method. *Id.*, at 76.

Like the *Casey* 24-hour waiting period, and in contrast to the situation in *Danforth*, any increased health risk to women imposed by the partial birth abortion ban is minimal

at most. Of the 5.5% of abortions that occur after 15 weeks (the time after which a partial birth abortion would be possible), the vast majority are performed with a D&E or induction procedure. And, for any woman with a vertex presentation fetus, the vertex presentation form of intact D&E, which presumably shares some of the health benefits of the partial birth abortion procedure but is not covered by the Nebraska statute, is available. Of the remaining women—that is, those women for whom a partial birth abortion procedure would be considered and who have a breech presentation fetus—there is no showing that any one faces a significant health risk from the partial birth abortion ban. A select committee of ACOG "could identify no circumstances under which this procedure . . . would be the only option to save the life or preserve the health of the woman." App. 600 (ACOG Executive Board, Statement on Intact Dilation and Extraction (Jan. 12, 1997)). See also *Hope Clinic* v. *Ryan*, 195 F. 3d 857, 872 (CA7 1999) (en banc) ("'There does not appear to be any identified situation in which intact D&X is the only appropriate procedure to induce abortion'" (quoting Late Term Pregnancy Techniques, AMA Policy H–5.982 W. D. Wis. 1999)); *Planned Parenthood of Wis.* v. *Doyle*, 44 F. Supp. 2d, at 980 (citing testimony of Dr. Haskell that "the D&X procedure is never medically necessary to . . . preserve the health of a woman"), vacated, 195 F. 3d 857 (CA7 1999). And, an ad hoc coalition of doctors, including former Surgeon General Koop, concluded that there are no medical conditions that require use of the partial birth abortion procedure to preserve the mother's health. See App. 719.

In fact, there was evidence before the Nebraska Legislature that partial birth abortion *increases* health risks relative to other procedures. During floor debates, a proponent of the Nebraska legislation read from and cited several articles by physicians concluding that partial birth abortion procedures are risky. App. in Nos. 98–3245, 98–3300 (CA8),

p. 812. One doctor testifying before a committee of the Nebraska Legislature stated that partial birth abortion involves three "very risky procedures": dilation of the cervix, using instruments blindly, and conversion of the fetus. App. 721 (quoting testimony of Paul Hays, M. D.).[22]

There was also evidence before Congress that partial birth abortion "does not meet medical standards set by ACOG nor has it been adequately proven to be safe nor efficacious." H. R. 1833 Hearing 112 (statement of Nancy G. Romer, M. D.); see *id.*, at 110–111.[23] The AMA supported the congressional ban on partial birth abortion, concluding that the procedure is "not medically indicated" and "not good medicine." See 143 Cong. Rec. S4670 (May 19, 1997) (reprinting a letter from the AMA to Sen. Santorum). And there was evidence before Congress that there is "certainly no basis upon which to state the claim that [partial birth abortion] is a safer or even a preferred procedure." Partial Birth Abortion: The Truth, S. 6 and H. R. 929 Joint Hearing 123 (statement of Curtis Cook, M. D.). This same doctor testified that

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[22] Use of the procedure may increase the risk of complications, including cervical incompetence, because it requires greater dilation of the cervix than other forms of abortion. See Epner, Jonas, & Seckinger, Late-term Abortion, 280 JAMA 724, 726 (Aug. 26, 1998). Physicians have also suggested that the procedure may pose a greater risk of infection. See *Planned Parenthood* of *Wis.* v. *Doyle*, 44 F. Supp. 2d 975, 979 (WD Wis. 1999). See also Sprang & Neerhof, Rationale for Banning Abortions Late in Pregnancy, 280 JAMA 744 (Aug. 26, 1998) ("Intact D&X poses serious medical risks to the mother").

[23] Nebraska was entitled to rely on testimony and evidence presented to Congress and to other state legislatures. Cf. *Erie* v. *Pap's A. M.*, 529 U. S. 277, 296–297 (2000); *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 51 (1986). At numerous points during the legislative debates, various members of the Nebraska Legislature made clear that that body was aware of, and relying on, evidence before Congress and other legislative bodies. See App. in Nos. 98–3245, 98–3300 (CA8), pp. 846, 852–853, 878–879, 890–891, 912–913.

"partial-birth abortion is an unnecessary, unsteady, and potentially dangerous procedure," and that "safe alternatives are in existence." *Id.*, at 122.

The majority justifies its result by asserting that a "significant body of medical opinion" supports the view that partial birth abortion may be a safer abortion procedure. *Ante*, at 937. I find this assertion puzzling. If there is a "significant body of medical opinion" supporting this procedure, no one in the majority has identified it. In fact, it is uncontested that although this procedure has been used since at least 1992, no formal studies have compared partial birth abortion with other procedures. 11 F. Supp. 2d, at 1112 (citing testimony of Dr. Stubblefield); *id.*, at 1115 (citing testimony of Dr. Boehm); Epner, Jonas, & Seckinger, Late-term Abortion, 280 JAMA 724 (Aug. 26, 1998); Sprang & Neerhof, Rationale for Banning Abortion Late in Pregnancy, 280 JAMA 744 (Aug. 26, 1998). Cf. *Kumho Tire Co.* v. *Carmichael*, 526 U. S. 137, 149–152 (1999) (observing that the reliability of a scientific technique may turn on whether the technique can be and has been tested; whether it has been subjected to peer review and publication; and whether there is a high rate of error or standards controlling its operation). The majority's conclusion makes sense only if the undue-burden standard is not whether a "significant body of medical opinion" supports the result, but rather, as JUSTICE GINSBURG candidly admits, whether *any* doctor could reasonably believe that the partial birth abortion procedure would best protect the woman. *Ante*, at 952.

Moreover, even if I were to assume credible evidence on both sides of the debate, that fact should resolve the undue-burden question in favor of allowing Nebraska to legislate. Where no one knows whether a regulation of abortion poses any burden at all, the burden surely does not amount to a "substantial obstacle." Under *Casey*, in such a case we should defer to the legislative judgment. We have said:

> "[I]t is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes. . . . [W]hen a legislature undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad . . . ." *Kansas* v. *Hendricks*, 521 U. S., at 360, n. 3 (internal quotations marks omitted).

In JUSTICE O'CONNOR's words:

> "It is . . . difficult to believe that this Court, without the resources available to those bodies entrusted with making legislative choices, believes itself competent to make these inquiries and to revise these standards every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate medical procedure in this area." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S., at 456 (dissenting opinion).

See *id.*, at 456, n. 4 ("Irrespective of the difficulty of the task, legislatures, with their superior factfinding capabilities, are certainly better able to make the necessary judgments than are courts"); *Webster* v. *Reproductive Health Services*, 492 U. S., at 519 (plurality opinion) (Court should not sit as an "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States (internal quotations marks omitted)); *Jones* v. *United States*, 463 U. S. 354, 365, n. 13 (1983) ("The lesson we have drawn is not that government may not act in the face of this [medical] uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments"). The Court today disregards these principles and the clear import of *Casey*.

2

Even if I were willing to assume that the partial birth method of abortion is safer for some small set of women, such

a conclusion would not require invalidating the Act, because this case comes to us on a facial challenge. The only question before us is whether respondent has shown that "'no set of circumstances exists under which the Act would be valid.'" *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 514 (1990) (quoting *Webster* v. *Reproductive Health Services*, *supra*, at 524 (O'CONNOR, J., concurring in part and concurring in judgment)). Courts may not invalidate on its face a state statute regulating abortion "based upon a worst-case analysis that may never occur." 497 U. S., at 514.

Invalidation of the statute would be improper even assuming that *Casey* rejected this standard *sub silentio* (at least so far as abortion cases are concerned) in favor of a so-called "'large fraction'" test. See *Fargo Women's Health Organization* v. *Schafer*, 507 U. S. 1013, 1014 (1993) (O'CONNOR, J., joined by SOUTER, J., concurring) (arguing that the "no set of circumstances" standard is incompatible with *Casey*). See also *Janklow* v. *Planned Parenthood, Sioux Falls Clinic*, 517 U. S. 1174, 1177–1179 (1996) (SCALIA, J., dissenting from denial of certiorari). In *Casey*, the Court was presented with a facial challenge to, among other provisions, a spousal notice requirement. The question, according to the majority, was whether the spousal notice provision operated as a "substantial obstacle" to the women "whose conduct it affects," namely, "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement." 505 U. S., at 895. The Court determined that a "large fraction" of the women in this category were victims of psychological or physical abuse. *Ibid.* For this subset of women, according to the Court, the provision would pose a substantial obstacle to the ability to obtain an abortion because their husbands could exercise an effective veto over their decision. *Id.*, at 897.

None of the opinions supporting the majority so much as mentions the large fraction standard, undoubtedly because

the Nebraska statute easily survives it. I will assume, for the sake of discussion, that the category of women whose conduct Nebraska's partial birth abortion statute might affect includes any woman who wishes to obtain a safe abortion after 16 weeks' gestation. I will also assume (although I doubt it is true) that, of these women, every one would be willing to use the partial birth abortion procedure if so advised by her doctor. Indisputably, there is no "large fraction" of these women who would face a substantial obstacle to obtaining a safe abortion because of their inability to use this particular procedure. In fact, it is not clear that *any* woman would be deprived of a safe abortion by her inability to obtain a partial birth abortion. More medically sophisticated minds than ours have searched and failed to identify a single circumstance (let alone a large fraction) in which partial birth abortion is required. But no matter. The "ad hoc nullification" machine is back at full throttle. See *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S., at 814 (O'CONNOR, J., dissenting); *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 785 (1994) (SCALIA, J., concurring in judgment in part and dissenting in part).

* * *

We were reassured repeatedly in *Casey* that not all regulations of abortion are unwarranted and that the States may express profound respect for fetal life. Under *Casey*, the regulation before us today should easily pass constitutional muster. But the Court's abortion jurisprudence is a particularly virulent strain of constitutional exegesis. And so today we are told that 30 States are prohibited from banning one rarely used form of abortion that they believe to border on infanticide. It is clear that the Constitution does not compel this result.

I respectfully dissent.

UNITED STATES *v.* ALASKA

ON BILL OF COMPLAINT

No. 84, Orig. Decided June 19, 1997—Decree entered June 29, 2000

Decree entered.

Opinion reported: 521 U. S. 1.

The joint motion for entry of a decree is granted.

DECREE

On June 18, 1979, the Court granted the United States leave to file a bill of complaint setting out a dispute over the rights of the United States and the State of Alaska to offer lands in the Beaufort Sea for mineral leasing. 442 U. S. 937. The Court appointed a Special Master to direct subsequent proceedings and to submit such reports as he deemed appropriate. 444 U. S. 1065 (1980). The Court later referred to the Master the State of Alaska's motion for leave to file a counterclaim seeking a decree quieting its title to coastal submerged lands within two federal reservations, the National Petroleum Reserve-Alaska and the Arctic National Wildlife Range (now known as the Arctic National Wildlife Refuge). 445 U. S. 914 (1980).

From 1980 through 1986, the Master oversaw extensive hearings and briefing. On May 20, 1996, the Court received and ordered filed the Special Master's Report. 517 U. S. 1207. On June 19, 1997, this Court overruled Alaska's exceptions, sustained the United States' exception, and directed the parties to prepare and submit an appropriate decree, consistent with the Court's decision, for the Court's consideration. 521 U. S. 1. The parties have prepared a proposed decree and have recommended its entry by the Court.

Accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED:

A. Alaska's Motion for Leave to File a Counterclaim.

The motion of the State of Alaska for leave to file a counterclaim is granted.

B. The Federal-State Boundary Marking the Seaward Extent of the State of Alaska's Submerged Lands Act Grant.

1. Except as provided in Paragraph C below, as against the State of Alaska and all persons claiming under it, the United States has exclusive rights to explore the area lying seaward of the line described in Exhibit A hereof and to exploit the natural resources of said area. The State of Alaska is not entitled to any interest in such lands, minerals, and resources, except as may be provided by § 8(g) of the Outer Continental Shelf Lands Act, 67 Stat. 468, 43 U. S. C. § 1337(g), and Paragraph C of this Decree. The State of Alaska, its privies, assigns, lessees, and other persons claiming under it are hereby enjoined from interfering with the rights of the United States in such lands, minerals, and resources.

2. Except as provided in Paragraph C below and except within the boundaries of the National Petroleum Reserve-Alaska and the Arctic National Wildlife Refuge, and subject to the exceptions set out in § 5 of the Submerged Lands Act, 67 Stat. 32, 43 U. S. C. § 1313, as against the United States and all persons claiming under it, the State of Alaska has exclusive rights to explore the area lying shoreward of the line described in Exhibit A hereof and to exploit the natural resources of said area. The United States is not entitled to any interest in such lands, minerals, and resources except as may be provided by Paragraph C of this Decree. The United States, its privies, assigns, lessees, and other persons claiming under it are hereby enjoined from interfering with the rights of the State of Alaska in such lands, minerals, and resources.

3. The boundary described in Exhibit A shall remain fixed for purposes of the Submerged Lands Act.

C. Distribution of Revenues in Escrow and Administration of Leases.

1. The United States and the State of Alaska shall resolve accounting and administration issues arising from the past issuance of offshore oil and gas leases in disputed areas based on the following principles:

a. *Existing and Former Leases That Are Subject to § 7 Agreements.* During the course of this litigation, the United States and the State of Alaska entered into agreements under § 7 of the Outer Continental Shelf Lands Act, 43 U. S. C. § 1336, and Alaska Stat. §§ 38.05.020 and 38.05.137, to allow mineral leasing of submerged lands in disputed areas. Under the terms of those "§ 7 Agreements," lease revenues are held in income-producing escrow accounts for distribution based on the outcome of the litigation. No later than 180 days after entry of this Decree, the funds held in escrow accounts shall be distributed in accordance with the distribution provisions contained in the § 7 Agreements. The United States and the State of Alaska shall carry out all applicable provisions and terms of the § 7 Agreements and shall administer the leases in accordance with the provisions therein.

b. *Existing and Former Leases That Are Affected by the Fixed Federal-State Boundary Described in Exhibit A.* The United States and the State of Alaska have issued mineral leases in offshore areas that were not in dispute on the date of lease issuance and are therefore not subject to § 7 Agreements. Those leases may be intersected, however, by the fixed federal-state boundary described in Exhibit A, which is based upon surveys conducted after the lease dates. Leases existing on the

date of this Decree and not covered by § 7 Agreements, but intersected by the fixed federal-state boundary described in Exhibit A, shall continue to be administered by the original lessor, who shall have the exclusive right to all past and future revenues from the lease. Following the expiration, relinquishment, or termination of such leases, the rights to explore and exploit the natural resources within the area that was leased shall be determined solely in accordance with Paragraph B of this Decree. The distribution of revenues from former leases that expired before the date of this Decree, that were not covered by § 7 Agreements, but that would have been intersected by the fixed federal-state boundary described in Exhibit A, shall not be affected by the fixing of the federal-state boundary.

c. *Existing and Former Leases That Are Both Subject to § 7 Agreements and Affected by the Fixed Federal-State Boundary Described in Exhibit A.* In the event that an existing lease is subject to a § 7 Agreement and is intersected by the fixed federal-state boundary described in Exhibit A, the funds held in escrow shall be distributed, and the lease shall be administered, in accordance with the provisions of the § 7 Agreement. Following the expiration, relinquishment, or termination of the lease, the rights to explore and exploit the natural resources within the area that was leased shall be determined solely in accordance with Paragraph B of this Decree. The distribution of revenues from former leases that expired before the date of this Decree, that were subject to § 7 Agreements, but that would have been intersected by the fixed federal-state boundary described in Exhibit A, shall not be affected by the fixing of the federal-state boundary.

2. This Decree shall not affect the rights or obligations of the United States or the State of Alaska with respect to

its lessees or third parties, whether arising from the § 7 Agreements or otherwise. This Decree shall not affect any rights or obligations arising under present or future unitization, operating, enhanced recovery, commingling, or other similar agreements between the parties or with others.

D. The Coastal Boundary of the National Petroleum Reserve-Alaska.

The coastal boundary of the National Petroleum Reserve-Alaska is a continuous line, as described in Executive Order No. 3739–A (1923), in Presidential Executive Orders (1980) (microform, reel 6), that begins at the western bank of the Colville River and follows the highest highwater mark westerly, extending across the entrances of small lagoons, including Peard Bay, Wainwright Inlet, the Kuk River, Kugrua Bay and River, and other small bays and river estuaries, and following the ocean side of barrier islands and sandspits within three miles of shore and the ocean side of the Plover Islands, to the northwestern extremity of Icy Cape, approximately 70° 21′ N., 161° 46′ W.

E. The Coastal Boundary of the Arctic National Wildlife Refuge.

The coastal boundary of the Arctic National Wildlife Refuge is a continuous line, as described in Public Land Order No. 2214, 25 Fed. Reg. 12598 (1960), that begins at the intersection of the International Boundary line between the State of Alaska and Yukon Territory, Canada, with the line of extreme low water of the Arctic Ocean in the vicinity of Monument 1 of said International Boundary line, and follows the line of extreme low water westerly, extending across the entrances of lagoons such that all offshore bars, reefs and islands, and lagoons that separate them from the mainland, are part of the Refuge, to Brownlow Point, at approximately 70° 10′ N., 145° 51′ W.

F. Resolution of Disputes Respecting the Coastal Boundaries of the National Petroleum Reserve-Alaska and the Arctic National Wildlife Refuge.

The coastal boundaries of the National Petroleum Reserve-Alaska and the Arctic National Wildlife Refuge are ambulatory and will therefore migrate as a result of changes in relevant physical features. The United States and the State of Alaska may resolve disputes arising from those changes through negotiation, through alternative methods of dispute resolution, or through invocation of this Court's retained jurisdiction in accordance with Paragraph G. The United States and the State of Alaska may jointly submit to this Court, for entry as a supplement to this Decree, any agreement respecting the location of the coastal boundary of the National Petroleum Reserve-Alaska or of the Arctic National Wildlife Refuge.

G. Retention of Jurisdiction.

The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as from time to time may be determined necessary or advisable to effectuate and supplement this Decree and the rights of the respective parties. In all other respects, this Decree is final.

EXHIBIT A

Location of the Fixed Offshore Boundary Between the United States of America and the State of Alaska in the Chukchi and Beaufort Seas.

The following line demarks the offshore federal-state boundary in the Chukchi and Beaufort Seas, from Point Hope to the United States-Canada border. The line is fixed by coordinates based on the North American Datum 1983 (NAD 83), which is equivalent to the World Geodetic System 1984 (WGS 84). For convenience, the coordinates are also set out by reference to the North American Datum 1927 (NAD 27). The NAD 83 coordinates are authoritative for purposes of this Decree. The NAD 27 coordinates

are derived by conversion using the computer program CORPSCON 4.11.

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BEGINNING AT				
	419037.815	7579200.000	419160.847	7579095.372
BY ARC CENTERED AT				
	424026.911	7581645.007	424149.808	7581540.582
TO				
	418923.219	7579449.224	419046.253	7579344.598
BY STRAIGHT LINE TO				
	418891.210	7579523.623	419014.244	7579418.998
BY ARC CENTERED AT				
	423994.902	7581719.406	424117.799	7581614.983
TO				
	418835.489	7583780.860	418958.496	7583676.338
BY STRAIGHT LINE TO				
	418867.420	7583860.777	418990.426	7583756.258
BY ARC CENTERED AT				
	424026.833	7581799.323	424149.729	7581694.902
TO				
	419643.952	7585213.923	419766.928	7585109.461
BY ARC CENTERED AT				
	424245.654	7582100.488	424368.544	7581996.080
TO				
	420000.182	7585684.495	420123.146	7585580.056
BY STRAIGHT LINE TO				
	420016.344	7585703.639	420139.307	7585599.201
BY ARC CENTERED AT				
	424535.646	7582471.760	424658.528	7582367.368
TO				
	421340.920	7587017.402	421463.845	7586913.030
BY STRAIGHT LINE TO				
	421342.652	7587018.619	421465.577	7586914.247

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	424945.716	7582789.309	425068.589	7582684.934
TO				
	421544.041	7587182.229	421666.961	7587077.866
BY STRAIGHT LINE TO				
	421749.101	7587341.018	421872.015	7587236.664
BY ARC CENTERED AT				
	425150.776	7582948.098	425273.644	7582843.732
TO				
	422257.197	7587691.128	422380.097	7587586.795
BY STRAIGHT LINE TO				
	422379.306	7587765.623	422502.203	7587661.295
BY ARC CENTERED AT				
	425272.885	7583022.593	425395.750	7582918.232
TO				
	422432.272	7587797.533	422555.168	7587693.207
BY STRAIGHT LINE TO				
	423667.558	7588532.405	423790.429	7588428.122
BY ARC CENTERED AT				
	426508.171	7583757.465	426631.009	7583653.151
TO				
	424623.133	7588983.914	424745.987	7588879.658
BY STRAIGHT LINE TO				
	424810.042	7589051.327	424932.893	7588947.076
BY ARC CENTERED AT				
	426695.080	7583824.878	426817.914	7583720.570
TO				
	425040.547	7589128.806	425163.395	7589024.561
BY STRAIGHT LINE TO				
	425575.307	7589386.105	425698.146	7589281.875
BY ARC CENTERED AT				
	427984.232	7584379.488	428107.042	7584275.220

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	425826.304	7589499.301	425949.139	7589395.078
BY STRAIGHT LINE TO				
	428709.846	7590714.673	428832.651	7590610.506
BY ARC CENTERED AT				
	430867.774	7585594.860	430990.599	7585490.588
TO				
	429122.712	7590869.696	429245.520	7590765.527
BY STRAIGHT LINE TO				
	429781.350	7591087.592	429904.163	7590983.420
BY STRAIGHT LINE TO				
	430946.202	7591567.918	431069.024	7591463.742
BY ARC CENTERED AT				
	433064.215	7586431.464	433187.058	7586327.179
TO				
	431169.965	7591654.581	431292.789	7591550.404
BY STRAIGHT LINE TO				
	434051.490	7592699.614	434174.335	7592595.436
BY ARC CENTERED AT				
	435945.740	7587476.497	436068.601	7587372.245
TO				
	434145.374	7592732.714	434268.220	7592628.537
BY ARC CENTERED AT				
	436218.709	7587578.064	436341.572	7587473.815
TO				
	434471.051	7592852.040	434593.899	7592747.865
BY STRAIGHT LINE TO				
	434935.909	7593006.082	435058.761	7592901.910
BY STRAIGHT LINE TO				
	435856.436	7593358.416	435979.295	7593254.251
BY STRAIGHT LINE TO				
	436680.965	7593679.254	436803.831	7593575.094

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	437590.120	7594059.507	437712.994	7593955.353
BY STRAIGHT LINE TO				
	438441.003	7594465.315	438563.884	7594361.166
BY STRAIGHT LINE TO				
	438616.819	7594566.432	438739.702	7594462.283
BY ARC CENTERED AT				
	442127.743	7590260.326	442250.654	7590156.103
TO				
	438755.227	7594675.671	438878.111	7594571.523
BY ARC CENTERED AT				
	442271.762	7590374.146	442394.674	7590269.924
TO				
	440279.974	7595560.852	440402.875	7595456.706
BY ARC CENTERED AT				
	445569.594	7593861.129	445692.550	7593756.935
TO				
	440824.601	7596751.488	440947.510	7596647.353
BY ARC CENTERED AT				
	446342.633	7597399.914	446465.610	7597295.756
TO				
	440806.050	7596935.824	440928.959	7596831.691
BY STRAIGHT LINE TO				
	440798.610	7597024.583	440921.519	7596920.452
BY ARC CENTERED AT				
	446335.193	7597488.673	446458.170	7597384.516
TO				
	441036.687	7599160.490	441159.601	7599056.384
BY STRAIGHT LINE TO				
	441122.157	7599431.370	441245.072	7599327.266
BY ARC CENTERED AT				
	446587.076	7598429.474	446710.060	7598325.326

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	441136.320	7599505.764	441259.236	7599401.661
BY ARC CENTERED AT				
	446630.024	7598676.091	446753.009	7598571.945
TO				
	441227.275	7599972.022	441350.193	7599867.922
BY ARC CENTERED AT				
	446717.567	7600823.978	446840.558	7600719.845
TO				
	441227.090	7599973.214	441350.008	7599869.114
BY ARC CENTERED AT				
	446692.127	7600974.467	446815.118	7600870.335
TO				
	441250.761	7602097.264	441373.683	7601993.184
BY ARC CENTERED AT				
	446710.057	7601065.167	446833.048	7600961.036
TO				
	441454.457	7602867.333	441577.383	7602763.258
BY ARC CENTERED AT				
	446740.606	7601156.847	446863.598	7601052.716
TO				
	442672.822	7604941.325	442795.768	7604837.256
BY STRAIGHT LINE TO				
	442806.839	7605085.374	442929.787	7604981.305
BY STRAIGHT LINE TO				
	443147.812	7605508.653	443270.765	7605404.584
BY ARC CENTERED AT				
	448460.473	7603882.379	448583.493	7603778.248
TO				
	443866.428	7607007.101	443989.393	7606903.037
BY ARC CENTERED AT				
	448640.459	7604164.960	448763.482	7604060.828

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	444140.297	7607423.438	444263.267	7607319.374
BY ARC CENTERED AT				
	449416.179	7605681.541	449539.211	7605577.409
TO				
	444263.634	7607760.103	444386.606	7607656.040
BY ARC CENTERED AT				
	449437.189	7605734.401	449560.221	7605630.269
TO				
	444336.387	7607936.890	444459.360	7607832.827
BY ARC CENTERED AT				
	449732.194	7606612.350	449855.230	7606508.219
TO				
	444358.965	7608025.697	444481.939	7607921.635
BY ARC CENTERED AT				
	449640.429	7609750.596	449763.470	7609646.479
TO				
	444101.350	7609317.303	444224.323	7609213.254
BY ARC CENTERED AT				
	449636.239	7609801.186	449759.280	7609697.069
TO				
	444104.295	7610317.646	444227.269	7610213.605
BY ARC CENTERED AT				
	449657.639	7610145.874	449780.681	7610041.758
TO				
	444109.017	7610432.102	444231.992	7610328.062
BY ARC CENTERED AT				
	449664.578	7610362.284	449787.620	7610258.169
TO				
	444129.751	7610846.874	444252.727	7610742.837
BY ARC CENTERED AT				
	449685.737	7610859.402	449808.780	7610755.289

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	444176.550	7611579.117	444299.528	7611475.086
BY ARC CENTERED AT				
	449707.456	7611051.661	449830.500	7610947.549
TO				
	444263.387	7612161.277	444386.367	7612057.249
BY ARC CENTERED AT				
	449725.106	7611142.081	449848.150	7611037.969
TO				
	444339.284	7612506.655	444462.265	7612402.629
BY ARC CENTERED AT				
	449891.872	7612311.957	450014.920	7612207.849
TO				
	444457.624	7613468.711	444580.609	7613364.692
BY ARC CENTERED AT				
	449927.242	7612492.796	450050.290	7612388.689
TO				
	444482.924	7613601.192	444605.909	7613497.174
BY ARC CENTERED AT				
	449944.871	7612583.216	450067.920	7612479.109
TO				
	444607.680	7614127.084	444730.669	7614023.070
BY ARC CENTERED AT				
	449895.986	7615830.891	450019.049	7615726.819
TO				
	444495.869	7614524.036	444618.857	7614420.029
BY STRAIGHT LINE TO				
	444456.769	7614685.603	444579.757	7614581.598
BY ARC CENTERED AT				
	449856.886	7615992.458	449979.949	7615888.388
TO				
	444850.562	7618401.992	444973.566	7618298.024

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	445379.964	7619501.939	445502.979	7619397.976
BY STRAIGHT LINE TO				
	445667.037	7620219.373	445790.059	7620115.414
BY STRAIGHT LINE TO				
	445772.868	7620597.288	445895.893	7620493.332
BY STRAIGHT LINE TO				
	445887.646	7621109.965	446010.674	7621006.013
BY ARC CENTERED AT				
	451414.867	7621674.733	451537.975	7621570.719
TO				
	445886.610	7621120.197	446009.638	7621016.245
BY ARC CENTERED AT				
	451177.684	7622815.388	451300.794	7622711.389
TO				
	445645.992	7623334.537	445769.023	7623230.615
BY ARC CENTERED AT				
	451187.703	7622936.327	451310.814	7622832.329
TO				
	445799.601	7624291.869	445922.637	7624187.956
BY STRAIGHT LINE TO				
	445974.640	7625639.973	446097.683	7625536.073
BY STRAIGHT LINE TO				
	446029.563	7626593.551	446152.609	7626489.662
BY STRAIGHT LINE TO				
	446029.673	7626668.725	446152.719	7626564.837
BY STRAIGHT LINE TO				
	446025.704	7626694.324	446148.750	7626590.436
BY ARC CENTERED AT				
	451516.097	7627545.626	451639.233	7627441.680
TO				
	446089.351	7628737.083	446212.401	7628633.223

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	446253.398	7629484.266	446376.451	7629380.414
BY STRAIGHT LINE TO				
	446300.892	7629901.105	446423.947	7629797.258
BY STRAIGHT LINE TO				
	446340.510	7630568.822	446463.566	7630464.984
BY STRAIGHT LINE TO				
	446322.443	7631029.005	446445.499	7630925.174
BY STRAIGHT LINE TO				
	446257.623	7631659.539	446380.678	7631555.718
BY STRAIGHT LINE TO				
	446198.310	7632042.817	446321.364	7631939.003
BY STRAIGHT LINE TO				
	446182.131	7632096.275	446305.185	7631992.462
BY ARC CENTERED AT				
	451499.920	7633705.702	451623.073	7633601.840
TO				
	445974.146	7633126.951	446097.196	7633023.155
BY STRAIGHT LINE TO				
	445616.329	7636543.297	445739.372	7636439.556
BY STRAIGHT LINE TO				
	445545.606	7637005.310	445668.648	7636901.576
BY ARC CENTERED AT				
	451037.635	7637845.999	451160.791	7637742.200
TO				
	445485.012	7637652.322	445608.052	7637548.598
BY ARC CENTERED AT				
	450664.312	7639663.288	450787.466	7639559.520
TO				
	445108.476	7639620.568	445231.507	7639516.878
BY ARC CENTERED AT				
	450562.004	7640682.722	450685.158	7640578.970

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	445110.977	7641757.636	445234.002	7641653.978
BY ARC CENTERED AT				
	450610.625	7640968.328	450733.780	7640864.580
TO				
	446324.334	7644503.416	446447.370	7644399.785
BY ARC CENTERED AT				
	451069.247	7641612.925	451192.404	7641509.181
TO				
	448337.844	7646451.166	448460.912	7646347.540
BY ARC CENTERED AT				
	451183.845	7641679.435	451307.003	7641575.691
TO				
	450960.870	7647230.959	451083.983	7647127.311
BY ARC CENTERED AT				
	451581.577	7641709.740	451704.741	7641605.991
TO				
	451547.923	7647265.638	451671.045	7647161.983
BY ARC CENTERED AT				
	451828.042	7641716.704	451951.210	7641612.951
TO				
	454078.080	7646796.710	454201.246	7646693.014
BY STRAIGHT LINE TO				
	454146.668	7646777.298	454269.835	7646673.601
BY STRAIGHT LINE TO				
	454419.808	7646711.638	454542.980	7646607.936
BY STRAIGHT LINE TO				
	455147.052	7646604.699	455270.234	7646500.990
BY ARC CENTERED AT				
	454338.750	7641107.810	454461.963	7641004.011
TO				
	455335.364	7646573.695	455458.548	7646469.985

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	455796.305	7646489.650	455919.494	7646385.938
BY ARC CENTERED AT				
	454799.691	7641023.765	454922.910	7640919.960
TO				
	455952.776	7646458.793	456075.967	7646355.080
BY STRAIGHT LINE TO				
	457362.970	7646159.609	457486.178	7646055.888
BY ARC CENTERED AT				
	456209.885	7640724.581	456333.120	7640620.770
TO				
	457460.307	7646138.044	457583.516	7646034.323
BY STRAIGHT LINE TO				
	458215.663	7645963.569	458338.881	7645859.843
BY STRAIGHT LINE TO				
	458739.887	7645896.824	458863.111	7645793.096
BY ARC CENTERED AT				
	458038.159	7640385.317	458161.411	7640281.501
TO				
	459065.433	7645845.523	459188.661	7645741.793
BY STRAIGHT LINE TO				
	460160.004	7645639.592	460283.242	7645535.858
BY STRAIGHT LINE TO				
	462426.304	7645330.526	462549.556	7645226.789
BY ARC CENTERED AT				
	461675.557	7639825.482	461798.832	7639721.661
TO				
	462482.452	7645322.577	462605.704	7645218.840
BY STRAIGHT LINE TO				
	463317.968	7645199.936	463441.226	7645096.197
BY STRAIGHT LINE TO				
	464785.892	7645052.499	464909.158	7644948.759

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	464230.647	7639524.313	464353.933	7639420.493
TO				
	465012.164	7645025.074	465135.433	7644921.333
BY STRAIGHT LINE TO				
	467442.146	7644679.836	467565.440	7644576.081
BY STRAIGHT LINE TO				
	469000.258	7644534.195	469123.568	7644430.433
BY ARC CENTERED AT				
	468483.180	7639002.309	468606.503	7638898.473
TO				
	469423.165	7644478.217	469546.479	7644374.452
BY STRAIGHT LINE TO				
	472068.398	7644024.141	472191.749	7643920.329
BY STRAIGHT LINE TO				
	474135.966	7643696.065	474259.346	7643592.213
BY STRAIGHT LINE TO				
	475161.349	7643620.507	475284.742	7643516.639
BY ARC CENTERED AT				
	474753.048	7638079.530	474876.448	7637975.596
TO				
	475227.393	7643615.244	475350.786	7643511.376
BY STRAIGHT LINE TO				
	476275.047	7643525.473	476398.450	7643421.593
BY STRAIGHT LINE TO				
	476929.064	7643504.040	477052.473	7643400.154
BY STRAIGHT LINE TO				
	477367.945	7643598.869	477491.358	7643494.980
BY ARC CENTERED AT				
	478541.360	7638168.194	478664.796	7638064.225
TO				
	478125.251	7643708.590	478248.670	7643604.696

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	479108.001	7643782.399	479231.429	7643678.497
BY ARC CENTERED AT				
	479524.110	7638242.003	479647.555	7638138.026
TO				
	479488.375	7643797.888	479611.806	7643693.983
BY STRAIGHT LINE TO				
	481768.279	7643812.552	481891.711	7643708.648
BY STRAIGHT LINE TO				
	483350.822	7643867.304	483474.253	7643763.404
BY STRAIGHT LINE TO				
	484996.039	7644037.456	485119.470	7643933.560
BY ARC CENTERED AT				
	485567.602	7638510.933	485691.048	7638406.965
TO				
	485049.537	7644042.727	485172.968	7643938.831
BY STRAIGHT LINE TO				
	486050.983	7644136.515	486174.423	7644032.619
BY ARC CENTERED AT				
	487568.054	7638791.645	487691.518	7638687.675
TO				
	486921.735	7644309.924	487045.183	7644206.028
BY STRAIGHT LINE TO				
	487552.694	7644383.824	487676.147	7644279.928
BY STRAIGHT LINE TO				
	488086.043	7644502.699	488209.501	7644398.804
BY ARC CENTERED AT				
	489294.728	7639079.765	489418.207	7638975.794
TO				
	488422.044	7644566.801	488545.505	7644462.906
BY STRAIGHT LINE TO				
	488836.976	7644632.793	488960.441	7644528.898

Decree

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	490606.976	7639366.273	490730.468	7639262.304
TO				
	489908.691	7644878.218	490032.165	7644774.325
BY STRAIGHT LINE TO				
	491112.449	7645030.717	491235.935	7644926.825
BY ARC CENTERED AT				
	491810.734	7639518.772	491934.238	7639414.805
TO				
	491353.687	7645055.941	491477.175	7644952.050
BY STRAIGHT LINE TO				
	491813.830	7645093.922	491937.323	7644990.031
BY STRAIGHT LINE TO				
	492323.728	7645204.026	492447.225	7645100.136
BY ARC CENTERED AT				
	495252.299	7640482.521	495375.838	7640378.566
TO				
	494878.706	7646025.946	495002.228	7645922.067
BY STRAIGHT LINE TO				
	495681.862	7646080.074	495805.395	7645976.196
BY STRAIGHT LINE TO				
	496331.276	7646156.553	496454.818	7646052.676
BY STRAIGHT LINE TO				
	497108.893	7646271.514	497232.447	7646167.639
BY STRAIGHT LINE TO				
	497551.491	7646382.462	497675.051	7646278.588
BY ARC CENTERED AT				
	499201.087	7641076.996	499324.683	7640973.053
TO				
	498885.015	7646623.998	499008.594	7646520.128
BY STRAIGHT LINE TO				
	499613.339	7646797.037	499736.928	7646693.169

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	500897.610	7641391.504	501021.233	7641287.563
TO				
	499845.463	7646846.971	499969.055	7646743.104
BY STRAIGHT LINE TO				
	500700.712	7647011.915	500824.319	7646908.048
BY STRAIGHT LINE TO				
	501070.925	7647127.094	501194.538	7647023.227
BY ARC CENTERED AT				
	502721.441	7641821.914	502845.095	7641717.975
TO				
	501210.738	7647168.587	501334.353	7647064.721
BY STRAIGHT LINE TO				
	502980.761	7647668.707	503104.406	7647564.843
BY ARC CENTERED AT				
	504491.464	7642322.034	504615.148	7642218.097
TO				
	503495.168	7647787.977	503618.822	7647684.113
BY STRAIGHT LINE TO				
	504554.077	7647980.988	504677.749	7647877.124
BY ARC CENTERED AT				
	505550.373	7642515.045	505674.079	7642411.108
TO				
	505099.734	7648052.739	505223.416	7647948.875
BY STRAIGHT LINE TO				
	506355.666	7648154.943	506479.376	7648051.076
BY STRAIGHT LINE TO				
	508573.030	7648525.933	508696.789	7648422.064
BY STRAIGHT LINE TO				
	509292.470	7648716.060	509416.244	7648612.191
BY ARC CENTERED AT				
	510712.027	7643344.469	510835.848	7643240.527

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	509618.243	7648791.741	509742.024	7648687.872
BY STRAIGHT LINE TO				
	509742.611	7648816.714	509866.395	7648712.845
BY STRAIGHT LINE TO				
	510198.478	7648962.136	510322.271	7648858.267
BY STRAIGHT LINE TO				
	511778.360	7649631.560	511902.181	7649527.692
BY ARC CENTERED AT				
	513945.980	7644515.843	514069.857	7644411.899
TO				
	512089.206	7649752.400	512213.032	7649648.532
BY ARC CENTERED AT				
	514853.984	7644933.153	514977.877	7644829.210
TO				
	513673.630	7650362.324	513797.485	7650258.456
BY ARC CENTERED AT				
	515288.225	7645046.102	515412.127	7644942.160
TO				
	514729.090	7650573.896	514852.965	7650470.025
BY ARC CENTERED AT				
	515745.035	7645111.571	515868.947	7645007.630
TO				
	516056.024	7650658.861	516179.927	7650554.989
BY STRAIGHT LINE TO				
	516798.244	7650617.251	516922.163	7650513.378
BY STRAIGHT LINE TO				
	517717.658	7650573.711	517841.597	7650469.836
BY STRAIGHT LINE TO				
	518405.177	7650608.168	518529.131	7650504.292
BY ARC CENTERED AT				
	518683.278	7645059.132	518807.255	7644955.188

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	518552.033	7650613.582	518675.990	7650509.706
BY STRAIGHT LINE TO				
	519753.470	7650641.970	519877.453	7650538.093
BY STRAIGHT LINE TO				
	521201.920	7650790.329	521325.925	7650686.452
BY STRAIGHT LINE TO				
	521968.701	7650924.371	522092.718	7650820.495
BY ARC CENTERED AT				
	522925.447	7645451.367	523049.493	7645347.426
TO				
	522151.041	7650953.133	522275.060	7650849.257
BY STRAIGHT LINE TO				
	524698.560	7651311.711	524822.618	7651207.836
BY STRAIGHT LINE TO				
	525853.627	7651538.471	525977.699	7651434.594
BY STRAIGHT LINE TO				
	527770.256	7651973.255	527894.352	7651869.375
BY ARC CENTERED AT				
	528999.395	7646554.920	529123.512	7646450.973
TO				
	527789.176	7651977.512	527913.272	7651873.631
BY STRAIGHT LINE TO				
	528486.366	7652133.112	528610.471	7652029.230
BY STRAIGHT LINE TO				
	529056.053	7652331.509	529180.165	7652227.627
BY STRAIGHT LINE TO				
	529835.237	7652646.800	529959.359	7652542.918
BY STRAIGHT LINE TO				
	530938.106	7653199.436	531062.241	7653095.548
BY STRAIGHT LINE TO				
	531052.393	7653263.240	531176.530	7653159.351

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	531449.822	7653664.283	531573.964	7653560.395
BY ARC CENTERED AT				
	535396.248	7649753.419	535520.433	7649649.435
TO				
	531723.478	7653922.339	531847.623	7653818.451
BY STRAIGHT LINE TO				
	532709.314	7654790.849	532833.473	7654686.960
BY ARC CENTERED AT				
	536382.084	7650621.929	536506.283	7650517.945
TO				
	532781.837	7654853.637	532905.997	7654749.748
BY STRAIGHT LINE TO				
	533327.409	7655317.798	533451.576	7655213.908
BY ARC CENTERED AT				
	536927.656	7651086.090	537051.863	7650982.106
TO				
	534383.231	7656025.223	534507.413	7655921.329
BY STRAIGHT LINE TO				
	535767.310	7656738.240	535891.515	7656634.336
BY ARC CENTERED AT				
	538311.735	7651799.107	538435.963	7651695.116
TO				
	535879.114	7656794.254	536003.321	7656690.350
BY STRAIGHT LINE TO				
	536915.563	7657299.001	537039.787	7657195.089
BY STRAIGHT LINE TO				
	538302.301	7657989.636	538426.550	7657885.713
BY STRAIGHT LINE TO				
	539033.292	7658446.342	539157.555	7658342.414
BY STRAIGHT LINE TO				
	539901.292	7659062.185	540025.572	7658958.252

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	539975.316	7659128.039	540099.597	7659024.106
BY STRAIGHT LINE TO				
	540054.671	7659242.514	540178.954	7659138.581
BY STRAIGHT LINE TO				
	540439.746	7659929.066	540564.040	7659825.135
BY ARC CENTERED AT				
	545285.566	7657211.133	545409.941	7657107.110
TO				
	540731.585	7660393.960	540855.886	7660290.030
BY STRAIGHT LINE TO				
	541254.601	7661142.290	541378.916	7661038.360
BY ARC CENTERED AT				
	545808.582	7657959.463	545932.970	7657855.440
TO				
	541490.161	7661455.228	541614.482	7661351.298
BY STRAIGHT LINE TO				
	541832.953	7661878.689	541957.283	7661774.758
BY ARC CENTERED AT				
	546151.374	7658382.924	546275.771	7658278.901
TO				
	542264.541	7662353.021	542388.882	7662249.089
BY STRAIGHT LINE TO				
	542839.287	7662915.713	542963.642	7662811.779
BY ARC CENTERED AT				
	546726.120	7658945.616	546850.531	7658841.590
TO				
	543310.237	7663327.497	543434.604	7663223.561
BY STRAIGHT LINE TO				
	544197.837	7664019.423	544322.227	7663915.481
BY ARC CENTERED AT				
	547613.720	7659637.542	547738.151	7659533.511

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	544289.181	7664089.123	544413.573	7663985.181
BY STRAIGHT LINE TO				
	545151.378	7664733.031	545275.791	7664629.083
BY STRAIGHT LINE TO				
	546109.587	7665485.148	546234.024	7665381.195
BY ARC CENTERED AT				
	549540.055	7661114.676	549664.533	7661010.634
TO				
	546429.263	7665718.165	546553.708	7665614.210
BY STRAIGHT LINE TO				
	547587.780	7666501.029	547712.255	7666397.067
BY ARC CENTERED AT				
	550698.572	7661897.540	550823.073	7661793.494
TO				
	547712.209	7666582.705	547836.687	7666478.742
BY STRAIGHT LINE TO				
	548098.093	7666828.671	548222.581	7666724.706
BY STRAIGHT LINE TO				
	549726.493	7668950.982	549851.030	7668847.018
BY ARC CENTERED AT				
	554134.471	7665568.843	554259.062	7665464.803
TO				
	549740.074	7668968.610	549864.611	7668864.646
BY STRAIGHT LINE TO				
	550623.662	7670110.698	550748.219	7670006.736
BY STRAIGHT LINE TO				
	551305.867	7671008.570	551430.440	7670904.609
BY ARC CENTERED AT				
	555729.766	7667647.283	555854.402	7667543.252
TO				
	551435.125	7671172.222	551559.701	7671068.261

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	552295.859	7672220.905	552420.454	7672116.945
BY STRAIGHT LINE TO				
	552721.916	7672749.046	552846.521	7672645.087
BY STRAIGHT LINE TO				
	553127.715	7673349.840	553252.329	7673245.882
BY STRAIGHT LINE TO				
	553805.234	7674493.054	553929.864	7674389.099
BY STRAIGHT LINE TO				
	553994.969	7674845.473	554119.604	7674741.519
BY ARC CENTERED AT				
	559410.976	7673606.118	559535.673	7673502.106
TO				
	554711.224	7676569.472	554835.873	7676465.526
BY STRAIGHT LINE TO				
	554741.551	7676648.837	554866.200	7676544.891
BY ARC CENTERED AT				
	559931.538	7674665.614	560056.243	7674561.606
TO				
	554841.619	7676893.136	554966.270	7676789.191
BY STRAIGHT LINE TO				
	555378.891	7678120.810	555503.549	7678016.870
BY ARC CENTERED AT				
	560468.810	7675893.288	560593.524	7675789.287
TO				
	555502.143	7678383.540	555626.803	7678279.601
BY STRAIGHT LINE TO				
	555788.648	7678954.958	555913.312	7678851.021
BY ARC CENTERED AT				
	560755.315	7676464.706	560880.033	7676360.707
TO				
	556132.377	7679546.520	556257.046	7679442.585

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	556401.283	7679949.898	556525.956	7679845.964
BY ARC CENTERED AT				
	561024.221	7676868.084	561148.943	7676764.087
TO				
	556551.259	7680163.800	556675.934	7680059.866
BY STRAIGHT LINE TO				
	557369.747	7681274.656	557494.433	7681170.724
BY ARC CENTERED AT				
	561842.709	7677978.940	561967.444	7677874.947
TO				
	557517.887	7681466.784	557642.575	7681362.853
BY STRAIGHT LINE TO				
	558355.041	7682504.829	558479.740	7682400.899
BY STRAIGHT LINE TO				
	559131.060	7683533.912	559255.770	7683429.982
BY STRAIGHT LINE TO				
	560215.765	7685030.897	560340.493	7684926.971
BY STRAIGHT LINE TO				
	560673.590	7685749.372	560798.326	7685645.449
BY STRAIGHT LINE TO				
	561151.984	7686554.386	561276.729	7686450.466
BY ARC CENTERED AT				
	565928.249	7683716.001	566053.111	7683612.052
TO				
	561351.107	7686865.430	561475.855	7686761.511
BY STRAIGHT LINE TO				
	561817.816	7687650.427	561942.573	7687546.511
BY ARC CENTERED AT				
	566593.520	7684811.099	566718.411	7684707.163
TO				
	561971.150	7687893.765	562095.910	7687789.851

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	562422.477	7688570.517	562547.245	7688466.606
BY STRAIGHT LINE TO				
	562979.524	7689444.953	563104.302	7689341.046
BY STRAIGHT LINE TO				
	563465.294	7690325.553	563590.082	7690221.651
BY STRAIGHT LINE TO				
	563864.396	7691128.204	563989.192	7691024.306
BY STRAIGHT LINE TO				
	564344.865	7692195.416	564469.677	7692091.530
BY STRAIGHT LINE TO				
	564650.860	7692910.019	564775.681	7692806.142
BY STRAIGHT LINE TO				
	565027.016	7693976.185	565151.848	7693872.320
BY STRAIGHT LINE TO				
	565352.388	7695006.525	565477.227	7694902.672
BY STRAIGHT LINE TO				
	565781.239	7696465.945	565906.085	7696362.109
BY STRAIGHT LINE TO				
	566186.613	7698105.674	566311.476	7698001.842
BY STRAIGHT LINE TO				
	566453.724	7699364.582	566578.604	7699260.747
BY STRAIGHT LINE TO				
	566633.125	7700277.873	566758.017	7700174.035
BY STRAIGHT LINE TO				
	566740.596	7701032.025	566865.498	7700928.184
BY STRAIGHT LINE TO				
	566761.508	7701453.111	566886.414	7701349.268
BY ARC CENTERED AT				
	572310.669	7701177.531	572435.600	7701073.722

Decree

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	566784.191	7701749.523	566909.101	7701645.678
BY STRAIGHT LINE TO				
	566830.044	7702192.546	566954.959	7702088.699
BY ARC CENTERED AT				
	572356.522	7701620.554	572481.460	7701516.741
TO				
	566910.552	7702720.800	567035.474	7702616.951
BY ARC CENTERED AT				
	572457.198	7703043.057	572582.160	7702939.231
TO				
	566907.385	7703305.194	567032.312	7703201.342
BY STRAIGHT LINE TO				
	566877.698	7703738.943	567002.629	7703635.088
BY ARC CENTERED AT				
	572420.730	7704118.328	572545.710	7704014.492
TO				
	566868.240	7704315.788	566993.176	7704211.930
BY STRAIGHT LINE TO				
	566907.001	7705405.728	567031.949	7705301.865
BY ARC CENTERED AT				
	572459.491	7705208.268	572584.490	7705104.421
TO				
	566928.329	7705733.036	567053.281	7705629.171
BY STRAIGHT LINE TO				
	566962.253	7706090.603	567087.209	7705986.736
BY STRAIGHT LINE TO				
	566874.327	7706693.264	566999.287	7706589.394
BY ARC CENTERED AT				
	572372.123	7707495.371	572497.160	7707391.502
TO				
	566816.141	7707509.550	566941.107	7707405.675

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	566819.528	7708836.763	566944.507	7708732.881
BY ARC CENTERED AT				
	572375.510	7708822.584	572500.570	7708718.702
TO				
	566820.251	7708913.296	566945.231	7708809.413
BY STRAIGHT LINE TO				
	566855.998	7711102.475	566981.000	7710998.579
BY STRAIGHT LINE TO				
	566890.966	7713229.516	567015.993	7713125.582
BY STRAIGHT LINE TO				
	566806.106	7715041.590	566931.151	7714937.625
BY ARC CENTERED AT				
	572356.024	7715301.494	572481.171	7715197.433
TO				
	566805.023	7715065.850	566930.069	7714961.884
BY STRAIGHT LINE TO				
	566746.986	7716433.013	566872.045	7716329.024
BY STRAIGHT LINE TO				
	566648.628	7717800.928	566773.700	7717696.917
BY STRAIGHT LINE TO				
	566377.494	7721112.206	566502.593	7721008.144
BY ARC CENTERED AT				
	571914.962	7721565.624	572040.172	7721461.338
TO				
	566365.674	7721292.597	566490.775	7721188.532
BY STRAIGHT LINE TO				
	566291.079	7722808.743	566416.194	7722704.654
BY ARC CENTERED AT				
	571840.367	7723081.770	571965.593	7722977.430
TO				
	566285.510	7723194.477	566410.629	7723090.382

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	566303.670	7724089.511	566428.799	7723985.399
BY ARC CENTERED AT				
	571858.527	7723976.804	571983.763	7723872.429
TO				
	566310.615	7724276.487	566435.747	7724172.371
BY STRAIGHT LINE TO				
	566380.746	7725574.794	566505.898	7725470.660
BY ARC CENTERED AT				
	571928.658	7725275.111	572053.913	7725170.689
TO				
	566442.978	7726156.273	566568.142	7726052.133
BY STRAIGHT LINE TO				
	566632.938	7727338.871	566758.130	7727234.716
BY ARC CENTERED AT				
	572118.618	7726457.709	572243.913	7726353.268
TO				
	566660.718	7727497.163	566785.914	7727393.006
BY STRAIGHT LINE TO				
	566980.917	7729178.443	567106.157	7729074.261
BY ARC CENTERED AT				
	572438.817	7728138.989	572564.173	7728034.519
TO				
	567056.854	7729518.701	567182.104	7729414.514
BY STRAIGHT LINE TO				
	567412.916	7730907.623	567538.209	7730803.410
BY ARC CENTERED AT				
	572794.879	7729527.911	572920.284	7729423.421
TO				
	567751.677	7731859.273	567877.005	7731755.038
BY STRAIGHT LINE TO				
	567894.021	7732733.971	568019.371	7732629.722

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	567975.869	7733660.191	568101.241	7733555.931
BY ARC CENTERED AT				
	573510.302	7733171.129	573635.806	7733066.599
TO				
	568025.598	7734058.348	568150.980	7733954.083
BY STRAIGHT LINE TO				
	568121.594	7734651.786	568246.993	7734547.512
BY ARC CENTERED AT				
	573606.298	7733764.567	573731.816	7733660.029
TO				
	568171.595	7734919.184	568297.001	7734814.905
BY STRAIGHT LINE TO				
	568504.635	7736486.780	568630.090	7736382.473
BY ARC CENTERED AT				
	573939.338	7735332.163	574064.888	7735227.602
TO				
	568520.577	7736559.420	568646.035	7736455.111
BY STRAIGHT LINE TO				
	568859.281	7738054.916	568984.790	7737950.579
BY STRAIGHT LINE TO				
	569444.914	7740741.733	569570.485	7740637.356
BY STRAIGHT LINE TO				
	570011.432	7743432.637	570137.049	7743328.226
BY ARC CENTERED AT				
	575448.250	7742288.020	575573.881	7742183.342
TO				
	570058.600	7743637.395	570184.221	7743532.981
BY STRAIGHT LINE TO				
	570529.885	7745519.793	570655.543	7745415.350
BY ARC CENTERED AT				
	575919.535	7744170.418	576045.194	7744065.705

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	570601.725	7745779.776	570727.389	7745675.329
BY STRAIGHT LINE TO				
	571051.818	7747267.021	571177.518	7747162.545
BY ARC CENTERED AT				
	576369.628	7745657.663	576495.314	7745552.916
TO				
	571318.537	7747971.884	571444.257	7747867.391
BY STRAIGHT LINE TO				
	571628.654	7748648.755	571754.397	7748544.243
BY ARC CENTERED AT				
	576679.745	7746334.534	576805.444	7746229.765
TO				
	571757.578	7748911.626	571883.330	7748807.106
BY STRAIGHT LINE TO				
	572752.553	7750811.998	572878.337	7750707.416
BY ARC CENTERED AT				
	577674.720	7748234.906	577800.513	7748130.053
TO				
	572872.833	7751029.725	572998.620	7750925.135
BY STRAIGHT LINE TO				
	573517.516	7752137.380	573643.324	7752032.747
BY ARC CENTERED AT				
	578319.403	7749342.561	578445.262	7749237.652
TO				
	573748.937	7752501.671	573874.754	7752397.022
BY STRAIGHT LINE TO				
	574319.665	7753327.376	574445.503	7753222.689
BY STRAIGHT LINE TO				
	575452.313	7755113.842	575578.189	7755009.085
BY STRAIGHT LINE TO				
	576334.164	7756572.662	576460.078	7756467.848

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	581088.938	7753698.422	581215.075	7753593.274
TO				
	576480.667	7756802.125	576606.588	7756697.302
BY STRAIGHT LINE TO				
	577536.510	7758369.804	577662.511	7758264.902
BY ARC CENTERED AT				
	582144.781	7755266.101	582270.967	7755160.885
TO				
	578234.513	7759213.117	578360.568	7759108.163
BY STRAIGHT LINE TO				
	578782.411	7760396.066	578908.515	7760291.069
BY ARC CENTERED AT				
	583823.912	7758061.027	583950.171	7757955.709
TO				
	578974.189	7760771.991	579100.311	7760666.980
BY STRAIGHT LINE TO				
	580823.282	7764079.887	580949.571	7763974.730
BY ARC CENTERED AT				
	585673.005	7761368.923	585799.381	7761263.485
TO				
	581260.860	7764745.625	581387.182	7764640.436
BY STRAIGHT LINE TO				
	582047.251	7765773.157	582173.618	7765667.917
BY STRAIGHT LINE TO				
	582366.586	7766225.925	582492.973	7766120.665
BY STRAIGHT LINE TO				
	582717.474	7766831.954	582843.886	7766726.670
BY STRAIGHT LINE TO				
	583529.801	7768385.592	583656.250	7768280.268
BY STRAIGHT LINE TO				
	584511.081	7770500.636	584637.561	7770395.274

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	584912.381	7771447.350	585038.874	7771341.974
BY ARC CENTERED AT				
	590027.786	7769278.995	590154.246	7769173.545
TO				
	585080.526	7771807.582	585207.025	7771702.200
BY STRAIGHT LINE TO				
	585390.908	7772414.855	585517.417	7772309.461
BY STRAIGHT LINE TO				
	585951.464	7773622.395	86077.970	7773517.003
BY STRAIGHT LINE TO				
	586335.670	7774541.560	586462.168	7774436.175
BY STRAIGHT LINE TO				
	586587.179	7775413.061	586713.671	7775307.683
BY ARC CENTERED AT				
	591925.328	7773872.507	592051.784	7773767.047
TO				
	586605.502	7775475.189	586731.994	7775369.812
BY STRAIGHT LINE TO				
	586865.022	7776336.621	586991.509	7776231.249
BY ARC CENTERED AT				
	592184.848	7774733.939	592311.305	7774628.477
TO				
	587233.544	7777254.598	587360.026	7777149.230
BY STRAIGHT LINE TO				
	587477.644	7777734.081	587604.124	7777628.714
BY ARC CENTERED AT				
	592428.948	7775213.422	592555.405	7775107.957
TO				
	587751.981	7778212.607	587878.460	7778107.240
BY STRAIGHT LINE TO				
	588011.151	7778616.760	588137.629	7778511.391

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	592688.118	7775617.575	592814.575	7775512.107
TO				
	588301.973	7779027.981	588428.450	7778922.610
BY STRAIGHT LINE TO				
	588925.902	7779830.420	589052.379	7779725.043
BY ARC CENTERED AT				
	593312.047	7776420.014	593438.504	7776314.537
TO				
	588930.725	7779836.614	589057.202	7779731.237
BY ARC CENTERED AT				
	594238.652	7778194.954	594365.111	7778089.465
TO				
	589152.653	7780431.412	589279.130	7780326.034
BY STRAIGHT LINE TO				
	589609.407	7781470.133	589735.887	7781364.751
BY STRAIGHT LINE TO				
	589868.033	7782164.578	589994.508	7782059.200
BY ARC CENTERED AT				
	595074.680	7780225.515	595201.149	7780120.024
TO				
	589924.927	7782310.984	590051.401	7782205.607
BY STRAIGHT LINE TO				
	590510.603	7783757.223	590637.066	7783651.856
BY ARC CENTERED AT				
	595660.356	7781671.754	595786.837	7781566.274
TO				
	590923.993	7784576.234	591050.451	7784470.872
BY STRAIGHT LINE TO				
	591543.538	7785586.532	591669.991	7785481.174
BY ARC CENTERED AT				
	596279.901	7782682.052	596406.390	7782576.594

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	591671.662	7785785.802	591798.115	7785680.445
BY STRAIGHT LINE TO				
	592514.803	7787037.641	592641.253	7786932.289
BY ARC CENTERED AT				
	597123.042	7783933.891	597249.543	7783828.463
TO				
	592653.873	7787234.750	592780.323	7787129.399
BY STRAIGHT LINE TO				
	593258.470	7788053.338	593384.922	7787947.990
BY STRAIGHT LINE TO				
	593808.744	7788920.745	593935.197	7788815.402
BY STRAIGHT LINE TO				
	594461.424	7790022.962	594587.882	7789917.630
BY STRAIGHT LINE TO				
	595314.168	7791515.359	595440.644	7791410.065
BY ARC CENTERED AT				
	600138.203	7788758.945	600264.788	7788653.652
TO				
	595656.206	7792042.364	595782.689	7791937.084
BY STRAIGHT LINE TO				
	596338.475	7792973.688	596464.975	7792868.434
BY ARC CENTERED AT				
	600820.472	7789690.269	600947.090	7789585.012
TO				
	596804.996	7793530.202	596931.508	7793424.965
BY STRAIGHT LINE TO				
	598053.179	7794835.446	598179.725	7794730.253
BY STRAIGHT LINE TO				
	598837.620	7795669.871	598964.190	7795564.706
BY ARC CENTERED AT				
	602885.679	7791864.303	603012.397	7791759.152

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	599259.101	7796073.468	599385.690	7795968.325
BY STRAIGHT LINE TO				
	599895.614	7796621.881	600022.230	7796516.770
BY STRAIGHT LINE TO				
	601695.426	7798351.388	601822.118	7798246.368
BY ARC CENTERED AT				
	605545.086	7794345.236	605671.931	7794240.211
TO				
	601766.868	7798418.834	601893.563	7798313.817
BY STRAIGHT LINE TO				
	603436.122	7799967.049	603562.888	7799862.113
BY STRAIGHT LINE TO				
	604462.464	7800931.258	604589.264	7800826.359
BY STRAIGHT LINE TO				
	605881.035	7802375.349	606007.882	7802270.505
BY ARC CENTERED AT				
	609844.585	7798481.840	609971.598	7798376.971
TO				
	605883.067	7802377.416	606009.914	7802272.572
BY STRAIGHT LINE TO				
	607807.683	7804334.611	607934.596	7804229.846
BY ARC CENTERED AT				
	611769.201	7800439.035	611896.289	7800334.222
TO				
	608447.768	7804892.934	608574.705	7804788.190
BY STRAIGHT LINE TO				
	608987.577	7805295.489	609114.535	7805190.761
BY STRAIGHT LINE TO				
	609731.036	7805957.641	609858.023	7805852.939
BY ARC CENTERED AT				
	613426.290	7801808.637	613553.442	7801703.885

	NAD 83/WGS 84 UTM ZONE 3 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 3 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	610256.373	7806371.614	610383.381	7806266.930
BY STRAIGHT LINE TO				
	610557.096	7806580.528	610684.115	7806475.854
BY ARC CENTERED AT				
	615350.174	7803770.627	615477.398	7803665.986
TO				
	611514.701	7807790.364	611641.756	7807685.737
BY STRAIGHT LINE TO				
	612039.638	7808291.238	612166.713	7808186.634
BY ARC CENTERED AT				
	616970.896	7805731.583	617098.179	7805627.052
TO				
	612485.767	7809010.722	612612.858	7808906.149

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BEGINNING AT				
	387514.238	7809010.831	387637.655	7808893.893
BY ARC CENTERED AT				
	391654.621	7805305.920	391778.230	7805189.006
TO				
	392829.198	7810736.344	392952.833	7810619.595
BY STRAIGHT LINE TO				
	393854.461	7810514.584	393978.140	7810397.833
BY ARC CENTERED AT				
	392679.884	7805084.160	392803.537	7804967.247
TO				
	394344.022	7810385.083	394467.722	7810268.331
BY STRAIGHT LINE TO				
	395312.128	7810081.162	395435.871	7809964.406

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	393647.990	7804780.239	393771.686	7804663.316
TO				
	395343.151	7810071.323	395466.895	7809954.567
BY STRAIGHT LINE TO				
	397176.227	7809484.041	397300.049	7809367.257
BY ARC CENTERED AT				
	395481.066	7804192.957	395604.843	7804076.017
TO				
	397307.721	7809440.096	397431.548	7809323.307
BY STRAIGHT LINE TO				
	399471.103	7808686.971	399595.017	7808570.097
BY ARC CENTERED AT				
	397644.448	7803439.832	397768.316	7803322.846
TO				
	399561.917	7808654.470	399685.835	7808537.593
BY STRAIGHT LINE TO				
	401171.451	7808062.630	401295.434	7807945.692
BY STRAIGHT LINE TO				
	402914.093	7807421.744	403038.152	7807304.770
BY STRAIGHT LINE TO				
	404124.377	7807148.173	404248.489	7807031.182
BY ARC CENTERED AT				
	402899.410	7801728.893	403023.490	7801611.794
TO				
	404217.285	7807126.331	404341.401	7807009.339
BY STRAIGHT LINE TO				
	406629.327	7806537.391	406753.548	7806420.366
BY STRAIGHT LINE TO				
	408063.141	7806307.682	408187.421	7806190.634
BY STRAIGHT LINE TO				
	408796.192	7806228.296	408920.501	7806111.237

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	409848.620	7806173.903	409972.972	7806056.829
BY STRAIGHT LINE TO				
	411443.560	7806111.256	411567.974	7805994.170
BY ARC CENTERED AT				
	411225.495	7800559.537	411349.911	7800442.362
TO				
	411564.762	7806105.169	411689.180	7805988.083
BY STRAIGHT LINE TO				
	412553.129	7806044.703	412677.583	7805927.617
BY STRAIGHT LINE TO				
	413223.921	7806354.292	413348.399	7806237.212
BY ARC CENTERED AT				
	415552.163	7801309.649	415676.728	7801192.492
TO				
	413795.599	7806580.666	413920.097	7806463.590
BY STRAIGHT LINE TO				
	414238.296	7806728.195	414362.810	7806611.122
BY STRAIGHT LINE TO				
	414823.650	7806980.778	414948.186	7806863.709
BY STRAIGHT LINE TO				
	416236.226	7807608.862	416360.809	7807491.815
BY ARC CENTERED AT				
	418493.550	7802532.089	418618.201	7802414.994
TO				
	416463.055	7807703.764	416587.645	7807586.722
BY STRAIGHT LINE TO				
	418719.903	7808589.844	418844.563	7808472.849
BY ARC CENTERED AT				
	420750.398	7803418.169	420875.115	7803301.115
TO				
	418838.699	7808634.925	418963.363	7808517.933

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	420906.846	7809392.805	421031.571	7809275.842
BY STRAIGHT LINE TO				
	422015.184	7809863.313	422139.936	7809746.354
BY ARC CENTERED AT				
	424186.269	7804749.066	424311.078	7804632.049
TO				
	422513.495	7810047.270	422638.260	7809930.312
BY STRAIGHT LINE TO				
	422906.975	7810171.501	423031.750	7810054.544
BY STRAIGHT LINE TO				
	423428.921	7810410.409	423553.708	7810293.453
BY STRAIGHT LINE TO				
	424326.805	7810942.754	424451.614	7810825.801
BY STRAIGHT LINE TO				
	425821.844	7811839.159	425946.679	7811722.203
BY ARC CENTERED AT				
	428678.934	7807074.060	428803.824	7806957.039
TO				
	426181.825	7812037.283	426306.665	7811920.324
BY STRAIGHT LINE TO				
	427323.580	7812611.726	427448.435	7812494.757
BY STRAIGHT LINE TO				
	427755.317	7812890.799	427880.177	7812773.826
BY ARC CENTERED AT				
	430771.441	7808224.737	430896.354	7808107.709
TO				
	428113.401	7813103.667	428238.266	7812986.691
BY ARC CENTERED AT				
	431223.408	7808499.648	431348.324	7808382.619
TO				
	428287.829	7813216.799	428412.696	7813099.822

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	431849.557	7808952.619	431974.476	7808835.588
TO				
	429976.285	7814183.297	430101.173	7814066.304
BY ARC CENTERED AT				
	433458.084	7809853.607	433583.009	7809736.567
TO				
	430193.278	7814349.180	430318.167	7814232.186
BY STRAIGHT LINE TO				
	431935.096	7815614.135	432059.995	7815497.126
BY ARC CENTERED AT				
	435199.902	7811118.562	435324.832	7811001.506
TO				
	432079.305	7815715.410	432204.205	7815598.400
BY STRAIGHT LINE TO				
	433566.422	7816724.948	433691.332	7816607.922
BY ARC CENTERED AT				
	436687.019	7812128.100	436811.955	7812011.025
TO				
	433592.071	7816742.256	433716.981	7816625.230
BY STRAIGHT LINE TO				
	434616.487	7817429.384	434741.405	7817312.345
BY STRAIGHT LINE TO				
	435417.605	7818032.427	435542.530	7817915.377
BY STRAIGHT LINE TO				
	436478.877	7818845.748	436603.812	7818728.682
BY STRAIGHT LINE TO				
	437539.079	7819693.046	437664.026	7819575.963
BY ARC CENTERED AT				
	441007.730	7815352.816	441132.697	7815235.695
TO				
	437604.175	7819744.279	437729.123	7819627.195

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	438933.110	7820774.256	439058.076	7820657.150
BY STRAIGHT LINE TO				
	439474.830	7821225.023	439599.805	7821107.910
BY STRAIGHT LINE TO				
	440293.903	7821979.273	440418.899	7821862.158
BY STRAIGHT LINE TO				
	442801.476	7824462.621	442926.555	7824345.529
BY ARC CENTERED AT				
	446711.046	7820514.913	446836.310	7820397.947
TO				
	442968.231	7824621.064	443093.317	7824503.974
BY STRAIGHT LINE TO				
	444031.625	7825590.362	444156.754	7825473.289
BY STRAIGHT LINE TO				
	444966.097	7826595.145	445091.322	7826478.155
BY ARC CENTERED AT				
	449034.550	7822811.387	449160.217	7822694.799
TO				
	445147.915	7826781.677	445273.160	7826664.704
BY STRAIGHT LINE TO				
	447416.013	7829001.985	447541.510	7828885.228
BY STRAIGHT LINE TO				
	448620.731	7830310.521	448746.372	7830193.884
BY STRAIGHT LINE TO				
	449362.033	7831190.541	449487.857	7831074.079
BY ARC CENTERED AT				
	453611.327	7827611.067	453738.481	7827495.989
TO				
	449564.961	7831418.436	449690.842	7831302.030
BY STRAIGHT LINE TO				
	450744.735	7832672.267	450870.914	7832556.142

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	451568.215	7833657.134	451694.565	7833541.159
BY STRAIGHT LINE TO				
	451805.100	7834023.108	451931.490	7833907.165
BY STRAIGHT LINE TO				
	453365.202	7836527.822	453491.776	7836411.995
BY ARC CENTERED AT				
	458081.197	7833590.386	458206.801	7833473.160
TO				
	454397.101	7837749.300	454523.492	7837633.199
BY ARC CENTERED AT				
	459313.705	7835161.611	459439.258	7835044.220
TO				
	455990.569	7839614.239	456116.587	7839497.598
BY ARC CENTERED AT				
	459612.826	7835401.356	459738.378	7835283.940
TO				
	456361.450	7839906.652	456487.393	7839789.898
BY STRAIGHT LINE TO				
	456532.524	7840030.112	456658.434	7839913.307
BY STRAIGHT LINE TO				
	456673.278	7840166.834	456799.161	7840049.987
BY STRAIGHT LINE TO				
	457702.622	7841584.754	457828.320	7841467.617
BY ARC CENTERED AT				
	462198.779	7838320.752	462324.369	7838203.191
TO				
	457847.972	7841776.126	457973.646	7841658.951
BY STRAIGHT LINE TO				
	459613.066	7843998.630	459738.695	7843881.268
BY ARC CENTERED AT				
	463963.873	7840543.256	464089.523	7840425.633

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	459693.724	7844097.825	459819.355	7843980.459
BY ARC CENTERED AT				
	464104.847	7840719.789	464230.504	7840602.162
TO				
	459806.268	7844239.924	459931.902	7844122.552
BY STRAIGHT LINE TO				
	461715.215	7846571.017	461840.905	7846453.547
BY ARC CENTERED AT				
	466271.567	7843391.584	466397.336	7843273.904
TO				
	462236.357	7847210.774	462362.064	7847093.277
BY STRAIGHT LINE TO				
	463018.952	7848037.634	463144.686	7847920.095
BY ARC CENTERED AT				
	467054.162	7844218.444	467179.975	7844100.744
TO				
	463268.231	7848284.875	463393.978	7848167.328
BY STRAIGHT LINE TO				
	465499.840	7850362.550	465625.711	7850244.948
BY STRAIGHT LINE TO				
	466487.159	7851405.904	466613.073	7851288.281
BY STRAIGHT LINE TO				
	468107.985	7853229.306	468233.968	7853111.651
BY STRAIGHT LINE TO				
	468566.279	7853820.802	468692.278	7853703.140
BY STRAIGHT LINE TO				
	469742.042	7855509.660	469868.083	7855391.982
BY ARC CENTERED AT				
	474301.844	7852335.176	474428.035	7852217.344
TO				
	469848.770	7855657.715	469974.815	7855540.036

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	470016.271	7855882.210	470142.323	7855764.528
BY STRAIGHT LINE TO				
	470162.984	7856097.295	470289.041	7855979.611
BY ARC CENTERED AT				
	474752.861	7852966.454	474879.067	7852848.615
TO				
	470336.316	7856337.398	470462.380	7856219.711
BY STRAIGHT LINE TO				
	471139.942	7857390.293	471266.039	7857272.593
BY ARC CENTERED AT				
	475556.487	7854019.349	475682.721	7853901.496
TO				
	471478.417	7857792.740	471604.528	7857675.034
BY STRAIGHT LINE TO				
	471886.014	7858233.248	472012.142	7858115.535
BY ARC CENTERED AT				
	475964.084	7854459.857	476090.333	7854341.996
TO				
	472287.355	7858625.287	472413.500	7858507.566
BY STRAIGHT LINE TO				
	472774.318	7859055.118	472900.482	7858937.386
BY ARC CENTERED AT				
	476451.047	7854889.688	476577.313	7854771.816
TO				
	473248.482	7859429.811	473374.663	7859312.068
BY STRAIGHT LINE TO				
	474307.868	7860177.093	474434.088	7860059.325
BY ARC CENTERED AT				
	477510.433	7855636.970	477636.734	7855519.076
TO				
	475011.571	7860599.311	475137.818	7860481.525

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	475808.783	7861000.759	475935.061	7860882.952
BY STRAIGHT LINE TO				
	476571.395	7861502.510	476697.704	7861384.683
BY ARC CENTERED AT				
	479625.203	7856861.024	479751.573	7856743.086
TO				
	477110.072	7861815.139	477236.403	7861697.298
BY STRAIGHT LINE TO				
	478225.773	7862381.564	478352.145	7862263.694
BY ARC CENTERED AT				
	480740.904	7857427.449	480867.312	7857309.485
TO				
	478512.163	7862516.835	478638.546	7862398.957
BY STRAIGHT LINE TO				
	480159.015	7863238.023	480285.461	7863120.099
BY STRAIGHT LINE TO				
	481758.343	7864069.758	481884.836	7863951.793
BY ARC CENTERED AT				
	484321.822	7859140.487	484448.299	7859022.433
TO				
	481835.676	7864109.211	481962.169	7863991.244
BY STRAIGHT LINE TO				
	483016.748	7864700.171	483143.244	7864582.177
BY ARC CENTERED AT				
	485502.894	7859731.447	485629.388	7859613.363
TO				
	483501.104	7864914.301	483627.602	7864796.296
BY STRAIGHT LINE TO				
	484378.399	7865253.141	484504.901	7865135.115
BY STRAIGHT LINE TO				
	485828.085	7865992.644	485954.594	7865874.584

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	488352.763	7861043.388	488479.284	7860925.242
TO				
	486405.111	7866246.828	486531.622	7866128.756
BY STRAIGHT LINE TO				
	486471.988	7866271.860	486598.499	7866153.787
BY STRAIGHT LINE TO				
	486721.368	7866393.706	486847.880	7866275.629
BY ARC CENTERED AT				
	489160.434	7861401.703	489286.962	7861283.541
TO				
	487071.898	7866550.213	487198.410	7866432.130
BY ARC CENTERED AT				
	489742.616	7861678.211	489869.150	7861560.037
TO				
	487762.827	7866869.509	487889.341	7866751.414
BY STRAIGHT LINE TO				
	487854.183	7866904.349	487980.697	7866786.253
BY ARC CENTERED AT				
	490273.957	7861902.966	490400.496	7861784.782
TO				
	487916.710	7866934.121	488043.224	7866816.024
BY STRAIGHT LINE TO				
	488237.857	7867084.588	488364.372	7866966.485
BY ARC CENTERED AT				
	490595.104	7862053.433	490721.646	7861935.242
TO				
	488277.110	7867102.793	488403.625	7866984.690
BY STRAIGHT LINE TO				
	488374.469	7867147.488	488500.985	7867029.383
BY ARC CENTERED AT				
	491266.091	7862403.264	491392.641	7862285.060

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	488708.588	7867335.638	488835.104	7867217.528
BY STRAIGHT LINE TO				
	489218.212	7867599.885	489344.729	7867481.766
BY ARC CENTERED AT				
	491775.715	7862667.511	491902.272	7862549.296
TO				
	489661.918	7867805.701	489788.437	7867687.575
BY STRAIGHT LINE TO				
	490858.650	7868298.024	490985.173	7868179.876
BY ARC CENTERED AT				
	492972.447	7863159.834	493099.017	7863041.595
TO				
	490932.533	7868327.802	491059.057	7868209.653
BY STRAIGHT LINE TO				
	491430.394	7868524.319	491556.919	7868406.161
BY ARC CENTERED AT				
	493470.308	7863356.351	493596.883	7863238.102
TO				
	491507.384	7868554.049	491633.910	7868435.890
BY STRAIGHT LINE TO				
	491826.553	7868674.584	491953.080	7868556.419
BY ARC CENTERED AT				
	493789.477	7863476.886	493916.054	7863358.631
TO				
	492477.384	7868875.733	492603.913	7868757.556
BY STRAIGHT LINE TO				
	493023.842	7869008.540	493150.374	7868890.352
BY STRAIGHT LINE TO				
	494630.559	7869402.678	494757.098	7869284.460
BY ARC CENTERED AT				
	495954.238	7864006.660	496080.822	7863888.362

Decree

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	495146.150	7869503.580	495272.692	7869385.351
BY STRAIGHT LINE TO				
	495697.122	7869584.577	495823.665	7869466.337
BY ARC CENTERED AT				
	496505.210	7864087.657	496631.795	7863969.347
TO				
	495722.669	7869588.272	495849.212	7869470.031
BY STRAIGHT LINE TO				
	496347.499	7869677.163	496474.042	7869558.909
BY ARC CENTERED AT				
	497130.040	7864176.548	497256.625	7864058.224
TO				
	496853.972	7869725.685	496980.516	7869607.420
BY STRAIGHT LINE TO				
	496861.426	7869727.828	496987.970	7869609.563
BY STRAIGHT LINE TO				
	496979.600	7869771.654	497106.144	7869653.386
BY STRAIGHT LINE TO				
	497198.476	7869859.986	497325.019	7869741.714
BY STRAIGHT LINE TO				
	497631.188	7870039.916	497757.731	7869921.636
BY STRAIGHT LINE TO				
	498047.044	7870215.424	498173.586	7870097.136
BY ARC CENTERED AT				
	500207.380	7865096.627	500333.964	7864978.244
TO				
	498147.372	7870256.618	498273.914	7870138.328
BY STRAIGHT LINE TO				
	498543.555	7870414.785	498670.096	7870296.488
BY ARC CENTERED AT				
	500603.563	7865254.794	500730.145	7865136.408

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	498770.752	7870499.786	498897.293	7870381.484
BY ARC CENTERED AT				
	501174.852	7865490.850	501301.431	7865372.461
TO				
	499295.537	7870719.360	499422.078	7870601.049
BY STRAIGHT LINE TO				
	499570.147	7870818.064	499696.687	7870699.747
BY STRAIGHT LINE TO				
	499771.476	7870903.196	499898.016	7870784.876
BY ARC CENTERED AT				
	501935.334	7865785.887	502061.910	7865667.492
TO				
	500025.610	7871003.366	500152.149	7870885.043
BY STRAIGHT LINE TO				
	500212.451	7871071.755	500338.989	7870953.430
BY ARC CENTERED AT				
	502701.814	7866104.642	502828.386	7865986.242
TO				
	500889.250	7871356.665	501015.785	7871238.335
BY STRAIGHT LINE TO				
	502496.098	7871911.216	502622.625	7871792.871
BY STRAIGHT LINE TO				
	502625.943	7871963.971	502752.469	7871845.625
BY ARC CENTERED AT				
	504717.258	7866816.589	504843.818	7866698.176
TO				
	503093.184	7872129.923	503219.708	7872011.573
BY STRAIGHT LINE TO				
	503561.302	7872273.008	503687.824	7872154.653
BY ARC CENTERED AT				
	505185.376	7866959.674	505311.929	7866841.260

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	503906.214	7872366.418	504032.734	7872248.059
BY STRAIGHT LINE TO				
	504247.138	7872447.076	504373.657	7872328.714
BY ARC CENTERED AT				
	505526.300	7867040.332	505652.848	7866921.917
TO				
	504612.728	7872520.708	504739.244	7872402.343
BY STRAIGHT LINE TO				
	504914.554	7872571.022	505041.066	7872452.656
BY ARC CENTERED AT				
	505828.126	7867090.646	505954.669	7866972.230
TO				
	505213.234	7872612.516	505339.742	7872494.148
BY STRAIGHT LINE TO				
	505775.145	7872675.088	505901.646	7872556.718
BY ARC CENTERED AT				
	506390.037	7867153.218	506516.572	7867034.799
TO				
	506450.094	7872708.893	506576.586	7872590.519
BY STRAIGHT LINE TO				
	506892.091	7872704.115	507018.578	7872585.738
BY ARC CENTERED AT				
	506832.034	7867148.440	506958.563	7867030.019
TO				
	507610.244	7872649.669	507736.723	7872531.287
BY STRAIGHT LINE TO				
	507753.151	7872629.454	507879.629	7872511.071
BY STRAIGHT LINE TO				
	507954.880	7872605.613	508081.356	7872487.229
BY ARC CENTERED AT				
	507302.804	7867088.011	507429.327	7866969.587

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	508092.787	7872587.562	508219.261	7872469.177
BY STRAIGHT LINE TO				
	508307.295	7872556.749	508433.767	7872438.363
BY ARC CENTERED AT				
	507517.312	7867057.198	507643.833	7866938.773
TO				
	508508.058	7872524.149	508634.528	7872405.761
BY STRAIGHT LINE TO				
	508632.263	7872501.640	508758.731	7872383.251
BY ARC CENTERED AT				
	507641.517	7867034.689	507768.036	7866916.263
TO				
	509081.908	7872400.731	509208.372	7872282.339
BY STRAIGHT LINE TO				
	509282.361	7872346.924	509408.823	7872228.532
BY ARC CENTERED AT				
	507841.970	7866980.882	507968.487	7866862.455
TO				
	509617.681	7872245.479	509744.139	7872127.086
BY STRAIGHT LINE TO				
	509764.162	7872196.072	509890.619	7872077.679
BY ARC CENTERED AT				
	507988.451	7866931.475	508114.966	7866813.047
TO				
	510062.028	7872086.028	510188.482	7871967.634
BY STRAIGHT LINE TO				
	510233.908	7872016.884	510360.360	7871898.489
BY ARC CENTERED AT				
	508160.331	7866862.331	508286.844	7866743.902
TO				
	511846.461	7871019.444	511972.900	7870901.042

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	512617.722	7870669.579	512744.154	7870551.174
BY ARC CENTERED AT				
	510322.486	7865609.833	510448.979	7865491.391
TO				
	514176.589	7869611.711	514303.010	7869493.299
BY STRAIGHT LINE TO				
	514230.886	7869559.419	514357.307	7869441.007
BY ARC CENTERED AT				
	510376.783	7865557.541	510503.276	7865439.099
TO				
	515209.410	7868298.864	515335.830	7868180.444
BY STRAIGHT LINE TO				
	515269.306	7868211.833	515395.726	7868093.412
BY STRAIGHT LINE TO				
	515431.054	7867978.251	515557.474	7867859.829
BY ARC CENTERED AT				
	510863.297	7864815.225	510989.788	7864696.778
TO				
	515701.632	7867546.461	515828.053	7867428.036
BY STRAIGHT LINE TO				
	515829.595	7867350.670	515956.016	7867232.244
BY ARC CENTERED AT				
	511178.794	7864311.066	511305.284	7864192.616
TO				
	516233.389	7866617.622	516359.811	7866499.192
BY STRAIGHT LINE TO				
	516307.283	7866455.691	516433.706	7866337.260
BY STRAIGHT LINE TO				
	519460.360	7864693.853	519586.767	7864575.398
BY ARC CENTERED AT				
	518067.712	7859315.222	518194.131	7859196.768

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	519545.936	7864670.966	519672.343	7864552.510
BY STRAIGHT LINE TO				
	519776.622	7864607.295	519903.027	7864488.836
BY ARC CENTERED AT				
	518298.398	7859251.551	518424.815	7859133.095
TO				
	520214.846	7864466.564	520341.248	7864348.099
BY STRAIGHT LINE TO				
	520420.739	7864390.901	520547.140	7864272.433
BY STRAIGHT LINE TO				
	520494.891	7864365.492	520621.292	7864247.023
BY STRAIGHT LINE TO				
	520748.039	7864289.099	520874.438	7864170.627
BY ARC CENTERED AT				
	519142.884	7858970.019	519269.294	7858851.554
TO				
	520998.915	7864206.839	521125.313	7864088.363
BY STRAIGHT LINE TO				
	521197.623	7864136.413	521324.019	7864017.935
BY ARC CENTERED AT				
	519341.592	7858899.593	519468.000	7858781.126
TO				
	521587.601	7863981.382	521713.995	7863862.898
BY STRAIGHT LINE TO				
	521820.527	7863878.435	521946.920	7863759.948
BY STRAIGHT LINE TO				
	521847.128	7863868.303	521973.521	7863749.816
BY STRAIGHT LINE TO				
	522005.256	7863815.365	522131.648	7863696.876
BY ARC CENTERED AT				
	520241.422	7858546.776	520367.822	7858428.299

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	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	522045.508	7863801.717	522171.900	7863683.227
BY STRAIGHT LINE TO				
	522283.470	7863720.022	522409.860	7863601.529
BY STRAIGHT LINE TO				
	522702.971	7863583.374	522829.359	7863464.875
BY ARC CENTERED AT				
	520982.153	7858300.579	521108.547	7858182.094
TO				
	522791.550	7863553.694	522917.937	7863435.194
BY STRAIGHT LINE TO				
	522994.195	7863483.894	523120.580	7863365.392
BY STRAIGHT LINE TO				
	523075.554	7863460.788	523201.938	7863342.286
BY ARC CENTERED AT				
	521557.635	7858116.159	521684.024	7857997.667
TO				
	523266.381	7863402.871	523392.763	7863284.367
BY STRAIGHT LINE TO				
	523602.974	7863294.079	523729.353	7863175.572
BY STRAIGHT LINE TO				
	523817.142	7863230.608	523943.518	7863112.099
BY STRAIGHT LINE TO				
	524297.954	7863095.126	524424.325	7862976.613
BY STRAIGHT LINE TO				
	524570.448	7863022.603	524696.817	7862904.088
BY STRAIGHT LINE TO				
	524791.778	7862970.526	524918.144	7862852.009
BY STRAIGHT LINE TO				
	524873.304	7862954.034	524999.669	7862835.517
BY ARC CENTERED AT				
	523771.644	7857508.349	523898.016	7857389.842

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	524942.700	7862939.533	525069.065	7862821.015
BY STRAIGHT LINE TO				
	525097.289	7862906.201	525223.652	7862787.682
BY STRAIGHT LINE TO				
	525205.043	7862889.153	525331.405	7862770.633
BY STRAIGHT LINE TO				
	525361.698	7862867.852	525488.059	7862749.331
BY ARC CENTERED AT				
	524613.139	7857362.510	524739.506	7857244.001
TO				
	525424.625	7862858.929	525550.985	7862740.407
BY STRAIGHT LINE TO				
	525622.547	7862829.708	525748.905	7862711.185
BY STRAIGHT LINE TO				
	525754.466	7862813.939	525880.823	7862695.415
BY ARC CENTERED AT				
	525095.023	7857297.213	525221.387	7857178.703
TO				
	525888.434	7862796.271	526014.789	7862677.746
BY STRAIGHT LINE TO				
	526319.000	7862770.985	526445.351	7862652.456
BY STRAIGHT LINE TO				
	527871.417	7862768.361	527997.752	7862649.814
BY STRAIGHT LINE TO				
	529470.413	7863031.316	529596.728	7862912.737
BY ARC CENTERED AT				
	530371.989	7857548.954	530498.311	7857430.398
TO				
	529539.183	7863042.184	529665.497	7862923.604
BY STRAIGHT LINE TO				
	530907.760	7863249.668	531034.057	7863131.060

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	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	531796.917	7863491.687	531923.202	7863373.060
BY STRAIGHT LINE TO				
	533425.487	7864061.159	533551.738	7863942.524
BY STRAIGHT LINE TO				
	535672.806	7865024.587	535799.008	7864905.945
BY STRAIGHT LINE TO				
	537808.466	7866126.317	537934.641	7866007.657
BY STRAIGHT LINE TO				
	540076.295	7867433.359	540202.450	7867314.675
BY STRAIGHT LINE TO				
	542201.554	7868891.140	542327.695	7868772.428
BY STRAIGHT LINE TO				
	543495.564	7869937.172	543621.699	7869818.441
BY STRAIGHT LINE TO				
	544528.036	7870870.647	544654.165	7870751.902
BY STRAIGHT LINE TO				
	545401.930	7871718.760	545528.055	7871600.002
BY ARC CENTERED AT				
	549271.365	7867731.705	549397.523	7867612.840
TO				
	545507.356	7871818.437	545633.481	7871699.677
BY STRAIGHT LINE TO				
	546188.185	7872445.502	546314.311	7872326.727
BY ARC CENTERED AT				
	549952.194	7868358.770	550078.353	7868239.890
TO				
	546936.420	7873025.058	547062.547	7872906.267
BY STRAIGHT LINE TO				
	547172.536	7873177.657	547298.663	7873058.861
BY STRAIGHT LINE TO				
	548693.994	7874649.772	548820.123	7874530.945

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	552557.398	7870656.873	552683.527	7870537.970
TO				
	548770.649	7874722.542	548896.778	7874603.713
BY STRAIGHT LINE TO				
	549757.448	7875641.643	549883.578	7875522.794
BY ARC CENTERED AT				
	553544.197	7871575.974	553670.317	7871457.060
TO				
	550338.893	7876114.163	550465.021	7875995.305
BY STRAIGHT LINE TO				
	550585.627	7876288.431	550711.754	7876169.570
BY STRAIGHT LINE TO				
	550822.181	7876494.667	550948.306	7876375.802
BY STRAIGHT LINE TO				
	552007.493	7877727.687	552133.614	7877608.805
BY STRAIGHT LINE TO				
	552604.194	7878444.324	552730.310	7878325.436
BY STRAIGHT LINE TO				
	556130.197	7882960.765	556256.290	7882841.855
BY STRAIGHT LINE TO				
	558685.059	7886699.546	558811.144	7886580.623
BY STRAIGHT LINE TO				
	559705.599	7888578.235	559831.688	7888459.304
BY STRAIGHT LINE TO				
	562028.667	7893199.198	562154.765	7893080.249
BY STRAIGHT LINE TO				
	562702.954	7894640.443	562829.049	7894521.494
BY ARC CENTERED AT				
	567735.422	7892286.000	567861.612	7892166.931
TO				
	562835.495	7894905.132	562961.589	7894786.182

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	563273.430	7895724.430	563399.524	7895605.479
BY ARC CENTERED AT				
	568173.357	7893105.298	568299.543	7892986.231
TO				
	563360.527	7895881.231	563486.622	7895762.279
BY STRAIGHT LINE TO				
	564369.217	7897630.068	564495.314	7897511.110
BY ARC CENTERED AT				
	569182.047	7894854.135	569308.226	7894735.072
TO				
	564523.607	7897882.017	564649.705	7897763.058
BY STRAIGHT LINE TO				
	564910.005	7898476.496	565036.105	7898357.534
BY STRAIGHT LINE TO				
	565076.260	7898782.291	565202.360	7898663.328
BY STRAIGHT LINE TO				
	565691.432	7899986.663	565817.534	7899867.696
BY ARC CENTERED AT				
	570639.345	7897459.353	570765.518	7897340.293
TO				
	565693.298	7899990.313	565819.400	7899871.346
BY STRAIGHT LINE TO				
	566205.059	7900990.404	566331.162	7900871.434
BY STRAIGHT LINE TO				
	566434.338	7901481.168	566560.441	7901362.197
BY ARC CENTERED AT				
	571468.086	7899129.464	571594.258	7899010.403
TO				
	566594.790	7901797.820	566720.894	7901678.847
BY STRAIGHT LINE TO				
	566819.948	7902209.033	566946.053	7902090.059

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	567305.589	7903115.524	567431.696	7902996.546
BY ARC CENTERED AT				
	572203.045	7900491.774	572329.218	7900372.713
TO				
	567582.581	7903577.297	567708.688	7903458.319
BY STRAIGHT LINE TO				
	567641.620	7903665.705	567767.727	7903546.726
BY STRAIGHT LINE TO				
	567929.890	7904189.082	568055.996	7904070.103
BY ARC CENTERED AT				
	572796.523	7901508.593	572922.699	7901389.533
TO				
	568037.531	7904375.845	568163.637	7904256.866
BY STRAIGHT LINE TO				
	568409.345	7904992.971	568535.452	7904873.990
BY STRAIGHT LINE TO				
	568804.923	7905683.735	568931.031	7905564.753
BY ARC CENTERED AT				
	573626.305	7902922.682	573752.488	7902803.624
TO				
	569154.205	7906219.568	569280.315	7906100.583
BY STRAIGHT LINE TO				
	569225.633	7906316.458	569351.743	7906197.473
BY STRAIGHT LINE TO				
	569632.665	7907065.302	569758.771	7906946.319
BY ARC CENTERED AT				
	574514.163	7904411.981	574640.357	7904292.923
TO				
	569633.496	7907066.831	569759.602	7906947.848
BY STRAIGHT LINE TO				
	569727.844	7907240.280	569853.949	7907121.298

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	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	574608.511	7904585.430	574734.706	7904466.373
TO				
	570092.495	7907821.900	570218.598	7907702.919
BY STRAIGHT LINE TO				
	570283.076	7908087.828	570409.179	7907968.847
BY STRAIGHT LINE TO				
	570322.697	7908147.608	570448.800	7908028.627
BY STRAIGHT LINE TO				
	570933.358	7909204.164	571059.457	7909085.185
BY ARC CENTERED AT				
	575743.698	7906423.919	575869.913	7906304.862
TO				
	571228.644	7909661.731	571354.742	7909542.752
BY STRAIGHT LINE TO				
	571555.231	7910117.149	571681.328	7909998.170
BY ARC CENTERED AT				
	576070.285	7906879.337	576196.503	7906760.282
TO				
	571675.053	7910278.024	571801.151	7910159.046
BY STRAIGHT LINE TO				
	571697.096	7910306.530	571823.194	7910187.552
BY STRAIGHT LINE TO				
	572147.451	7911085.497	572273.547	7910966.524
BY ARC CENTERED AT				
	576957.433	7908304.631	577083.646	7908185.583
TO				
	572157.038	7911102.013	572283.134	7910983.040
BY STRAIGHT LINE TO				
	572486.547	7911667.460	572612.642	7911548.490
BY STRAIGHT LINE TO				
	572851.307	7912319.054	572977.401	7912200.088

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	577699.371	7909605.125	577825.578	7909486.084
TO				
	572923.826	7912444.721	573049.920	7912325.756
BY STRAIGHT LINE TO				
	573277.440	7913039.418	573403.533	7912920.456
BY ARC CENTERED AT				
	578052.985	7910199.822	578179.190	7910080.785
TO				
	573285.409	7913052.777	573411.502	7912933.815
BY STRAIGHT LINE TO				
	573485.671	7913387.435	573611.764	7913268.474
BY ARC CENTERED AT				
	578253.247	7910534.480	578379.450	7910415.445
TO				
	573905.159	7913993.276	574031.252	7913874.317
BY STRAIGHT LINE TO				
	574167.197	7914322.686	574293.291	7914203.728
BY STRAIGHT LINE TO				
	574655.109	7914962.272	574781.205	7914843.315
BY ARC CENTERED AT				
	579072.500	7911592.436	579198.701	7911473.405
TO				
	574671.936	7914984.217	574798.032	7914865.260
BY STRAIGHT LINE TO				
	574873.597	7915245.856	574999.693	7915126.900
BY ARC CENTERED AT				
	579274.161	7911854.075	579400.361	7911735.045
TO				
	575096.078	7915516.419	575222.175	7915397.463
BY STRAIGHT LINE TO				
	575774.359	7916290.217	575900.460	7916171.260

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	579952.442	7912627.873	580078.641	7912508.846
TO				
	576275.570	7916793.176	576401.671	7916674.221
BY STRAIGHT LINE TO				
	576643.671	7917118.113	576769.772	7916999.159
BY STRAIGHT LINE TO				
	576916.254	7917454.625	577042.354	7917335.672
BY ARC CENTERED AT				
	581233.571	7913957.496	581359.751	7913838.497
TO				
	577230.208	7917810.056	577356.308	7917691.105
BY STRAIGHT LINE TO				
	578444.507	7919071.887	578570.605	7918952.940
BY ARC CENTERED AT				
	582447.870	7915219.327	582574.022	7915100.367
TO				
	578598.439	7919225.699	578724.537	7919106.753
BY STRAIGHT LINE TO				
	579590.639	7920179.032	579716.736	7920060.089
BY STRAIGHT LINE TO				
	580499.044	7921057.007	580625.126	7920938.086
BY ARC CENTERED AT				
	584360.246	7917061.978	584486.352	7916943.088
TO				
	581067.809	7921537.354	581193.874	7921418.458
BY STRAIGHT LINE TO				
	581725.504	7922021.206	581851.551	7921902.337
BY ARC CENTERED AT				
	585017.941	7917545.830	585144.041	7917426.958
TO				
	582276.602	7922378.448	582402.635	7922259.600

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	582787.869	7922668.468	582913.890	7922549.639
BY ARC CENTERED AT				
	585529.208	7917835.850	585655.311	7917716.987
TO				
	582909.219	7922735.319	583035.238	7922616.495
BY STRAIGHT LINE TO				
	583509.187	7923056.151	583635.193	7922937.348
BY STRAIGHT LINE TO				
	583851.228	7923245.006	583977.226	7923126.216
BY STRAIGHT LINE TO				
	583965.428	7923319.096	584091.424	7923200.310
BY ARC CENTERED AT				
	586989.379	7918658.103	587115.489	7918539.267
TO				
	584107.456	7923408.225	584233.448	7923289.444
BY STRAIGHT LINE TO				
	584174.701	7923449.022	584300.692	7923330.244
BY ARC CENTERED AT				
	589589.466	7922204.252	589715.555	7922085.521
TO				
	584184.013	7923488.858	584310.003	7923370.081
BY STRAIGHT LINE TO				
	584273.339	7923864.730	584399.321	7923745.962
BY ARC CENTERED AT				
	589678.792	7922580.124	589804.876	7922461.403
TO				
	586377.607	7927049.051	586503.552	7926930.365
BY STRAIGHT LINE TO				
	586546.706	7927173.964	586672.651	7927055.282
BY ARC CENTERED AT				
	589847.891	7922705.037	589973.978	7922586.323

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	590917.749	7928157.059	591043.756	7928038.477
BY STRAIGHT LINE TO				
	591217.329	7928098.272	591343.345	7927979.696
BY ARC CENTERED AT				
	590147.471	7922646.250	590273.567	7922527.544
TO				
	592512.753	7927673.633	592638.811	7927555.082
BY STRAIGHT LINE TO				
	593033.141	7927428.801	593159.217	7927310.259
BY ARC CENTERED AT				
	590667.859	7922401.418	590793.975	7922282.722
TO				
	594216.288	7926676.671	594342.405	7926558.111
BY STRAIGHT LINE TO				
	594792.269	7926198.611	594918.408	7926080.039
BY ARC CENTERED AT				
	591243.840	7921923.358	591369.982	7921804.670
TO				
	595397.128	7925613.796	595523.293	7925495.209
BY STRAIGHT LINE TO				
	595621.872	7925360.865	595748.047	7925242.272
BY ARC CENTERED AT				
	595248.979	7919817.393	595375.262	7919698.701
TO				
	596566.908	7925214.818	596693.106	7925096.214
BY STRAIGHT LINE TO				
	597061.307	7925094.097	597187.518	7924975.487
BY ARC CENTERED AT				
	595743.378	7919696.672	595869.673	7919577.973
TO				
	597926.968	7924805.593	598053.201	7924686.969

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	598748.227	7924454.581	598874.476	7924335.941
BY ARC CENTERED AT				
	596564.637	7919345.660	596690.956	7919226.945
TO				
	599827.370	7923842.738	599953.643	7923724.074
BY STRAIGHT LINE TO				
	600350.632	7923463.099	600476.918	7923344.421
BY ARC CENTERED AT				
	599503.685	7917972.032	599630.071	7917853.260
TO				
	600958.969	7923334.054	601085.264	7923215.366
BY STRAIGHT LINE TO				
	602578.330	7922894.550	602704.647	7922775.835
BY ARC CENTERED AT				
	601123.046	7917532.528	601249.454	7917413.733
TO				
	603393.428	7922603.475	603519.751	7922484.746
BY STRAIGHT LINE TO				
	603920.050	7922367.694	604046.378	7922248.956
BY ARC CENTERED AT				
	601649.668	7917296.747	601776.084	7917177.943
TO				
	604112.353	7922277.140	604238.682	7922158.398
BY STRAIGHT LINE TO				
	604341.882	7922163.644	604468.214	7922044.898
BY STRAIGHT LINE TO				
	605765.631	7921707.200	605891.971	7921588.431
BY ARC CENTERED AT				
	604069.450	7916416.443	604195.886	7916297.606
TO				
	606389.537	7921464.842	606515.880	7921346.064

	NAD 83/WGS 84 UTM ZONE 4 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 4 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	606930.279	7921216.256	607056.624	7921097.469

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BEGINNING AT				
	393069.723	7921216.294	393191.024	7921085.209
BY STRAIGHT LINE TO				
	393663.548	7920868.363	393784.847	7920737.270
BY ARC CENTERED AT				
	390854.810	7916074.604	390976.202	7915943.447
TO				
	394571.202	7920204.685	394692.500	7920073.579
BY STRAIGHT LINE TO				
	394936.460	7919876.013	395057.759	7919744.900
BY ARC CENTERED AT				
	391220.068	7915745.932	391341.463	7915614.768
TO				
	395123.577	7919699.633	395244.876	7919568.517
BY ARC CENTERED AT				
	391985.071	7915114.994	392106.472	7914983.816
TO				
	395372.966	7919518.550	395494.265	7919387.430
BY STRAIGHT LINE TO				
	395973.823	7919056.278	396095.121	7918925.150
BY STRAIGHT LINE TO				
	396208.361	7918901.251	396329.659	7918770.119
BY ARC CENTERED AT				
	393144.690	7914266.269	393266.094	7914135.075
TO				
	396882.581	7918376.902	397003.878	7918245.761

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	397643.651	7917684.844	397764.949	7917553.692
BY ARC CENTERED AT				
	393905.760	7913574.211	394027.164	7913443.005
TO				
	398232.885	7917059.196	398354.182	7916928.034
BY STRAIGHT LINE TO				
	398438.374	7916804.051	398559.671	7916672.885
BY ARC CENTERED AT				
	394111.249	7913319.066	394232.654	7913187.856
TO				
	398788.899	7916317.186	398910.197	7916186.013
BY STRAIGHT LINE TO				
	398872.848	7916186.210	398994.146	7916055.035
BY STRAIGHT LINE TO				
	398983.585	7916033.131	399104.883	7915901.954
BY ARC CENTERED AT				
	394481.967	7912776.665	394603.376	7912645.446
TO				
	399462.952	7915238.154	399584.250	7915106.964
BY STRAIGHT LINE TO				
	399715.858	7914726.382	399837.157	7914595.184
BY ARC CENTERED AT				
	394734.873	7912264.893	394856.286	7912133.666
TO				
	399923.880	7914250.678	400045.180	7914119.472
BY STRAIGHT LINE TO				
	400094.446	7913804.976	400215.747	7913673.763
BY ARC CENTERED AT				
	394905.439	7911819.191	395026.856	7911687.957
TO				
	400226.826	7913416.680	400348.127	7913285.460

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	400319.443	7913108.164	400440.745	7912976.939
BY ARC CENTERED AT				
	394998.056	7911510.675	395119.476	7911379.437
TO				
	400392.085	7912842.435	400513.388	7912711.206
BY STRAIGHT LINE TO				
	400492.861	7912434.262	400614.165	7912303.026
BY ARC CENTERED AT				
	395098.832	7911102.502	395220.256	7910971.257
TO				
	400550.802	7912172.625	400672.107	7912041.385
BY STRAIGHT LINE TO				
	400697.114	7911427.207	400818.421	7911295.955
BY ARC CENTERED AT				
	395245.144	7910357.084	395366.577	7910225.828
TO				
	400719.034	7911308.749	400840.342	7911177.495
BY ARC CENTERED AT				
	402036.467	7905911.203	402157.878	7905779.891
TO				
	400747.974	7911315.731	400869.281	7911184.477
BY ARC CENTERED AT				
	402662.912	7906100.163	402784.358	7905968.862
TO				
	402680.727	7911656.134	402802.093	7911524.905
BY STRAIGHT LINE TO				
	403128.878	7911654.697	403250.271	7911523.476
BY ARC CENTERED AT				
	403111.063	7906098.726	403232.538	7905967.432
TO				
	403576.909	7911635.162	403698.330	7911503.948

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	404046.319	7911595.665	404167.770	7911464.459
BY ARC CENTERED AT				
	403580.473	7906059.229	403701.979	7905927.942
TO				
	405049.084	7911417.617	405170.599	7911286.426
BY STRAIGHT LINE TO				
	405561.958	7911277.050	405683.507	7911145.866
BY ARC CENTERED AT				
	404093.347	7905918.662	404214.888	7905787.382
TO				
	406245.940	7911040.720	406367.536	7910909.545
BY STRAIGHT LINE TO				
	406971.299	7910735.881	407092.948	7910604.716
BY ARC CENTERED AT				
	404818.706	7905613.823	404940.298	7905482.552
TO				
	407189.487	7910638.615	407311.152	7910507.453
BY STRAIGHT LINE TO				
	407761.274	7910368.836	407882.981	7910237.682
BY STRAIGHT LINE TO				
	408309.080	7910110.506	408430.828	7909979.359
BY STRAIGHT LINE TO				
	408380.178	7910080.976	408501.931	7909949.830
BY ARC CENTERED AT				
	407611.949	7904578.344	407733.726	7904447.110
TO				
	408623.305	7910041.520	408745.075	7909910.379
BY STRAIGHT LINE TO				
	409188.169	7909936.951	409309.978	7909805.820
BY ARC CENTERED AT				
	408176.813	7904473.775	408298.625	7904342.549

Decree

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	409958.662	7909736.298	410080.526	7909605.180
BY STRAIGHT LINE TO				
	411129.649	7909339.811	411251.535	7909208.681
BY ARC CENTERED AT				
	409347.800	7904077.288	409469.685	7903946.078
TO				
	411842.503	7909041.721	411964.385	7908910.574
BY STRAIGHT LINE TO				
	412434.517	7908744.225	412556.397	7908613.063
BY ARC CENTERED AT				
	409939.814	7903779.792	410061.734	7903648.587
TO				
	413324.111	7908186.114	413445.989	7908054.928
BY STRAIGHT LINE TO				
	413575.886	7907992.737	413697.763	7907861.543
BY ARC CENTERED AT				
	410191.589	7903586.415	410313.514	7903455.207
TO				
	414129.824	7907505.527	414251.701	7907374.314
BY ARC CENTERED AT				
	412239.140	7902281.118	412361.035	7902149.850
TO				
	414807.873	7907207.653	414929.743	7907076.423
BY ARC CENTERED AT				
	412562.785	7902125.457	412684.676	7901994.180
TO				
	416670.374	7905866.693	416792.198	7905735.419
BY STRAIGHT LINE TO				
	416910.747	7905602.782	417032.564	7905471.502
BY ARC CENTERED AT				
	412803.158	7901861.546	412925.045	7901730.260

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	417396.583	7904987.180	417518.386	7904855.886
BY STRAIGHT LINE TO				
	417535.406	7904783.166	417657.205	7904651.867
BY ARC CENTERED AT				
	412941.981	7901657.532	413063.866	7901526.240
TO				
	417592.717	7904697.235	417714.514	7904565.934
BY STRAIGHT LINE TO				
	418509.835	7904602.862	418631.609	7904471.550
BY ARC CENTERED AT				
	417941.114	7899076.046	418062.889	7898944.665
TO				
	419124.356	7904504.589	419246.114	7904373.269
BY ARC CENTERED AT				
	418649.792	7898968.893	418771.550	7898837.507
TO				
	419280.610	7904488.966	419402.366	7904357.642
BY STRAIGHT LINE TO				
	419481.945	7904465.958	419603.697	7904334.630
BY ARC CENTERED AT				
	418851.127	7898945.885	418972.880	7898814.497
TO				
	419865.258	7904408.547	419987.004	7904277.209
BY STRAIGHT LINE TO				
	420761.988	7904242.071	420883.719	7904110.710
BY ARC CENTERED AT				
	419747.857	7898779.409	419869.600	7898647.996
TO				
	420997.347	7904193.087	421119.074	7904061.719
BY STRAIGHT LINE TO				
	421556.193	7904064.104	421677.911	7903932.721

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	420306.703	7898650.426	420428.440	7898518.996
TO				
	421693.004	7904030.696	421814.720	7903899.310
BY STRAIGHT LINE TO				
	422015.327	7903947.645	422137.038	7903816.250
BY ARC CENTERED AT				
	420629.026	7898567.375	420750.760	7898435.936
TO				
	424031.697	7902959.523	424153.372	7902828.075
BY STRAIGHT LINE TO				
	424422.170	7902657.017	424543.834	7902525.564
BY ARC CENTERED AT				
	421019.499	7898264.869	421141.229	7898133.415
TO				
	424694.616	7902431.720	424816.272	7902300.263
BY ARC CENTERED AT				
	421907.686	7897625.250	422029.409	7897493.762
TO				
	424757.219	7902394.872	424878.873	7902263.414
BY ARC CENTERED AT				
	422148.208	7897489.549	422269.929	7897358.053
TO				
	425007.423	7902253.374	425129.070	7902121.913
BY STRAIGHT LINE TO				
	425067.877	7902217.089	425189.522	7902085.628
BY ARC CENTERED AT				
	422848.342	7897123.682	422970.057	7896992.161
TO				
	425117.395	7902195.223	425239.039	7902063.761
BY STRAIGHT LINE TO				
	425500.997	7902023.596	425622.630	7901892.131

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	423231.944	7896952.055	423353.657	7896820.521
TO				
	425788.616	7901884.860	425910.240	7901753.392
BY ARC CENTERED AT				
	423584.713	7896784.669	423706.417	7896653.130
TO				
	426140.083	7901718.149	426261.697	7901586.678
BY ARC CENTERED AT				
	424492.481	7896412.063	424614.156	7896280.519
TO				
	428166.100	7900580.235	428287.657	7900448.748
BY ARC CENTERED AT				
	425257.634	7895846.319	425379.286	7895714.768
TO				
	429159.110	7899802.027	429280.652	7899670.540
BY STRAIGHT LINE TO				
	429676.105	7899409.058	429797.639	7899277.572
BY ARC CENTERED AT				
	426313.976	7894985.798	426435.595	7894854.236
TO				
	430148.760	7899006.192	430270.287	7898874.706
BY STRAIGHT LINE TO				
	430193.008	7898963.987	430314.535	7898832.501
BY STRAIGHT LINE TO				
	430198.613	7898960.367	430320.140	7898828.881
BY ARC CENTERED AT				
	427184.162	7894293.224	427305.754	7894161.654
TO				
	430647.263	7898637.884	430768.783	7898506.399
BY STRAIGHT LINE TO				
	431068.684	7898301.971	431190.198	7898170.487

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	431302.386	7898138.267	431423.897	7898006.783
BY ARC CENTERED AT				
	428492.017	7893345.464	428613.582	7893213.893
TO				
	431576.456	7897966.651	431697.963	7897835.168
BY STRAIGHT LINE TO				
	431832.819	7897795.540	431954.323	7897664.058
BY ARC CENTERED AT				
	428748.380	7893174.353	428869.942	7893042.783
TO				
	431976.150	7897696.591	432097.652	7897565.109
BY STRAIGHT LINE TO				
	432283.764	7897477.030	432405.262	7897345.549
BY ARC CENTERED AT				
	429055.994	7892954.792	429177.552	7892823.223
TO				
	432624.758	7897213.085	432746.252	7897081.607
BY STRAIGHT LINE TO				
	432700.169	7897149.885	432821.662	7897018.407
BY ARC CENTERED AT				
	429131.405	7892891.592	429252.962	7892760.023
TO				
	432882.539	7896990.144	433004.031	7896858.667
BY STRAIGHT LINE TO				
	432998.411	7896884.094	433119.901	7896752.618
BY ARC CENTERED AT				
	429247.277	7892785.542	429368.833	7892653.973
TO				
	433344.498	7896538.130	433465.985	7896406.656
BY STRAIGHT LINE TO				
	433374.270	7896505.623	433495.757	7896374.149

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	433632.458	7896329.992	433753.942	7896198.520
BY ARC CENTERED AT				
	430507.486	7891736.117	430629.024	7891604.564
TO				
	433736.057	7896257.783	433857.540	7896126.312
BY ARC CENTERED AT				
	430709.329	7891598.593	430830.864	7891467.044
TO				
	434327.540	7895814.952	434449.017	7895683.486
BY STRAIGHT LINE TO				
	434528.600	7895642.415	434650.076	7895510.950
BY STRAIGHT LINE TO				
	434961.533	7895320.646	435083.005	7895189.184
BY ARC CENTERED AT				
	431647.285	7890861.398	431768.806	7890729.866
TO				
	435509.640	7894855.312	435631.107	7894723.854
BY STRAIGHT LINE TO				
	435709.646	7894661.894	435831.111	7894530.437
BY STRAIGHT LINE TO				
	436012.854	7894377.134	436134.317	7894245.678
BY ARC CENTERED AT				
	432209.304	7890327.178	432330.816	7890195.656
TO				
	436033.206	7894357.924	436154.669	7894226.469
BY STRAIGHT LINE TO				
	436413.161	7893997.467	436534.621	7893866.013
BY ARC CENTERED AT				
	432589.259	7889966.721	432710.766	7889835.206
TO				
	436686.640	7893719.134	436808.098	7893587.681

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	436957.614	7893423.249	437079.069	7893291.799
BY ARC CENTERED AT				
	433518.551	7889059.537	433640.047	7888928.036
TO				
	437412.243	7893022.906	437533.693	7892891.463
BY STRAIGHT LINE TO				
	437666.506	7892773.113	437787.954	7892641.674
BY ARC CENTERED AT				
	433772.814	7888809.744	433894.307	7888678.246
TO				
	437671.551	7892768.151	437792.999	7892636.712
BY STRAIGHT LINE TO				
	437992.096	7892452.438	438113.540	7892321.003
BY STRAIGHT LINE TO				
	438488.462	7891963.815	438609.900	7891832.389
BY ARC CENTERED AT				
	434590.784	7888004.366	434712.268	7887872.876
TO				
	438713.199	7891729.260	438834.634	7891597.839
BY ARC CENTERED AT				
	435570.084	7887147.779	435691.559	7887016.295
TO				
	439944.794	7890572.841	440066.209	7890441.445
BY STRAIGHT LINE TO				
	440000.760	7890517.380	440122.174	7890385.985
BY STRAIGHT LINE TO				
	440165.219	7890368.184	440286.631	7890236.792
BY ARC CENTERED AT				
	436432.121	7886253.197	436553.588	7886121.715
TO				
	440451.370	7890089.181	440572.777	7889957.795

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	440660.683	7889869.868	440782.087	7889738.486
BY ARC CENTERED AT				
	436641.434	7886033.884	436762.898	7885902.405
TO				
	441026.125	7889446.159	441147.523	7889314.783
BY STRAIGHT LINE TO				
	441456.193	7888893.532	441577.586	7888762.164
BY ARC CENTERED AT				
	437071.502	7885481.257	437192.959	7885349.785
TO				
	441540.577	7888782.242	441661.970	7888650.875
BY STRAIGHT LINE TO				
	441697.817	7888569.361	441819.209	7888437.997
BY ARC CENTERED AT				
	437411.858	7885033.871	437533.309	7884902.405
TO				
	441811.054	7888427.425	441932.445	7888296.064
BY STRAIGHT LINE TO				
	442170.170	7887961.889	442291.558	7887830.534
BY ARC CENTERED AT				
	437770.974	7884568.335	437892.419	7884436.874
TO				
	442238.936	7887870.826	442360.324	7887739.473
BY STRAIGHT LINE TO				
	442423.319	7887621.373	442544.706	7887490.023
BY ARC CENTERED AT				
	437955.357	7884318.882	438076.798	7884187.424
TO				
	442425.381	7887618.582	442546.768	7887487.232
BY STRAIGHT LINE TO				
	442631.852	7887338.881	442753.237	7887207.535

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	442873.180	7887032.005	442994.564	7886900.664
BY STRAIGHT LINE TO				
	443053.615	7886806.067	443174.998	7886674.729
BY ARC CENTERED AT				
	438712.151	7883338.961	438833.579	7883207.514
TO				
	443057.493	7886801.206	443178.876	7886669.868
BY STRAIGHT LINE TO				
	443071.947	7886783.065	443193.330	7886651.727
BY ARC CENTERED AT				
	439255.221	7882745.524	439376.639	7882614.084
TO				
	443237.022	7886620.365	443358.404	7886489.031
BY STRAIGHT LINE TO				
	443406.565	7886446.142	443527.946	7886314.811
BY ARC CENTERED AT				
	439424.764	7882571.301	439546.179	7882439.863
TO				
	443497.300	7886350.665	443618.680	7886219.336
BY STRAIGHT LINE TO				
	443535.961	7886309.005	443657.341	7886177.677
BY ARC CENTERED AT				
	439463.425	7882529.641	439584.839	7882398.203
TO				
	443643.736	7886189.441	443765.116	7886058.115
BY STRAIGHT LINE TO				
	443930.671	7885861.697	444052.049	7885730.377
BY ARC CENTERED AT				
	439750.360	7882201.897	439871.769	7882070.463
TO				
	444109.793	7885646.382	444231.170	7885515.065

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	444200.405	7885531.701	444321.782	7885400.386
BY ARC CENTERED AT				
	439840.972	7882087.216	439962.379	7881955.783
TO				
	444252.851	7885464.265	444374.228	7885332.951
BY STRAIGHT LINE TO				
	444330.803	7885362.426	444452.179	7885231.113
BY STRAIGHT LINE TO				
	444419.938	7885252.952	444541.314	7885121.641
BY ARC CENTERED AT				
	441333.223	7880633.285	441454.609	7880501.872
TO				
	446234.318	7883250.231	446355.691	7883118.949
BY STRAIGHT LINE TO				
	447035.530	7881749.697	447156.905	7881618.420
BY ARC CENTERED AT				
	442134.435	7879132.751	442255.817	7879001.351
TO				
	447109.422	7881606.340	447230.798	7881475.063
BY STRAIGHT LINE TO				
	447190.479	7881443.314	447311.855	7881312.037
BY STRAIGHT LINE TO				
	447252.753	7881319.360	447374.129	7881188.084
BY ARC CENTERED AT				
	442438.177	7878546.456	442559.558	7878415.061
TO				
	447437.030	7880971.452	447558.407	7880840.176
BY STRAIGHT LINE TO				
	467442.071	7870395.422	467563.354	7870264.061
BY STRAIGHT LINE TO				
	467991.965	7870438.867	468113.242	7870307.500

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	468429.562	7864900.127	468550.794	7864768.709
TO				
	468171.254	7870450.119	468292.531	7870318.750
BY STRAIGHT LINE TO				
	468281.360	7870455.244	468402.636	7870323.874
BY STRAIGHT LINE TO				
	469599.091	7870625.241	469720.362	7870493.857
BY STRAIGHT LINE TO				
	470316.901	7870797.832	470438.170	7870666.441
BY ARC CENTERED AT				
	471849.948	7865457.523	471971.166	7865326.068
TO				
	470479.961	7870841.970	470601.230	7870710.578
BY STRAIGHT LINE TO				
	470969.734	7870966.585	471091.002	7870835.188
BY ARC CENTERED AT				
	472339.721	7865582.138	472460.937	7865450.678
TO				
	472334.002	7871138.135	472455.265	7871006.723
BY STRAIGHT LINE TO				
	473269.492	7871139.098	473390.755	7871007.681
BY ARC CENTERED AT				
	473275.211	7865583.101	473396.428	7865451.637
TO				
	473731.159	7871120.361	473852.422	7870988.942
BY STRAIGHT LINE TO				
	474166.649	7871084.502	474287.913	7870953.081
BY ARC CENTERED AT				
	473710.701	7865547.242	473831.919	7865415.777
TO				
	474649.099	7871023.422	474770.363	7870891.998

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	475332.030	7870906.395	475453.294	7870774.968
BY ARC CENTERED AT				
	474393.632	7865430.215	474514.850	7865298.747
TO				
	475921.551	7870771.994	476042.814	7870640.563
BY ARC CENTERED AT				
	476559.072	7865252.691	476680.292	7865121.216
TO				
	476691.369	7870807.116	476812.634	7870675.682
BY STRAIGHT LINE TO				
	477015.489	7870799.396	477136.754	7870667.961
BY ARC CENTERED AT				
	476883.192	7865244.971	477004.413	7865113.495
TO				
	477982.441	7870691.143	478103.708	7870559.702
BY STRAIGHT LINE TO				
	479357.355	7870413.632	479478.625	7870282.181
BY ARC CENTERED AT				
	478258.106	7864967.460	478379.332	7864835.975
TO				
	479637.382	7870349.535	479758.652	7870218.082
BY STRAIGHT LINE TO				
	480033.985	7870247.897	480155.256	7870116.441
BY ARC CENTERED AT				
	479629.240	7864706.659	479750.473	7864575.165
TO				
	480172.913	7870235.995	480294.185	7870104.538
BY ARC CENTERED AT				
	480065.567	7864681.032	480186.802	7864549.535
TO				
	480838.804	7870182.963	480960.078	7870051.502

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	481005.272	7864629.457	481126.512	7864497.955
TO				
	481079.268	7870184.964	481200.542	7870053.502
BY ARC CENTERED AT				
	481994.781	7864704.912	482116.022	7864573.405
TO				
	481697.024	7870252.928	481818.301	7870121.463
BY ARC CENTERED AT				
	482705.105	7864789.146	482826.340	7864657.636
TO				
	481820.741	7870274.311	481942.017	7870142.846
BY ARC CENTERED AT				
	483194.198	7864890.748	483315.430	7864759.236
TO				
	481993.228	7870315.396	482114.502	7870183.930
BY ARC CENTERED AT				
	483439.289	7864950.879	483560.519	7864819.367
TO				
	483009.534	7870490.233	483130.801	7870358.763
BY ARC CENTERED AT				
	484377.345	7865105.233	484498.568	7864973.717
TO				
	483242.915	7870544.186	483364.181	7870412.715
BY ARC CENTERED AT				
	484757.617	7865198.644	484878.837	7865067.127
TO				
	483397.536	7870585.602	483518.800	7870454.131
BY ARC CENTERED AT				
	486374.716	7865894.596	486495.928	7865763.076
TO				
	483989.438	7870912.522	484110.700	7870781.050

	NAD 83/WGS 84 UTM ZONE 5 (meters) X–COORD	Y–COORD	NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters) X–COORD	Y–COORD
BY ARC CENTERED AT				
	487081.228	7866296.250	487202.442	7866164.734
TO				
	484924.778	7871416.686	485046.035	7871285.213
BY ARC CENTERED AT				
	487633.600	7866565.766	487754.815	7866434.253
TO				
	485334.042	7871623.549	485455.297	7871492.075
BY ARC CENTERED AT				
	487813.601	7866651.535	487934.817	7866520.023
TO				
	485399.248	7871655.537	485520.503	7871524.063
BY ARC CENTERED AT				
	488494.194	7867041.380	488615.411	7866909.871
TO				
	485756.576	7871876.107	485877.829	7871744.633
BY ARC CENTERED AT				
	489024.246	7867382.615	489145.464	7867251.109
TO				
	485943.466	7872006.242	486064.718	7871874.768
BY ARC CENTERED AT				
	489427.178	7867678.092	489548.397	7867546.589
TO				
	486539.924	7872424.975	486661.176	7872293.503
BY ARC CENTERED AT				
	489856.340	7867967.339	489977.560	7867835.838
TO				
	487075.850	7872777.538	487197.102	7872646.068
BY ARC CENTERED AT				
	490292.432	7868247.335	490413.652	7868115.836
TO				
	488047.444	7873329.575	488168.695	7873198.108

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	490798.254	7868502.342	490919.474	7868370.845
TO				
	488987.793	7873755.091	489109.043	7873623.626
BY ARC CENTERED AT				
	491228.617	7868671.013	491349.835	7868539.515
TO				
	491003.718	7874222.459	491124.961	7874090.995
BY ARC CENTERED AT				
	491762.851	7868718.565	491884.065	7868587.065
TO				
	491934.829	7874271.903	492056.065	7874140.434
BY ARC CENTERED AT				
	492270.584	7868726.057	492391.795	7868594.554
TO				
	492348.830	7874281.506	492470.063	7874150.036
BY ARC CENTERED AT				
	492524.946	7868728.298	492646.155	7868596.794
TO				
	492507.911	7874284.272	492629.143	7874152.801
BY ARC CENTERED AT				
	493715.004	7868860.983	493836.205	7868729.475
TO				
	493100.385	7874382.883	493221.613	7874251.410
BY ARC CENTERED AT				
	494246.188	7868946.315	494367.386	7868814.805
TO				
	494872.983	7874466.846	494994.199	7874335.364
BY ARC CENTERED AT				
	494677.760	7868914.277	494798.955	7868782.765
TO				
	496221.702	7874251.447	496342.909	7874119.957

	NAD 83/WGS 84 UTM ZONE 5 (meters) X–COORD	Y–COORD	NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters) X–COORD	Y–COORD
BY ARC CENTERED AT				
	495109.183	7868807.970	495230.374	7868676.455
TO				
	497132.722	7873982.371	497253.924	7873850.874
BY ARC CENTERED AT				
	495413.975	7868698.902	495535.164	7868567.385
TO				
	498134.982	7873542.997	498256.177	7873411.492
BY ARC CENTERED AT				
	496024.518	7868403.437	496145.702	7868271.916
TO				
	498416.859	7873418.000	498538.052	7873286.492
BY ARC CENTERED AT				
	497472.314	7867942.877	497593.489	7867811.347
TO				
	499585.718	7873081.229	499706.903	7872949.713
BY ARC CENTERED AT				
	498085.437	7867731.622	498206.607	7867600.088
TO				
	501115.514	7872388.635	501236.692	7872257.103
BY ARC CENTERED AT				
	503689.198	7867464.685	503810.355	7867333.110
TO				
	502721.992	7872935.850	502843.169	7872804.305
BY ARC CENTERED AT				
	504070.278	7867545.928	504191.435	7867414.350
TO				
	504958.038	7873030.544	505079.207	7872898.978
BY ARC CENTERED AT				
	504732.501	7867479.124	504853.654	7867347.540
TO				
	507620.273	7872225.692	507741.415	7872094.097

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	505397.486	7867133.703	505518.631	7867002.111
TO				
	508596.136	7871676.585	508717.267	7871544.978
BY ARC CENTERED AT				
	505961.271	7866785.100	506082.409	7866653.502
TO				
	509219.221	7871285.644	509340.345	7871154.031
BY ARC CENTERED AT				
	511332.756	7866147.346	511453.841	7866015.705
TO				
	514578.450	7870656.737	514699.526	7870525.088
BY ARC CENTERED AT				
	514948.326	7865113.062	515069.377	7864981.398
TO				
	517427.168	7870085.433	517548.216	7869953.764
BY ARC CENTERED AT				
	515594.602	7864840.356	515715.646	7864708.687
TO				
	517959.562	7869867.890	518080.604	7869736.217
BY ARC CENTERED AT				
	515745.924	7864771.917	515866.966	7864640.247
TO				
	519843.476	7868524.144	519964.516	7868392.436
BY ARC CENTERED AT				
	517645.323	7863421.472	517766.341	7863289.790
TO				
	520073.034	7868419.007	520194.074	7868287.295
BY ARC CENTERED AT				
	520388.783	7862871.986	520509.804	7862740.259
TO				
	523270.118	7867622.464	523391.154	7867490.701

	NAD 83/WGS 84 UTM ZONE 5 (meters) X–COORD	Y–COORD	NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters) X–COORD	Y–COORD
BY ARC CENTERED AT				
	520437.063	7862843.036	520558.084	7862711.308
TO				
	523780.984	7867280.077	523902.009	7867148.314
BY ARC CENTERED AT				
	522569.446	7861857.779	522690.468	7861726.017
TO				
	525871.085	7866326.371	525992.066	7866194.608
BY ARC CENTERED AT				
	522975.443	7861584.600	523096.458	7861452.837
TO				
	526803.306	7865611.584	526924.267	7865479.821
BY ARC CENTERED AT				
	523132.439	7861440.988	523253.449	7861309.227
TO				
	527043.261	7865387.455	527164.216	7865255.692
BY ARC CENTERED AT				
	524999.981	7860220.818	525120.942	7860089.065
TO				
	527595.807	7865133.131	527716.754	7865001.363
BY ARC CENTERED AT				
	525448.042	7860009.047	525568.993	7859877.295
TO				
	528255.307	7864803.669	528376.248	7864671.890
BY ARC CENTERED AT				
	526712.241	7859466.246	526833.166	7859334.494
TO				
	528559.696	7864706.098	528680.635	7864574.314
BY ARC CENTERED AT				
	527009.587	7859370.716	527130.506	7859238.964
TO				
	530546.060	7863655.864	530666.983	7863524.046

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	527223.352	7859202.916	527344.266	7859071.164
TO				
	530805.841	7863449.669	530926.761	7863317.846
BY ARC CENTERED AT				
	528094.174	7858600.339	528215.078	7858468.573
TO				
	531708.127	7862820.348	531829.038	7862688.510
BY ARC CENTERED AT				
	528712.002	7858141.420	528832.901	7858009.642
TO				
	533377.376	7861158.608	533498.270	7861026.727
BY ARC CENTERED AT				
	529201.709	7857493.510	529322.601	7857361.722
TO				
	534103.110	7860109.882	534223.996	7859977.980
BY ARC CENTERED AT				
	529393.342	7857162.473	529514.232	7857030.681
TO				
	534923.759	7856629.909	535044.627	7856497.976
BY STRAIGHT LINE TO				
	551754.203	7832614.205	551874.772	7832481.697
BY ARC CENTERED AT				
	550057.891	7827323.490	550178.359	7827191.030
TO				
	552441.273	7832342.317	552561.840	7832209.783
BY STRAIGHT LINE TO				
	572587.354	7822775.178	572707.939	7822641.876
BY ARC CENTERED AT				
	573244.300	7817258.154	573364.754	7817124.808
TO				
	572927.453	7822805.112	573048.036	7822671.797

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	576314.880	7818401.196	576435.343	7818267.726
TO				
	575097.647	7823822.218	575218.232	7823688.815
BY ARC CENTERED AT				
	577502.353	7818813.573	577622.823	7818680.056
TO				
	575766.370	7824091.404	575886.957	7823957.974
BY STRAIGHT LINE TO				
	576292.638	7824264.504	576413.225	7824131.053
BY ARC CENTERED AT				
	578028.621	7818986.673	578149.094	7818853.135
TO				
	577625.817	7824528.052	577746.404	7824394.547
BY ARC CENTERED AT				
	582664.319	7822186.550	582784.873	7822052.843
TO				
	578956.379	7826324.221	579076.985	7826190.662
BY STRAIGHT LINE TO				
	579349.579	7826676.584	579470.190	7826543.010
BY ARC CENTERED AT				
	583057.519	7822538.913	583178.082	7822405.192
TO				
	581957.222	7827984.873	582077.855	7827851.198
BY STRAIGHT LINE TO				
	582182.421	7828030.372	582303.056	7827896.688
BY ARC CENTERED AT				
	583282.718	7822584.412	583403.283	7822450.683
TO				
	583376.566	7828139.619	583497.205	7828005.888
BY STRAIGHT LINE TO				
	583502.368	7828168.522	583623.008	7828034.786

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	584746.423	7822753.592	584867.003	7822619.806
TO				
	584635.469	7828308.484	584756.121	7828174.703
BY ARC CENTERED AT				
	586266.183	7822997.184	586386.785	7822863.338
TO				
	584656.034	7828314.754	584776.686	7828180.972
BY ARC CENTERED AT				
	586739.384	7823164.144	586859.995	7823030.280
TO				
	585429.481	7828563.523	585550.143	7828429.710
BY STRAIGHT LINE TO				
	585581.359	7828600.369	585702.023	7828466.549
BY ARC CENTERED AT				
	586891.262	7823200.990	587011.876	7823067.120
TO				
	587987.361	7828647.797	588108.047	7828513.880
BY ARC CENTERED AT				
	589725.878	7823370.800	589846.507	7823236.812
TO				
	588231.110	7828721.950	588351.798	7828588.023
BY STRAIGHT LINE TO				
	588697.219	7828852.151	588817.908	7828718.203
BY ARC CENTERED AT				
	590191.987	7823501.001	590312.616	7823366.993
TO				
	589953.456	7829051.878	590074.147	7828917.874
BY ARC CENTERED AT				
	590841.878	7823567.369	590962.506	7823433.333
TO				
	591013.893	7829120.706	591134.584	7828986.655

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	593086.687	7823965.838	593207.315	7823831.703
TO				
	592335.550	7829470.829	592456.245	7829336.719
BY ARC CENTERED AT				
	594954.569	7824570.842	595075.205	7824436.624
TO				
	594382.236	7830097.285	594502.943	7829963.081
BY ARC CENTERED AT				
	596115.206	7824818.464	596235.846	7824684.194
TO				
	594512.927	7830138.411	594633.635	7830004.201
BY STRAIGHT LINE TO				
	594920.815	7830261.260	595041.526	7830127.031
BY ARC CENTERED AT				
	596523.094	7824941.313	596643.736	7824807.025
TO				
	595284.196	7830357.425	595404.910	7830223.179
BY STRAIGHT LINE TO				
	595768.154	7830468.127	595888.871	7830333.859
BY ARC CENTERED AT				
	597007.052	7825052.015	597127.696	7824917.705
TO				
	597278.623	7830601.374	597399.346	7830467.036
BY STRAIGHT LINE TO				
	597480.943	7830591.473	597601.668	7830457.125
BY ARC CENTERED AT				
	597209.372	7825042.114	597330.016	7824907.795
TO				
	598186.978	7830511.431	598307.713	7830377.047
BY ARC CENTERED AT				
	603721.922	7830028.183	603842.746	7829893.526

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	599891.749	7834052.970	600012.564	7833918.486
BY STRAIGHT LINE TO				
	600152.080	7834300.713	600272.903	7834166.214
BY ARC CENTERED AT				
	603982.253	7830275.926	604103.086	7830141.256
TO				
	602162.492	7835525.460	602283.367	7835390.855
BY STRAIGHT LINE TO				
	602627.229	7835686.562	602748.116	7835551.934
BY ARC CENTERED AT				
	604446.990	7830437.028	604567.836	7830302.337
TO				
	603739.615	7835947.814	603860.528	7835813.134
BY STRAIGHT LINE TO				
	604118.606	7835996.462	604239.528	7835861.764
BY ARC CENTERED AT				
	604825.981	7830485.676	604946.836	7830350.967
TO				
	605429.921	7836008.754	605550.870	7835873.994
BY STRAIGHT LINE TO				
	605847.403	7835963.103	605968.359	7835828.324
BY ARC CENTERED AT				
	605243.463	7830440.025	605364.327	7830305.298
TO				
	606938.507	7835731.146	607059.469	7835596.323
BY STRAIGHT LINE TO				
	607259.512	7835628.310	607380.471	7835493.476
BY ARC CENTERED AT				
	605564.468	7830337.189	605685.338	7830202.448
TO				
	608679.472	7834937.829	608800.411	7834802.949

	NAD 83/WGS 84 UTM ZONE 5 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 5 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	608987.908	7834728.993	609108.842	7834594.104
BY ARC CENTERED AT				
	605872.904	7830128.353	605993.777	7829993.599
TO				
	609667.961	7834186.269	609788.880	7834051.360
BY STRAIGHT LINE TO				
	609846.642	7834448.856	609967.564	7834313.939
BY ARC CENTERED AT				
	614440.052	7831323.201	614560.829	7831188.192
TO				
	611162.022	7835809.199	611282.960	7835674.229

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BEGINNING AT				
	388837.978	7835809.199	388952.283	7835662.600
BY ARC CENTERED AT				
	391657.632	7831021.852	391771.770	7830875.233
TO				
	389043.550	7835924.475	389157.855	7835777.870
BY STRAIGHT LINE TO				
	389497.304	7836166.417	389611.609	7836019.799
BY ARC CENTERED AT				
	392111.386	7831263.794	392225.521	7831117.163
TO				
	390873.296	7836680.091	390987.598	7836533.434
BY STRAIGHT LINE TO				
	391277.472	7836772.480	391391.772	7836625.811
BY ARC CENTERED AT				
	392515.562	7831356.183	392629.691	7831209.543

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	392594.942	7836911.616	392709.233	7836764.911
BY STRAIGHT LINE TO				
	393155.455	7836903.607	393269.741	7836756.887
BY ARC CENTERED AT				
	393076.075	7831348.174	393190.191	7831201.523
TO				
	394175.903	7836794.229	394290.180	7836647.482
BY STRAIGHT LINE TO				
	394386.997	7836786.282	394501.273	7836639.529
BY ARC CENTERED AT				
	394177.986	7831234.215	394292.112	7831087.533
TO				
	395906.384	7836514.535	396020.647	7836367.743
BY ARC CENTERED AT				
	398685.597	7831703.598	398799.765	7831556.785
TO				
	397398.187	7837108.384	397512.455	7836961.544
BY STRAIGHT LINE TO				
	397683.101	7837176.250	397797.369	7837029.402
BY ARC CENTERED AT				
	398970.511	7831771.464	399084.676	7831624.645
TO				
	398741.278	7837322.733	398855.529	7837175.860
BY ARC CENTERED AT				
	399567.750	7831828.547	399681.906	7831681.716
TO				
	400080.994	7837360.790	400195.214	7837213.890
BY STRAIGHT LINE TO				
	400721.567	7837301.362	400835.771	7837154.451
BY ARC CENTERED AT				
	400208.323	7831769.119	400322.467	7831622.276

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	401598.052	7837148.505	401712.234	7837001.578
BY STRAIGHT LINE TO				
	402075.792	7837025.084	402189.961	7836878.149
BY ARC CENTERED AT				
	400686.063	7831645.698	400800.198	7831498.847
TO				
	402261.590	7836973.629	402375.754	7836826.691
BY ARC CENTERED AT				
	401379.176	7831488.150	401493.298	7831341.287
TO				
	402816.539	7836855.004	402930.689	7836708.056
BY STRAIGHT LINE TO				
	403060.021	7836818.641	403174.164	7836671.689
BY ARC CENTERED AT				
	402239.343	7831323.586	402353.449	7831176.708
TO				
	404264.557	7836497.332	404378.667	7836350.358
BY STRAIGHT LINE TO				
	404664.518	7836340.771	404778.616	7836193.791
BY ARC CENTERED AT				
	403791.842	7830853.734	403905.910	7830706.828
TO				
	405169.302	7836236.274	405283.387	7836089.285
BY STRAIGHT LINE TO				
	406330.941	7835938.996	406444.994	7835791.986
BY ARC CENTERED AT				
	404953.481	7830556.456	405067.521	7830409.529
TO				
	406577.616	7835869.771	406691.663	7835722.756
BY STRAIGHT LINE TO				
	406915.498	7835828.675	407029.536	7835681.654

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	406244.662	7830313.322	406358.672	7830166.370
TO				
	407481.737	7835729.851	407595.761	7835582.819
BY STRAIGHT LINE TO				
	407796.875	7835657.877	407910.891	7835510.839
BY ARC CENTERED AT				
	406559.800	7830241.348	406673.803	7830094.390
TO				
	408306.806	7835515.540	408420.809	7835368.493
BY STRAIGHT LINE TO				
	409006.728	7835372.987	409120.714	7835225.926
BY STRAIGHT LINE TO				
	409088.691	7835360.970	409202.675	7835213.908
BY ARC CENTERED AT				
	408282.723	7829863.739	408396.684	7829716.750
TO				
	410811.989	7834810.652	410925.930	7834663.559
BY STRAIGHT LINE TO				
	410923.253	7834764.073	411037.191	7834616.978
BY ARC CENTERED AT				
	408777.736	7829639.047	408891.684	7829492.050
TO				
	411048.196	7834709.959	411162.131	7834562.862
BY ARC CENTERED AT				
	409114.135	7829501.452	409228.075	7829354.450
TO				
	411431.997	7834550.873	411545.922	7834403.770
BY STRAIGHT LINE TO				
	412312.620	7834146.636	412426.526	7833999.516
BY ARC CENTERED AT				
	409994.758	7829097.215	410108.674	7828950.200

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	413339.249	7833533.826	413453.138	7833386.685
BY ARC CENTERED AT				
	411682.241	7828230.670	411796.113	7828083.630
TO				
	413749.846	7833387.621	413863.729	7833240.471
BY ARC CENTERED AT				
	411973.654	7828123.186	412087.523	7827976.139
TO				
	414176.430	7833223.864	414290.307	7833076.704
BY ARC CENTERED AT				
	412139.476	7828054.729	412253.343	7827907.678
TO				
	414491.702	7833088.234	414605.574	7832941.067
BY ARC CENTERED AT				
	413026.185	7827728.999	413140.041	7827581.928
TO				
	414973.698	7832932.491	415087.564	7832785.313
BY ARC CENTERED AT				
	413403.839	7827602.887	413517.691	7827455.807
TO				
	415527.671	7832736.938	415641.529	7832589.747
BY STRAIGHT LINE TO				
	415789.585	7832628.590	415903.439	7832481.393
BY STRAIGHT LINE TO				
	415996.543	7832552.402	416110.394	7832405.200
BY ARC CENTERED AT				
	414077.125	7827338.481	414190.969	7827191.386
TO				
	416084.828	7832519.047	416198.678	7832371.843
BY STRAIGHT LINE TO				
	416289.558	7832439.705	416403.405	7832292.497

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	416430.844	7832397.864	416544.689	7832250.652
BY STRAIGHT LINE TO				
	416838.250	7832277.316	416952.085	7832130.095
BY ARC CENTERED AT				
	415261.836	7826949.647	415375.667	7826802.524
TO				
	417800.911	7831891.533	417914.721	7831744.290
BY ARC CENTERED AT				
	415620.569	7826781.225	415734.396	7826634.095
TO				
	418253.721	7831673.632	418367.519	7831526.379
BY STRAIGHT LINE TO				
	418775.446	7831392.833	418889.230	7831245.569
BY ARC CENTERED AT				
	417947.257	7825898.906	418061.032	7825751.722
TO				
	419152.115	7831322.692	419265.890	7831175.418
BY STRAIGHT LINE TO				
	419635.447	7831215.323	419749.210	7831068.037
BY ARC CENTERED AT				
	418430.589	7825791.537	418544.352	7825644.341
TO				
	420311.288	7831019.549	420425.033	7830872.247
BY STRAIGHT LINE TO				
	420694.267	7830881.778	420808.003	7830734.467
BY ARC CENTERED AT				
	418813.568	7825653.766	418927.321	7825506.561
TO				
	421238.272	7830652.761	421351.991	7830505.440
BY STRAIGHT LINE TO				
	421942.000	7830311.426	422055.693	7830164.098

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	419517.296	7825312.431	419631.030	7825165.210
TO				
	422498.494	7830000.884	422612.166	7829853.550
BY STRAIGHT LINE TO				
	422849.614	7829777.621	422963.273	7829630.284
BY ARC CENTERED AT				
	419868.416	7825089.168	419982.140	7824941.940
TO				
	423338.144	7829428.537	423451.784	7829281.196
BY ARC CENTERED AT				
	420367.060	7824733.668	420480.770	7824586.430
TO				
	423847.953	7829064.086	423961.574	7828916.742
BY ARC CENTERED AT				
	420951.898	7824322.567	421065.590	7824175.320
TO				
	424559.456	7828548.045	424673.049	7828400.696
BY STRAIGHT LINE TO				
	424737.373	7828396.146	424850.960	7828248.796
BY ARC CENTERED AT				
	421129.815	7824170.668	421243.500	7824023.420
TO				
	425032.930	7828124.759	425146.505	7827977.408
BY ARC CENTERED AT				
	421525.361	7823815.919	421639.030	7823668.670
TO				
	425285.910	7827905.835	425399.475	7827758.483
BY STRAIGHT LINE TO				
	425678.266	7827545.076	425791.815	7827397.723
BY ARC CENTERED AT				
	421917.717	7823455.160	422031.370	7823307.910

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	425814.607	7827415.385	425928.150	7827268.032
BY STRAIGHT LINE TO				
	426369.541	7826869.326	426483.060	7826721.972
BY ARC CENTERED AT				
	422472.651	7822909.101	422586.281	7822761.851
TO				
	426529.793	7826704.985	426643.305	7826557.631
BY STRAIGHT LINE TO				
	427045.395	7826530.052	427158.886	7826382.693
BY ARC CENTERED AT				
	425260.306	7821268.627	425373.812	7821121.382
TO				
	427736.538	7826242.299	427850.002	7826094.934
BY STRAIGHT LINE TO				
	428022.253	7826236.036	428135.706	7826088.667
BY STRAIGHT LINE TO				
	428156.791	7826246.805	428270.239	7826099.433
BY ARC CENTERED AT				
	428600.134	7820708.522	428713.514	7820561.252
TO				
	428570.491	7826264.443	428683.924	7826117.065
BY STRAIGHT LINE TO				
	429162.392	7826267.601	429275.803	7826120.215
BY ARC CENTERED AT				
	429192.035	7820711.680	429305.394	7820564.403
TO				
	430131.803	7826187.625	430245.178	7826040.226
BY STRAIGHT LINE TO				
	430786.345	7826075.294	430899.692	7825927.885
BY STRAIGHT LINE TO				
	431353.456	7825984.137	431466.779	7825836.720

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	430471.706	7820498.551	430585.015	7820351.263
TO				
	432320.433	7825737.954	432433.716	7825590.525
BY STRAIGHT LINE TO				
	432676.269	7825612.397	432789.537	7825464.963
BY ARC CENTERED AT				
	430827.542	7820372.994	430940.836	7820225.704
TO				
	432961.543	7825502.826	433074.799	7825355.389
BY ARC CENTERED AT				
	431744.412	7820081.781	431857.666	7819934.484
TO				
	435428.847	7824240.396	435541.991	7824092.933
BY STRAIGHT LINE TO				
	435682.321	7824015.824	435795.451	7823868.358
BY ARC CENTERED AT				
	431997.886	7819857.209	432111.127	7819709.914
TO				
	436689.946	7822832.728	436803.021	7822685.256
BY STRAIGHT LINE TO				
	436736.244	7822759.721	436849.316	7822612.249
BY STRAIGHT LINE TO				
	436847.888	7822607.199	436960.954	7822459.726
BY ARC CENTERED AT				
	432364.617	7819325.519	432477.836	7819178.233
TO				
	437381.242	7821713.532	437494.274	7821566.070
BY STRAIGHT LINE TO				
	437564.166	7821329.255	437677.186	7821181.799
BY ARC CENTERED AT				
	434405.951	7816758.170	434519.057	7816610.924

Decree

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	438937.797	7819972.437	439050.743	7819824.985
BY ARC CENTERED AT				
	436724.577	7814876.282	436837.575	7814729.033
TO				
	439238.960	7819830.776	439351.892	7819683.320
BY ARC CENTERED AT				
	437770.067	7814472.466	437883.025	7814325.203
TO				
	439493.064	7819754.550	439605.984	7819607.087
BY STRAIGHT LINE TO				
	440529.231	7819416.556	440642.103	7819269.063
BY ARC CENTERED AT				
	438806.234	7814134.472	438919.155	7813987.193
TO				
	441042.907	7819220.377	441155.755	7819072.871
BY STRAIGHT LINE TO				
	441733.161	7818916.818	441845.979	7818769.295
BY ARC CENTERED AT				
	439496.488	7813830.913	439609.384	7813683.623
TO				
	442727.280	7818350.993	442840.055	7818203.451
BY STRAIGHT LINE TO				
	443479.125	7817813.601	443591.871	7817666.048
BY ARC CENTERED AT				
	440248.333	7813293.521	440361.204	7813146.222
TO				
	444142.981	7817255.951	444255.704	7817108.393
BY STRAIGHT LINE TO				
	444393.034	7817010.175	444505.750	7816862.617
BY ARC CENTERED AT				
	448783.482	7820415.040	448895.996	7820267.203

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	443821.560	7817915.347	443934.291	7817767.778
BY STRAIGHT LINE TO				
	443778.923	7817999.982	443891.655	7817852.412
BY ARC CENTERED AT				
	448740.845	7820499.675	448853.357	7820351.833
TO				
	444435.104	7824011.047	444547.785	7823863.284
BY ARC CENTERED AT				
	448772.815	7820539.246	448885.327	7820391.403
TO				
	447915.414	7826028.690	448027.948	7825880.768
BY STRAIGHT LINE TO				
	448296.947	7826088.282	448409.465	7825940.345
BY ARC CENTERED AT				
	449154.348	7820598.838	449266.868	7820451.004
TO				
	449856.380	7826110.307	449968.906	7825962.386
BY STRAIGHT LINE TO				
	450446.206	7826035.177	450558.747	7825887.275
BY ARC CENTERED AT				
	449744.174	7820523.708	449856.709	7820375.893
TO				
	451626.820	7825751.019	451739.390	7825603.157
BY STRAIGHT LINE TO				
	451965.990	7825628.865	452078.569	7825481.015
BY ARC CENTERED AT				
	450083.344	7820401.554	450195.888	7820253.753
TO				
	452738.934	7825281.818	452851.533	7825133.997
BY ARC CENTERED AT				
	450384.596	7820249.301	450497.149	7820101.514

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	452858.767	7825223.998	452971.369	7825076.182
BY ARC CENTERED AT				
	451286.633	7819895.065	451399.210	7819747.314
TO				
	453958.440	7824766.470	454071.075	7824618.697
BY STRAIGHT LINE TO				
	454117.186	7824679.403	454229.827	7824531.637
BY ARC CENTERED AT				
	451445.379	7819807.998	451557.960	7819660.254
TO				
	455571.355	7823528.947	455684.049	7823381.252
BY ARC CENTERED AT				
	453264.477	7818474.498	453377.102	7818326.834
TO				
	457598.596	7821950.781	457711.367	7821803.192
BY STRAIGHT LINE TO				
	457659.244	7821875.167	457772.017	7821727.581
BY ARC CENTERED AT				
	453325.125	7818398.884	453437.751	7818251.224
TO				
	457672.144	7821859.023	457784.917	7821711.438
BY ARC CENTERED AT				
	463149.858	7820929.623	463262.646	7820781.952
TO				
	457912.832	7822785.072	458025.612	7822637.477
BY ARC CENTERED AT				
	463232.652	7821182.372	463345.437	7821034.682
TO				
	458600.414	7824250.190	458713.199	7824102.563
BY STRAIGHT LINE TO				
	458647.117	7824320.709	458759.903	7824173.080

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	463279.355	7821252.891	463392.136	7821105.191
TO				
	459975.783	7825720.054	460088.578	7825572.383
BY STRAIGHT LINE TO				
	460262.899	7825932.383	460375.696	7825784.704
BY ARC CENTERED AT				
	463566.471	7821465.220	463679.228	7821317.461
TO				
	461205.401	7826494.582	461318.205	7826346.879
BY STRAIGHT LINE TO				
	461416.121	7826593.506	461528.927	7826445.798
BY ARC CENTERED AT				
	463777.191	7821564.144	463889.929	7821416.342
TO				
	463864.297	7827119.461	463977.015	7826971.526
BY STRAIGHT LINE TO				
	464099.251	7827115.777	464211.949	7826967.801
BY ARC CENTERED AT				
	464012.145	7821560.460	464124.859	7821412.611
TO				
	465926.117	7826776.383	466038.660	7826628.094
BY STRAIGHT LINE TO				
	466190.675	7826679.304	466303.196	7826530.970
BY ARC CENTERED AT				
	464276.703	7821463.381	464389.390	7821315.482
TO				
	468333.845	7825259.265	468446.241	7825110.727
BY STRAIGHT LINE TO				
	468466.221	7825117.778	468578.614	7824969.240
BY ARC CENTERED AT				
	464409.079	7821321.894	464521.751	7821173.972

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	468920.277	7824565.076	469032.659	7824416.539
BY STRAIGHT LINE TO				
	469559.951	7823675.303	469672.319	7823526.771
BY ARC CENTERED AT				
	465048.753	7820432.121	465161.351	7820284.101
TO				
	470207.214	7822495.957	470319.567	7822347.434
BY STRAIGHT LINE TO				
	470436.703	7821922.360	470549.051	7821773.843
BY ARC CENTERED AT				
	465278.242	7819858.524	465390.812	7819710.481
TO				
	470816.760	7820298.923	470929.102	7820150.476
BY STRAIGHT LINE TO				
	470835.014	7820069.358	470947.356	7819920.921
BY ARC CENTERED AT				
	465296.496	7819628.959	465409.062	7819480.921
TO				
	470700.288	7818337.382	470812.631	7818189.026
BY STRAIGHT LINE TO				
	470644.945	7818105.834	470757.288	7817957.489
BY ARC CENTERED AT				
	465241.153	7819397.411	465353.721	7819249.391
TO				
	470552.803	7817767.837	470665.147	7817619.509
BY ARC CENTERED AT				
	464999.130	7817607.051	465111.698	7817459.130
TO				
	470496.723	7816803.554	470609.067	7816655.272
BY STRAIGHT LINE TO				
	470470.063	7816621.144	470582.407	7816472.871

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	464972.470	7817424.641	465085.038	7817276.730
TO				
	469920.221	7814897.015	470032.569	7814748.839
BY ARC CENTERED AT				
	464933.948	7817347.773	465046.518	7817199.870
TO				
	468205.453	7812857.072	468317.812	7812709.061
BY STRAIGHT LINE TO				
	468059.641	7812750.847	468172.001	7812602.848
BY ARC CENTERED AT				
	464788.136	7817241.548	464900.717	7817093.670
TO				
	462104.814	7812376.477	462217.484	7812228.960
BY ARC CENTERED AT				
	464753.163	7817260.674	464865.747	7817112.801
TO				
	459239.952	7816572.456	459352.689	7816424.931
BY ARC CENTERED AT				
	464321.205	7818819.678	464433.848	7818671.831
TO				
	459039.326	7817096.050	459152.068	7816948.521
BY ARC CENTERED AT				
	463253.092	7820717.281	463365.866	7820569.592
TO				
	458880.683	7817289.282	458993.427	7817141.752
BY STRAIGHT LINE TO				
	458799.503	7817392.827	458912.248	7817245.296
BY ARC CENTERED AT				
	463171.912	7820820.826	463284.696	7820673.151
TO				
	458791.219	7817403.420	458903.964	7817255.889

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	453325.125	7818398.884	453437.751	7818251.224
TO				
	458774.887	7817317.574	458887.631	7817170.044
BY STRAIGHT LINE TO				
	458754.067	7817212.642	458866.809	7817065.113
BY ARC CENTERED AT				
	453304.305	7818293.952	453416.931	7818146.294
TO				
	457922.548	7815205.107	458035.264	7815057.604
BY STRAIGHT LINE TO				
	457830.549	7815067.556	457943.264	7814920.055
BY ARC CENTERED AT				
	453212.306	7818156.401	453324.930	7818008.744
TO				
	453097.613	7812601.585	453210.252	7812454.065
BY STRAIGHT LINE TO				
	453030.244	7812602.976	453142.883	7812455.456
BY ARC CENTERED AT				
	453144.937	7818157.792	453257.560	7818010.134
TO				
	450304.486	7813382.755	450417.125	7813235.213
BY ARC CENTERED AT				
	451832.751	7818724.435	451945.349	7818576.734
TO				
	447812.156	7814889.861	447924.789	7814742.274
BY ARC CENTERED AT				
	450917.435	7819497.071	451030.009	7819349.324
TO				
	447732.489	7814944.571	447845.123	7814796.985
BY ARC CENTERED AT				
	449109.924	7820327.118	449222.447	7820179.294

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	447502.442	7815008.741	447615.082	7814861.159
BY ARC CENTERED AT				
	448783.482	7820415.040	448895.996	7820267.203
TO				
	446531.677	7815335.817	446644.341	7815188.252
BY ARC CENTERED AT				
	442825.825	7811196.276	442938.623	7811048.962
TO				
	447547.359	7814124.801	447660.011	7813977.253
BY ARC CENTERED AT				
	442881.466	7811108.415	442994.263	7810961.102
TO				
	448179.666	7812781.201	448292.324	7812633.691
BY ARC CENTERED AT				
	448724.113	7807251.941	448836.829	7807104.630
TO				
	450269.652	7812588.648	450382.300	7812441.134
BY STRAIGHT LINE TO				
	450327.624	7812571.859	450440.272	7812424.346
BY ARC CENTERED AT				
	448782.085	7807235.152	448894.800	7807087.840
TO				
	451465.681	7812100.072	451578.329	7811952.570
BY ARC CENTERED AT				
	453199.037	7806821.378	453311.670	7806673.990
TO				
	454135.353	7812297.914	454248.003	7812150.410
BY ARC CENTERED AT				
	453263.428	7806810.758	453376.061	7806663.370
TO				
	456929.100	7810985.921	457041.767	7810838.459

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	457668.779	7805479.378	457781.379	7805331.981
TO				
	460533.645	7810239.807	460646.286	7810092.323
BY ARC CENTERED AT				
	461556.513	7804778.774	461669.047	7804631.309
TO				
	462121.497	7810305.973	462234.126	7810158.468
BY ARC CENTERED AT				
	461635.654	7804771.256	461748.187	7804623.789
TO				
	466099.715	7808079.019	466212.117	7807931.380
BY ARC CENTERED AT				
	463861.419	7802993.828	463973.868	7802846.310
TO				
	468499.263	7806053.164	468611.610	7805905.436
BY ARC CENTERED AT				
	464624.770	7802071.024	464737.189	7801923.489
TO				
	469329.709	7805026.136	469442.050	7804878.374
BY ARC CENTERED AT				
	466552.310	7800214.152	466664.679	7800066.580
TO				
	469456.014	7804950.991	469568.354	7804803.223
BY ARC CENTERED AT				
	468752.828	7799439.669	468865.170	7799292.009
TO				
	470479.055	7804720.699	470591.388	7804572.878
BY STRAIGHT LINE TO				
	470577.916	7804688.384	470690.248	7804540.558
BY ARC CENTERED AT				
	468851.689	7799407.354	468964.030	7799259.690

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	471161.767	7804460.341	471274.095	7804312.486
BY ARC CENTERED AT				
	469163.502	7799276.127	469275.840	7799128.450
TO				
	472517.546	7803705.520	472629.870	7803557.636
BY ARC CENTERED AT				
	469795.710	7798861.891	469908.040	7798714.190
TO				
	473471.772	7803027.909	473584.094	7802880.022
BY STRAIGHT LINE TO				
	473575.124	7802936.712	473687.446	7802788.825
BY ARC CENTERED AT				
	469899.062	7798770.694	470011.391	7798622.989
TO				
	473827.195	7802699.931	473939.516	7802552.044
BY ARC CENTERED AT				
	470248.316	7798450.136	470360.641	7798302.420
TO				
	474250.751	7802303.660	474363.069	7802155.773
BY ARC CENTERED AT				
	470344.307	7798352.859	470456.630	7798205.140
TO				
	475290.572	7800883.393	475402.880	7800735.510
BY STRAIGHT LINE TO				
	475296.993	7800870.841	475409.301	7800722.958
BY ARC CENTERED AT				
	470545.680	7797990.883	470658.000	7797843.160
TO				
	475661.331	7800158.659	475773.633	7800010.780
BY STRAIGHT LINE TO				
	475806.534	7799816.000	475918.833	7799668.123

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	470690.883	7797648.224	470803.201	7797500.500
TO				
	476172.814	7798552.418	476285.101	7798404.552
BY ARC CENTERED AT				
	471532.509	7795496.816	471644.810	7795349.089
TO				
	477065.078	7794987.090	477177.343	7794839.252
BY ARC CENTERED AT				
	477067.513	7789431.091	477179.689	7789283.300
TO				
	477376.239	7794978.507	477488.508	7794830.663
BY ARC CENTERED AT				
	477732.005	7789433.909	477844.188	7789286.100
TO				
	478961.521	7794852.158	479073.810	7794704.281
BY ARC CENTERED AT				
	477918.474	7789394.944	478030.658	7789247.130
TO				
	479741.340	7794643.401	479853.638	7794495.508
BY STRAIGHT LINE TO				
	479813.369	7794618.384	479925.667	7794470.490
BY ARC CENTERED AT				
	478451.261	7789231.938	478563.448	7789084.110
TO				
	480429.301	7794423.902	480541.606	7794275.995
BY ARC CENTERED AT				
	479354.916	7788972.771	479467.107	7788824.920
TO				
	480820.894	7794331.880	480933.204	7794183.964
BY STRAIGHT LINE TO				
	481160.252	7794239.049	481272.563	7794091.125

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	479694.274	7788879.940	479806.467	7788732.080
TO				
	482254.587	7793810.856	482366.882	7793662.896
BY STRAIGHT LINE TO				
	482395.901	7793744.955	482508.194	7793596.990
BY ARC CENTERED AT				
	480047.684	7788709.579	480159.877	7788561.710
TO				
	482524.900	7793682.761	482637.190	7793534.792
BY ARC CENTERED AT				
	481409.977	7788239.776	481522.167	7788091.870
TO				
	482650.643	7793655.483	482762.931	7793507.510
BY STRAIGHT LINE TO				
	482804.755	7793620.178	482917.041	7793472.200
BY ARC CENTERED AT				
	481564.089	7788204.471	481676.277	7788056.560
TO				
	483828.797	7793277.954	483941.065	7793129.943
BY ARC CENTERED AT				
	486910.156	7788654.713	487022.328	7788506.590
TO				
	484046.441	7793415.834	484158.709	7793267.815
BY ARC CENTERED AT				
	489585.932	7792987.843	489698.242	7792839.459
TO				
	484845.456	7795885.605	484957.715	7795737.558
BY ARC CENTERED AT				
	489624.990	7793052.728	489737.302	7792904.340
TO				
	486380.838	7797563.228	486493.084	7797415.103

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	487300.127	7803042.648	487412.361	7802894.457
TO				
	482848.122	7799718.676	482960.425	7799570.688
BY ARC CENTERED AT				
	487264.908	7803089.305	487377.141	7802941.117
TO				
	482035.666	7801212.030	482147.999	7801064.062
BY ARC CENTERED AT				
	484082.269	7806377.352	484194.529	7806229.328
TO				
	481479.888	7801468.508	481592.241	7801320.555
BY ARC CENTERED AT				
	483187.882	7806755.463	483300.185	7806607.459
TO				
	479441.507	7802652.560	479553.863	7802504.621
BY ARC CENTERED AT				
	483128.889	7806808.562	483241.195	7806660.559
TO				
	477870.737	7805013.855	477983.094	7804865.899
BY ARC CENTERED AT				
	480195.242	7810060.221	480307.633	7809912.199
TO				
	477218.346	7805369.035	477330.699	7805221.075
BY ARC CENTERED AT				
	479970.686	7810195.396	480083.075	7810047.369
TO				
	474479.758	7809347.549	474592.107	7809199.525
BY ARC CENTERED AT				
	479953.897	7810297.779	480066.285	7810149.749
TO				
	477755.093	7815400.170	477867.450	7815251.986

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	477896.042	7815460.910	478008.400	7815312.727
BY ARC CENTERED AT				
	480094.846	7810358.519	480207.235	7810210.489
TO				
	480638.595	7815887.847	480750.960	7815739.696
BY ARC CENTERED AT				
	480318.324	7810341.086	480430.715	7810193.059
TO				
	481380.580	7815794.594	481492.941	7815646.452
BY ARC CENTERED AT				
	480565.522	7810298.703	480677.915	7810150.679
TO				
	481808.289	7815713.928	481920.635	7815565.782
BY STRAIGHT LINE TO				
	482060.556	7815656.034	482172.892	7815507.885
BY ARC CENTERED AT				
	480817.789	7810240.809	480930.184	7810092.789
TO				
	482438.670	7815555.118	482550.992	7815406.966
BY ARC CENTERED AT				
	481455.228	7810086.848	481567.613	7809938.829
TO				
	484839.987	7814492.815	484952.217	7814344.647
BY ARC CENTERED AT				
	481959.139	7809742.041	482071.501	7809594.019
TO				
	486400.375	7813080.387	486512.570	7812932.190
BY STRAIGHT LINE TO				
	486494.079	7812955.726	486606.276	7812807.525
BY ARC CENTERED AT				
	482052.843	7809617.380	482165.201	7809469.359

Decree

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	486816.311	7812477.190	486928.513	7812328.973
BY STRAIGHT LINE TO				
	486991.967	7812184.607	487104.172	7812036.382
BY ARC CENTERED AT				
	482228.499	7809324.797	482340.849	7809176.779
TO				
	487510.239	7811048.851	487622.454	7810900.604
BY STRAIGHT LINE TO				
	487666.367	7810986.957	487778.585	7810838.699
BY ARC CENTERED AT				
	485618.826	7805822.007	485731.015	7805673.948
TO				
	488811.335	7810369.207	488923.579	7810220.870
BY ARC CENTERED AT				
	486096.419	7805521.695	486208.608	7805373.608
TO				
	489290.826	7810067.561	489403.081	7809919.190
BY ARC CENTERED AT				
	486366.353	7805343.517	486478.550	7805195.407
TO				
	490105.259	7809453.227	490217.535	7809304.798
BY ARC CENTERED AT				
	487141.704	7804753.602	487253.924	7804605.427
TO				
	490702.996	7809018.146	490815.284	7808869.678
BY ARC CENTERED AT				
	487171.793	7804728.654	487284.014	7804580.476
TO				
	492533.724	7806184.274	492646.027	7806035.720
BY ARC CENTERED AT				
	487243.440	7804486.620	487355.664	7804338.436

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	492617.196	7805897.961	492729.499	7805749.403
BY ARC CENTERED AT				
	487460.921	7803828.670	487573.154	7803680.467
TO				
	492934.736	7804780.764	493047.039	7804632.192
BY ARC CENTERED AT				
	495428.257	7799815.737	495540.529	7799667.074
TO				
	493298.902	7804947.499	493411.205	7804798.908
BY ARC CENTERED AT				
	496363.147	7800312.897	496475.412	7800164.214
TO				
	494750.318	7805629.655	494862.625	7805480.990
BY STRAIGHT LINE TO				
	494933.220	7805685.138	495045.528	7805536.463
BY ARC CENTERED AT				
	496546.049	7800368.380	496658.312	7800219.693
TO				
	497786.750	7805784.079	497899.040	7805635.322
BY ARC CENTERED AT				
	496878.153	7800302.876	496990.412	7800154.183
TO				
	497821.793	7805778.155	497934.083	7805629.397
BY STRAIGHT LINE TO				
	498201.977	7805712.632	498314.263	7805563.865
BY ARC CENTERED AT				
	497258.337	7800237.353	497370.591	7800088.653
TO				
	498939.976	7805532.750	499052.256	7805383.965
BY ARC CENTERED AT				
	499180.488	7799981.958	499292.718	7799833.224

Decree

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	500163.181	7805450.363	500275.447	7805301.550
BY STRAIGHT LINE TO				
	500663.627	7805360.431	500775.880	7805211.611
BY ARC CENTERED AT				
	499680.934	7799892.026	499793.157	7799743.284
TO				
	503222.100	7804173.297	503334.279	7804024.457
BY STRAIGHT LINE TO				
	503465.554	7803971.929	503577.725	7803823.089
BY ARC CENTERED AT				
	499924.388	7799690.658	500036.606	7799541.914
TO				
	503565.295	7803887.434	503677.462	7803738.594
BY STRAIGHT LINE TO				
	503569.847	7803883.486	503682.014	7803734.646
BY ARC CENTERED AT				
	501819.819	7798610.295	501931.973	7798461.555
TO				
	504765.229	7803321.314	504877.360	7803172.466
BY STRAIGHT LINE TO				
	505131.361	7803092.402	505243.481	7802943.546
BY ARC CENTERED AT				
	502185.951	7798381.383	502298.092	7798232.645
TO				
	505663.006	7802714.883	505775.110	7802566.016
BY ARC CENTERED AT				
	502919.546	7797883.469	503031.660	7797734.736
TO				
	506219.840	7802353.055	506331.928	7802204.176
BY STRAIGHT LINE TO				
	506458.538	7802176.803	506570.618	7802027.919

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	503158.244	7797707.217	503270.349	7797558.486
TO				
	507359.717	7801342.703	507471.768	7801193.804
BY STRAIGHT LINE TO				
	507504.292	7801175.620	507616.338	7801026.719
BY ARC CENTERED AT				
	503302.819	7797540.134	503414.918	7797391.406
TO				
	508187.013	7800188.489	508299.034	7800039.582
BY STRAIGHT LINE TO				
	508237.365	7800095.628	508349.383	7799946.721
BY ARC CENTERED AT				
	503353.171	7797447.273	503465.267	7797298.546
TO				
	508703.658	7798944.412	508815.654	7798795.509
BY ARC CENTERED AT				
	504078.841	7795865.418	504190.895	7795716.718
TO				
	509046.958	7798352.777	509158.940	7798203.873
BY STRAIGHT LINE TO				
	509069.704	7798341.805	509181.686	7798192.900
BY ARC CENTERED AT				
	506655.974	7793337.503	506767.935	7793188.779
TO				
	510567.955	7797282.822	510679.893	7797133.884
BY ARC CENTERED AT				
	513005.762	7792290.204	513117.578	7792141.279
TO				
	511628.355	7797672.758	511740.274	7797523.777
BY STRAIGHT LINE TO				
	511851.327	7797729.817	511963.242	7797580.827

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	513228.734	7792347.263	513340.547	7792198.329
TO				
	513068.751	7797900.959	513180.641	7797751.924
BY STRAIGHT LINE TO				
	513339.176	7797908.749	513451.060	7797759.705
BY ARC CENTERED AT				
	513499.159	7792355.053	513610.967	7792206.109
TO				
	514165.918	7797870.900	514277.782	7797721.828
BY STRAIGHT LINE TO				
	514246.178	7797861.198	514358.039	7797712.123
BY ARC CENTERED AT				
	514136.844	7792306.274	514248.637	7792157.310
TO				
	514891.211	7797810.824	515003.051	7797661.729
BY ARC CENTERED AT				
	514843.789	7792255.026	514955.558	7792106.039
TO				
	516594.741	7797527.910	516706.523	7797378.762
BY ARC CENTERED AT				
	516068.055	7791996.930	516179.778	7791847.909
TO				
	516635.327	7797523.895	516747.108	7797374.746
BY ARC CENTERED AT				
	517034.908	7791982.282	517146.600	7791833.229
TO				
	516992.729	7797538.122	517104.498	7797388.961
BY STRAIGHT LINE TO				
	517412.123	7797541.306	517523.879	7797392.131
BY ARC CENTERED AT				
	517454.302	7791985.466	517565.981	7791836.399

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	518084.887	7797505.565	518196.621	7797356.368
BY STRAIGHT LINE TO				
	518338.856	7797476.553	518450.581	7797327.348
BY ARC CENTERED AT				
	517708.271	7791956.454	517819.941	7791807.379
TO				
	518913.261	7797380.211	519024.967	7797230.989
BY STRAIGHT LINE TO				
	519142.249	7797329.337	519253.947	7797180.108
BY ARC CENTERED AT				
	517937.259	7791905.580	518048.921	7791756.499
TO				
	519814.680	7797134.770	519926.354	7796985.523
BY STRAIGHT LINE TO				
	519846.654	7797123.290	519958.327	7796974.042
BY ARC CENTERED AT				
	521446.833	7791802.711	521558.383	7791653.519
TO				
	520342.645	7797247.884	520454.303	7797098.619
BY STRAIGHT LINE TO				
	520599.072	7797299.883	520710.722	7797150.609
BY ARC CENTERED AT				
	521703.260	7791854.710	521814.804	7791705.509
TO				
	520942.708	7797358.408	521054.347	7797209.122
BY STRAIGHT LINE TO				
	521135.393	7797385.035	521247.026	7797235.742
BY ARC CENTERED AT				
	521895.945	7791881.337	522007.483	7791732.129
TO				
	522102.915	7797433.481	522214.517	7797284.157

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	522564.480	7797416.275	522676.067	7797266.936
BY ARC CENTERED AT				
	522357.510	7791864.131	522469.034	7791714.909
TO				
	523148.813	7797363.492	523260.380	7797214.136
BY STRAIGHT LINE TO				
	523591.978	7797299.725	523703.530	7797150.358
BY ARC CENTERED AT				
	522800.675	7791800.364	522912.184	7791651.129
TO				
	523805.818	7797264.687	523917.362	7797115.316
BY STRAIGHT LINE TO				
	524045.366	7797220.623	524156.901	7797071.248
BY ARC CENTERED AT				
	523040.223	7791756.300	523151.724	7791607.059
TO				
	524798.535	7797026.734	524910.041	7796877.347
BY STRAIGHT LINE TO				
	525005.823	7796957.579	525117.322	7796808.190
BY ARC CENTERED AT				
	523247.511	7791687.145	523359.004	7791537.899
TO				
	525498.766	7796766.612	525610.245	7796617.216
BY STRAIGHT LINE TO				
	525519.302	7796757.510	525630.781	7796608.114
BY ARC CENTERED AT				
	524401.959	7791315.022	524513.407	7791165.760
TO				
	526767.055	7796342.492	526878.486	7796193.078
BY STRAIGHT LINE TO				
	526844.902	7796305.870	526956.330	7796156.455

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	526955.564	7796259.217	527066.988	7796109.801
BY ARC CENTERED AT				
	524797.207	7791139.585	524908.638	7790990.319
TO				
	528003.290	7795677.224	528114.673	7795527.797
BY ARC CENTERED AT				
	525147.983	7790911.056	525259.398	7790761.789
TO				
	529117.784	7794798.190	529229.127	7794648.755
BY STRAIGHT LINE TO				
	529118.788	7794797.165	529230.131	7794647.730
BY ARC CENTERED AT				
	525584.706	7790510.045	525696.099	7790360.779
TO				
	529685.512	7794258.715	529796.835	7794109.278
BY STRAIGHT LINE TO				
	529771.442	7794266.494	529882.763	7794117.055
BY ARC CENTERED AT				
	530272.400	7788733.125	530383.625	7788583.800
TO				
	530250.697	7794289.083	530362.004	7794139.634
BY STRAIGHT LINE TO				
	530580.426	7794290.371	530691.723	7794140.915
BY ARC CENTERED AT				
	530602.129	7788734.413	530713.346	7788585.080
TO				
	530618.483	7794290.389	530729.779	7794140.932
BY ARC CENTERED AT				
	531725.309	7788845.752	531836.498	7788696.391
TO				
	531014.270	7794356.066	531125.554	7794206.600

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	531256.416	7794387.312	531367.693	7794237.841
BY ARC CENTERED AT				
	531967.455	7788876.998	532078.638	7788727.631
TO				
	531807.267	7794430.688	531918.528	7794281.205
BY STRAIGHT LINE TO				
	532016.153	7794436.713	532127.408	7794287.226
BY ARC CENTERED AT				
	532176.341	7788883.023	532287.519	7788733.651
TO				
	532968.235	7794382.299	533079.461	7794232.794
BY STRAIGHT LINE TO				
	533125.020	7794359.722	533236.240	7794210.214
BY ARC CENTERED AT				
	532333.126	7788860.446	532444.299	7788711.070
TO				
	534086.100	7794132.658	534197.283	7793983.134
BY STRAIGHT LINE TO				
	534238.034	7794082.141	534349.211	7793932.615
BY ARC CENTERED AT				
	532485.060	7788809.929	532596.229	7788660.551
TO				
	534458.893	7794003.494	534570.062	7793853.965
BY ARC CENTERED AT				
	533217.075	7788588.051	533328.220	7788438.661
TO				
	534646.868	7793956.927	534758.029	7793807.395
BY STRAIGHT LINE TO				
	534790.264	7793918.739	534901.419	7793769.205
BY ARC CENTERED AT				
	533360.471	7788549.863	533471.610	7788400.471

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	535224.659	7793783.785	535335.796	7793634.245
BY STRAIGHT LINE TO				
	535502.352	7793763.069	535613.479	7793613.524
BY ARC CENTERED AT				
	535089.019	7788222.465	535200.095	7788073.042
TO				
	536299.874	7793644.915	536410.970	7793495.356
BY STRAIGHT LINE TO				
	536537.789	7793591.788	536648.875	7793442.225
BY STRAIGHT LINE TO				
	536629.866	7793577.467	536740.949	7793427.903
BY ARC CENTERED AT				
	535776.026	7788087.468	535887.077	7787938.032
TO				
	537640.191	7793321.398	537751.234	7793171.818
BY ARC CENTERED AT				
	536213.094	7787951.805	536324.129	7787802.362
TO				
	538214.200	7793134.923	538325.222	7792985.338
BY STRAIGHT LINE TO				
	538584.184	7792992.079	538695.192	7792842.490
BY ARC CENTERED AT				
	536583.078	7787808.961	536694.099	7787659.513
TO				
	538940.968	7792839.815	539051.963	7792690.223
BY STRAIGHT LINE TO				
	539384.527	7792631.925	539495.506	7792482.330
BY ARC CENTERED AT				
	537304.997	7787479.771	537415.990	7787330.314
TO				
	540063.112	7792302.834	540174.066	7792153.234

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	540111.947	7792274.907	540222.899	7792125.307
BY ARC CENTERED AT				
	538293.001	7787025.091	538403.960	7786875.624
TO				
	540480.112	7792132.506	540591.051	7791982.903
BY STRAIGHT LINE TO				
	540842.183	7791977.459	540953.109	7791827.853
BY ARC CENTERED AT				
	538655.072	7786870.044	538766.019	7786720.573
TO				
	541071.795	7791872.902	541182.713	7791723.294
BY STRAIGHT LINE TO				
	541356.883	7791735.185	541467.791	7791585.575
BY ARC CENTERED AT				
	538940.160	7786732.327	539051.098	7786582.854
TO				
	541968.057	7791390.757	542078.943	7791241.143
BY STRAIGHT LINE TO				
	542307.157	7791170.348	542418.031	7791020.733
BY ARC CENTERED AT				
	539279.260	7786511.918	539390.187	7786362.444
TO				
	542857.172	7790762.528	542968.022	7790612.911
BY STRAIGHT LINE TO				
	543131.330	7790531.758	543242.168	7790382.141
BY ARC CENTERED AT				
	539553.418	7786281.148	539664.335	7786131.673
TO				
	543156.153	7790510.739	543266.990	7790361.122
BY ARC CENTERED AT				
	541815.130	7785119.005	541925.978	7784969.514

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	543679.842	7790352.740	543790.657	7790203.116
BY ARC CENTERED AT				
	542593.371	7784904.005	542704.196	7784754.504
TO				
	544813.221	7789997.275	544923.988	7789847.638
BY STRAIGHT LINE TO				
	545549.432	7789676.405	545660.168	7789526.760
BY ARC CENTERED AT				
	543329.582	7784583.135	543440.376	7784433.624
TO				
	546294.226	7789282.073	546404.931	7789132.421
BY STRAIGHT LINE TO				
	547519.295	7788509.155	547629.947	7788359.502
BY ARC CENTERED AT				
	544554.651	7783810.217	544665.393	7783660.694
TO				
	547970.917	7788191.799	548081.549	7788042.154
BY STRAIGHT LINE TO				
	548986.607	7787399.878	549097.194	7787250.254
BY ARC CENTERED AT				
	545570.341	7783018.296	545681.039	7782868.764
TO				
	549333.357	7787105.941	549443.929	7786956.324
BY STRAIGHT LINE TO				
	549458.702	7786990.551	549569.268	7786840.937
BY STRAIGHT LINE TO				
	549646.311	7786881.274	549756.869	7786731.664
BY ARC CENTERED AT				
	546849.891	7782080.319	546960.535	7781930.773
TO				
	550597.973	7786181.662	550708.489	7786032.072

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	551808.300	7785075.584	551918.763	7784926.025
BY ARC CENTERED AT				
	548060.218	7780974.241	548170.809	7780824.712
TO				
	551927.164	7784963.710	552037.621	7784814.154
BY STRAIGHT LINE TO				
	553432.029	7783505.062	553542.444	7783355.513
BY ARC CENTERED AT				
	549565.083	7779515.593	549675.600	7779366.113
TO				
	553565.190	7783371.534	553675.601	7783221.985
BY STRAIGHT LINE TO				
	554044.590	7782874.210	554154.988	7782724.664
BY STRAIGHT LINE TO				
	554621.494	7782372.773	554731.877	7782223.227
BY STRAIGHT LINE TO				
	554803.200	7782221.526	554913.578	7782071.980
BY STRAIGHT LINE TO				
	555234.630	7781937.838	555344.998	7781788.291
BY ARC CENTERED AT				
	554865.455	7776394.117	554975.785	7776244.691
TO				
	558042.785	7780951.936	558153.100	7780802.354
BY ARC CENTERED AT				
	556111.788	7775742.292	556222.087	7775592.862
TO				
	558600.577	7780709.692	558710.884	7780560.102
BY ARC CENTERED AT				
	557719.059	7775224.069	557829.330	7775074.625
TO				
	558972.448	7780636.846	559082.750	7780487.248

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	559105.320	7780606.078	559215.620	7780456.478
BY ARC CENTERED AT				
	557851.931	7775193.301	557962.201	7775043.855
TO				
	561899.735	7778999.141	562009.991	7778849.517
BY ARC CENTERED AT				
	558129.396	7774918.249	558239.661	7774768.804
TO				
	562290.849	7778599.478	562401.099	7778449.853
BY ARC CENTERED AT				
	558510.252	7774528.087	558620.510	7774378.644
TO				
	562788.721	7778072.638	562898.964	7777923.011
BY ARC CENTERED AT				
	558695.355	7774315.845	558805.609	7774166.404
TO				
	563134.630	7777656.798	563244.867	7777507.171
BY ARC CENTERED AT				
	558734.725	7774264.164	558844.978	7774114.724
TO				
	563143.709	7777644.992	563253.946	7777495.365
BY ARC CENTERED AT				
	560751.540	7772630.347	560861.764	7772480.913
TO				
	563225.888	7777604.956	563336.124	7777455.328
BY ARC CENTERED AT				
	560811.571	7772600.937	560921.794	7772451.502
TO				
	563377.419	7777528.975	563487.654	7777379.344

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	560874.842	7772568.507	560985.064	7772419.072
TO				
	563463.231	7777484.743	563573.465	7777335.110
BY ARC CENTERED AT				
	561234.945	7772395.158	561345.164	7772245.722
TO				
	563606.930	7777419.382	563717.162	7777269.747
BY ARC CENTERED AT				
	561451.257	7772298.619	561561.473	7772149.182
TO				
	563690.689	7777383.310	563800.921	7777233.673
BY ARC CENTERED AT				
	562019.972	7772084.457	562130.183	7771935.012
TO				
	565261.440	7776596.887	565371.656	7776447.222
BY ARC CENTERED AT				
	567075.128	7771345.252	567185.314	7771195.671
TO				
	566195.727	7776831.215	566305.937	7776681.514
BY ARC CENTERED AT				
	567351.040	7771396.660	567461.225	7771247.071
TO				
	567421.629	7776952.212	567531.830	7776802.479
BY ARC CENTERED AT				
	567723.512	7771404.419	567833.695	7771254.822
TO				
	568085.544	7776948.611	568195.740	7776798.863
BY ARC CENTERED AT				
	568228.856	7771394.460	568339.036	7771244.852
TO				
	568327.340	7776949.587	568437.534	7776799.834

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	568486.107	7771395.856	568596.286	7771246.242
TO				
	571342.693	7776161.257	571452.863	7776011.458
BY ARC CENTERED AT				
	572730.327	7770781.331	572840.486	7770631.653
TO				
	575699.094	7775477.666	575809.241	7775327.835
BY STRAIGHT LINE TO				
	575843.904	7775386.125	575954.050	7775236.295
BY ARC CENTERED AT				
	572875.137	7770689.790	572985.295	7770540.113
TO				
	578324.897	7771771.107	578435.041	7771621.343
BY ARC CENTERED AT				
	579568.323	7766356.033	579678.466	7766206.396
TO				
	579584.003	7771912.011	579694.145	7771762.230
BY STRAIGHT LINE TO				
	579834.523	7771911.304	579944.665	7771761.520
BY ARC CENTERED AT				
	579818.843	7766355.326	579928.986	7766205.685
TO				
	581134.479	7771753.311	581244.619	7771603.517
BY STRAIGHT LINE TO				
	581323.949	7771707.132	581434.088	7771557.336
BY ARC CENTERED AT				
	580008.313	7766309.147	580118.456	7766159.505
TO				
	582660.693	7771191.156	582770.826	7771041.355

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	583730.879	7770992.845	583841.007	7770843.035
BY ARC CENTERED AT				
	582718.557	7765529.848	582828.686	7765380.186
TO				
	584255.684	7770868.984	584365.810	7770719.170
BY STRAIGHT LINE TO				
	585825.726	7770416.972	585935.845	7770267.149
BY ARC CENTERED AT				
	584288.599	7765077.836	584398.718	7764928.157
TO				
	586365.999	7770230.849	586476.112	7770081.032
BY STRAIGHT LINE TO				
	586690.492	7770100.032	586800.602	7769950.218
BY ARC CENTERED AT				
	584613.092	7764947.019	584723.208	7764797.338
TO				
	587084.594	7769923.043	587194.700	7769773.234
BY STRAIGHT LINE TO				
	588070.731	7769433.246	588180.827	7769283.450
BY STRAIGHT LINE TO				
	588081.281	7769431.241	588191.376	7769281.445
BY ARC CENTERED AT				
	587718.941	7763887.069	587829.027	7763737.397
TO				
	588610.687	7769371.039	588720.776	7769221.247
BY STRAIGHT LINE TO				
	588726.898	7769523.960	588836.985	7769374.165
BY STRAIGHT LINE TO				
	589384.755	7770476.137	589494.831	7770326.326

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	589926.819	7771272.634	590036.886	7771122.809
BY STRAIGHT LINE TO				
	590420.401	7772031.759	590530.461	7771881.920
BY ARC CENTERED AT				
	595747.010	7770451.768	595857.113	7770301.984
TO				
	590428.461	7772058.681	590538.521	7771908.842
BY ARC CENTERED AT				
	595823.472	7770730.905	595933.574	7770581.115
TO				
	590845.225	7773197.925	590955.284	7773048.065
BY ARC CENTERED AT				
	595925.764	7770949.091	596035.866	7770799.296
TO				
	591071.570	7773652.041	591181.629	7773502.174
BY ARC CENTERED AT				
	595980.914	7771050.603	596091.016	7770900.806
TO				
	591810.265	7774721.409	591920.324	7774571.524
BY ARC CENTERED AT				
	596079.994	7771166.336	596190.096	7771016.536
TO				
	592611.327	7775506.553	592721.386	7775356.656
BY ARC CENTERED AT				
	596351.244	7771397.763	596461.347	7771247.958
TO				
	592978.656	7775813.053	593088.716	7775663.152
BY ARC CENTERED AT				
	596671.934	7771662.290	596782.038	7771512.479
TO				
	593369.968	7776130.641	593480.028	7775980.735

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	596850.563	7771799.983	596960.668	7771650.169
TO				
	593934.002	7776528.916	594044.062	7776379.005
BY ARC CENTERED AT				
	597079.552	7771949.107	597189.658	7771799.289
TO				
	594273.933	7776744.692	594383.994	7776594.778
BY STRAIGHT LINE TO				
	594667.932	7776975.198	594777.993	7776825.281
BY ARC CENTERED AT				
	597473.551	7772179.613	597583.659	7772029.790
TO				
	595778.919	7777470.866	595888.984	7777320.941
BY ARC CENTERED AT				
	597651.120	7772239.805	597761.230	7772089.980
TO				
	596126.176	7777582.434	596236.242	7777432.506
BY STRAIGHT LINE TO				
	596342.874	7777644.286	596452.941	7777494.357
BY ARC CENTERED AT				
	597867.818	7772301.657	597977.929	7772151.830
TO				
	596357.839	7777648.534	596467.906	7777498.605
BY ARC CENTERED AT				
	598479.634	7772513.642	598589.749	7772363.810
TO				
	596917.213	7777845.431	597027.283	7777695.498
BY ARC CENTERED AT				
	598747.173	7772599.444	598857.290	7772449.610
TO				
	597971.278	7778101.000	598081.353	7777951.063

	NAD 83/WGS 84 UTM ZONE 6 (meters) X–COORD	Y–COORD	NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters) X–COORD	Y–COORD
BY ARC CENTERED AT				
	598834.542	7772612.475	598944.659	7772462.640
TO				
	598646.643	7778165.297	598756.722	7778015.359
BY ARC CENTERED AT				
	598932.881	7772616.675	599042.999	7772466.840
TO				
	599016.783	7778172.041	599126.864	7778022.103
BY ARC CENTERED AT				
	599439.636	7772632.156	599549.758	7772482.320
TO				
	599320.489	7778186.878	599430.572	7778036.940
BY ARC CENTERED AT				
	599989.863	7772671.348	600099.988	7772521.509
TO				
	599959.107	7778227.263	600069.191	7778077.323
BY ARC CENTERED AT				
	600295.585	7772681.461	600405.708	7772531.619
TO				
	600005.196	7778229.867	600115.280	7778079.927
BY STRAIGHT LINE TO				
	600045.998	7778232.003	600156.082	7778082.063
BY ARC CENTERED AT				
	603916.492	7774245.975	604026.587	7774096.081
TO				
	600154.044	7778334.143	600264.127	7778184.201
BY STRAIGHT LINE TO				
	600504.799	7778656.952	600614.879	7778507.003
BY ARC CENTERED AT				
	604267.247	7774568.784	604377.338	7774418.883
TO				
	601334.186	7779287.501	601444.260	7779137.540

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	601652.256	7779485.207	601762.329	7779335.243
BY STRAIGHT LINE TO				
	601759.936	7779559.469	601870.008	7779409.503
BY ARC CENTERED AT				
	604914.269	7774985.705	605024.359	7774835.795
TO				
	604179.042	7780492.844	604289.106	7780342.863
BY STRAIGHT LINE TO				
	604390.580	7780521.085	604500.645	7780371.103
BY ARC CENTERED AT				
	608461.886	7776740.397	608571.989	7776590.454
TO				
	604718.140	7780845.699	604828.206	7780695.714
BY ARC CENTERED AT				
	608787.356	7777062.761	608897.460	7776912.814
TO				
	605201.230	7781306.443	605311.297	7781156.453
BY ARC CENTERED AT				
	608962.035	7777216.763	609072.139	7777066.815
TO				
	605835.970	7781809.894	605946.040	7781659.900
BY ARC CENTERED AT				
	609311.544	7777475.206	609421.649	7777325.254
TO				
	606076.120	7781991.972	606186.191	7781841.977
BY ARC CENTERED AT				
	609596.264	7777693.399	609706.369	7777543.444
TO				
	606509.524	7782313.050	606619.597	7782163.052

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	606589.473	7782366.470	606699.546	7782216.472
BY ARC CENTERED AT				
	609676.213	7777746.819	609786.319	7777596.863
TO				
	607198.591	7782719.798	607308.665	7782569.799
BY ARC CENTERED AT				
	610065.752	7777960.752	610175.858	7777810.793
TO				
	607906.978	7783080.208	608017.054	7782930.207
BY STRAIGHT LINE TO				
	607981.608	7783111.678	608091.684	7782961.677
BY ARC CENTERED AT				
	610140.382	7777992.222	610250.488	7777842.263
TO				
	608317.198	7783240.568	608427.275	7783090.567
BY STRAIGHT LINE TO				
	608392.554	7783279.028	608502.631	7783129.027
BY ARC CENTERED AT				
	610918.258	7778330.295	611028.366	7778180.330
TO				
	608532.131	7783347.818	608642.209	7783197.817
BY ARC CENTERED AT				
	611071.097	7778405.876	611181.205	7778255.910
TO				
	609775.633	7783808.737	609885.715	7783658.733
BY ARC CENTERED AT				
	611581.964	7778554.567	611692.074	7778404.598
TO				
	611160.145	7784094.531	611270.233	7783944.526

	NAD 83/WGS 84 UTM ZONE 6 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	611869.163	7778583.957	611979.274	7778433.987
TO				
	611787.488	7784139.357	611897.580	7783989.352
BY STRAIGHT LINE TO				
	611796.577	7784146.759	611906.669	7783996.754
BY ARC CENTERED AT				
	615305.027	7779838.637	615415.140	7779688.628
TO				
	612110.231	7784384.230	612220.323	7784234.224
BY ARC CENTERED AT				
	617214.680	7782190.207	617324.789	7782040.165
TO				
	612381.562	7784930.664	612491.650	7784780.653
BY STRAIGHT LINE TO				
	612506.546	7785151.088	612616.632	7785001.075
BY ARC CENTERED AT				
	617339.664	7782410.631	617449.773	7782260.588
TO				
	613595.417	7786515.549	613705.495	7786365.525

	NAD 83/WGS 84 UTM ZONE 6 Enclave (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 Enclave (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BEGINNING AT				
	500190.454	7789750.990	500302.466	7789602.387
BY ARC CENTERED AT				
	503919.064	7793870.044	504031.098	7793721.380
TO				
	499316.076	7790758.511	499428.145	7790609.892
BY ARC CENTERED AT				
	503278.860	7794652.799	503390.924	7794504.120

	NAD 83/WGS 84 UTM ZONE 6 Enclave (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 Enclave (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	498649.798	7791580.191	498761.908	7791431.565
BY ARC CENTERED AT				
	493253.521	7790257.568	493365.702	7790109.069
TO				
	498661.424	7791531.821	498773.532	7791383.196
BY STRAIGHT LINE TO				
	498725.704	7791259.018	498837.801	7791110.397
BY ARC CENTERED AT				
	493317.801	7789984.765	493429.972	7789836.269
TO				
	498775.470	7791025.433	498887.559	7790876.815
BY STRAIGHT LINE TO				
	498895.451	7790396.206	499007.516	7790247.598
BY ARC CENTERED AT				
	493437.782	7789355.538	493549.932	7789207.049
TO				
	498977.053	7788924.714	499089.065	7788776.130
BY ARC CENTERED AT				
	493425.668	7789151.114	493537.812	7789002.630
TO				
	498953.779	7788595.124	499065.780	7788446.546
BY ARC CENTERED AT				
	499540.875	7783070.230	499652.667	7782921.741
TO				
	499216.562	7788616.757	499328.558	7788468.176
BY STRAIGHT LINE TO				
	499394.112	7788627.138	499506.105	7788478.555
BY STRAIGHT LINE TO				
	499458.343	7788684.043	499570.336	7788535.458

	NAD 83/WGS 84 UTM ZONE 6 Enclave (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 6 Enclave (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	503142.675	7784525.337	503254.405	7784376.911
TO				
	499694.050	7788881.496	499806.045	7788732.905
BY ARC CENTERED AT				
	504747.660	7786572.782	504859.416	7786424.330
TO				
	500190.454	7789750.990	500302.466	7789602.387

	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BEGINNING AT				
	386404.584	7786515.549	386506.593	7786355.070
BY ARC CENTERED AT				
	389726.957	7782062.351	389828.993	7781901.852
TO				
	387295.348	7787057.990	387397.346	7786897.497
BY STRAIGHT LINE TO				
	387498.499	7787156.873	387600.495	7786996.377
BY ARC CENTERED AT				
	389930.108	7782161.234	390032.143	7782000.732
TO				
	389461.870	7787697.468	389563.849	7787536.948
BY STRAIGHT LINE TO				
	389767.071	7787723.281	389869.048	7787562.757
BY ARC CENTERED AT				
	390235.309	7782187.047	390337.343	7782026.540
TO				
	390423.087	7787739.873	390525.060	7787579.342
BY STRAIGHT LINE TO				
	390650.697	7787732.176	390752.669	7787571.643

	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	390462.919	7782179.350	390564.951	7782018.840
TO				
	392417.532	7787380.179	392519.488	7787219.634
BY STRAIGHT LINE TO				
	392551.238	7787329.929	392653.193	7787169.383
BY STRAIGHT LINE TO				
	392628.118	7787375.093	392730.071	7787214.547
BY ARC CENTERED AT				
	395442.427	7782584.603	395544.386	7782424.052
TO				
	393857.000	7787909.597	393958.932	7787749.041
BY STRAIGHT LINE TO				
	394291.164	7788038.862	394393.089	7787878.303
BY ARC CENTERED AT				
	395876.591	7782713.868	395978.547	7782553.313
TO				
	394984.955	7788197.856	395086.870	7788037.292
BY STRAIGHT LINE TO				
	396780.692	7788489.823	396882.593	7788329.244
BY ARC CENTERED AT				
	397672.328	7783005.835	397774.285	7782845.261
TO				
	397065.185	7788528.562	397167.085	7788367.981
BY STRAIGHT LINE TO				
	398031.744	7788634.821	398133.643	7788474.231
BY ARC CENTERED AT				
	398638.887	7783112.094	398740.844	7782951.510
TO				
	398330.390	7788659.523	398432.288	7788498.930
BY ARC CENTERED AT				
	401665.118	7784215.569	401767.057	7784054.960

	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	398909.866	7789040.268	399011.760	7788879.669
BY STRAIGHT LINE TO				
	399192.881	7789201.890	399294.773	7789041.288
BY ARC CENTERED AT				
	401948.133	7784377.191	402050.068	7784216.581
TO				
	400583.374	7789762.966	400685.258	7789602.351
BY STRAIGHT LINE TO				
	400845.457	7789829.378	400947.339	7789668.762
BY ARC CENTERED AT				
	402210.216	7784443.603	402312.148	7784282.992
TO				
	402035.377	7789996.851	402137.249	7789836.232
BY STRAIGHT LINE TO				
	402287.599	7790004.792	402389.469	7789844.172
BY ARC CENTERED AT				
	402462.438	7784451.544	402564.368	7784290.932
TO				
	403753.962	7789855.348	403855.824	7789694.724
BY STRAIGHT LINE TO				
	404069.063	7789780.038	404170.923	7789619.414
BY ARC CENTERED AT				
	402777.539	7784376.234	402879.468	7784215.621
TO				
	405605.442	7789158.713	405707.301	7788998.087
BY STRAIGHT LINE TO				
	405668.397	7789131.637	405770.257	7788971.012
BY ARC CENTERED AT				
	403473.288	7784027.655	403575.216	7783867.039
TO				
	406523.796	7788671.311	406625.664	7788510.692

	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	407396.059	7788098.304	407497.938	7787937.691
BY STRAIGHT LINE TO				
	407683.240	7787925.236	407785.122	7787764.625
BY STRAIGHT LINE TO				
	408011.044	7787798.802	408112.930	7787638.193
BY STRAIGHT LINE TO				
	408280.380	7787738.067	408382.268	7787577.460
BY ARC CENTERED AT				
	407058.185	7782318.161	407160.135	7782157.552
TO				
	408325.953	7787727.588	408427.841	7787566.981
BY STRAIGHT LINE TO				
	409140.631	7788355.811	409242.514	7788195.208
BY ARC CENTERED AT				
	412533.433	7783956.035	412635.369	7783795.459
TO				
	409803.728	7788795.234	409905.607	7788634.635
BY STRAIGHT LINE TO				
	410340.508	7789098.022	410442.383	7788937.426
BY ARC CENTERED AT				
	413070.213	7784258.823	413172.141	7784098.250
TO				
	411101.123	7789454.188	411202.989	7789293.597
BY STRAIGHT LINE TO				
	411956.475	7789778.374	412058.332	7789617.788
BY ARC CENTERED AT				
	413925.565	7784583.009	414027.485	7784422.441
TO				
	413213.400	7790093.178	413315.246	7789932.600
BY STRAIGHT LINE TO				
	413494.632	7790129.526	413596.476	7789968.950

	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	414206.797	7784619.357	414308.715	7784458.791
TO				
	415569.907	7790005.549	415671.746	7789844.983
BY STRAIGHT LINE TO				
	415757.958	7789957.958	415859.798	7789797.392
BY ARC CENTERED AT				
	414394.848	7784571.766	414496.765	7784411.201
TO				
	417458.812	7789206.554	417560.667	7789045.989
BY STRAIGHT LINE TO				
	417876.087	7788930.702	417977.947	7788770.137
BY ARC CENTERED AT				
	414812.123	7784295.914	414914.044	7784135.351
TO				
	418788.027	7788176.806	418889.902	7788016.241
BY STRAIGHT LINE TO				
	418944.673	7788016.325	419046.551	7787855.760
BY ARC CENTERED AT				
	414968.769	7784135.433	415070.693	7783974.870
TO				
	419427.341	7787450.591	419529.230	7787290.025
BY STRAIGHT LINE TO				
	419771.210	7786988.120	419873.104	7786827.555
BY ARC CENTERED AT				
	415312.638	7783672.962	415414.571	7783512.399
TO				
	419795.737	7786954.876	419897.631	7786794.311
BY STRAIGHT LINE TO				
	419933.549	7786766.625	420035.445	7786606.061
BY STRAIGHT LINE TO				
	420414.272	7786493.578	420516.166	7786333.016

	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	421277.264	7786009.619	421379.155	7785849.060
BY ARC CENTERED AT				
	418559.664	7781163.612	418661.658	7781003.043
TO				
	422453.752	7785126.593	422555.644	7784966.037
BY STRAIGHT LINE TO				
	423178.722	7784414.226	423280.617	7784253.672
BY ARC CENTERED AT				
	419284.634	7780451.245	419386.638	7780290.673
TO				
	423386.089	7784199.205	423487.986	7784038.651
BY STRAIGHT LINE TO				
	424195.293	7783728.812	424297.187	7783568.261
BY ARC CENTERED AT				
	421403.066	7778925.417	421505.058	7778764.843
TO				
	424590.039	7783476.498	424691.930	7783315.953
BY STRAIGHT LINE TO				
	426220.579	7782334.684	426322.460	7782174.167
BY STRAIGHT LINE TO				
	428036.747	7781092.035	428138.617	7780931.549
BY ARC CENTERED AT				
	424899.350	7776506.637	425001.329	7776346.073
TO				
	428672.435	7780584.990	428774.302	7780424.514
BY STRAIGHT LINE TO				
	428966.145	7780313.265	429068.009	7780152.794
BY ARC CENTERED AT				
	427550.421	7774940.662	427652.381	7774780.142
TO				
	429752.155	7780041.790	429854.006	7779881.336

	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	430040.107	7779917.505	430141.953	7779757.057
BY ARC CENTERED AT				
	427838.373	7774816.377	427940.331	7774655.862
TO				
	430976.609	7779401.201	431078.443	7779240.773
BY STRAIGHT LINE TO				
	431758.663	7778865.898	431860.488	7778705.487
BY ARC CENTERED AT				
	428620.427	7774281.074	428722.381	7774120.573
TO				
	432044.949	7778656.206	432146.772	7778495.801
BY STRAIGHT LINE TO				
	432728.395	7778121.257	432830.212	7777960.866
BY ARC CENTERED AT				
	430434.520	7773060.894	430536.461	7772900.432
TO				
	433014.916	7777981.330	433116.730	7777820.945
BY STRAIGHT LINE TO				
	433421.866	7777767.916	433523.675	7777607.540
BY STRAIGHT LINE TO				
	434096.646	7777494.987	434198.449	7777334.623
BY ARC CENTERED AT				
	432013.364	7772344.349	432115.291	7772183.922
TO				
	434191.611	7777455.550	434293.413	7777295.187
BY STRAIGHT LINE TO				
	435029.889	7777098.300	435131.684	7776937.952
BY ARC CENTERED AT				
	432851.642	7771987.099	432953.562	7771826.691
TO				
	435792.513	7776700.953	435894.303	7776540.618

	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	436077.434	7776523.197	436179.223	7776362.867
BY ARC CENTERED AT				
	433136.563	7771809.343	433238.482	7771648.942
TO				
	436294.681	7776380.495	436396.470	7776220.169
BY STRAIGHT LINE TO				
	436727.141	7776081.717	436828.929	7775921.399
BY ARC CENTERED AT				
	433569.023	7771510.565	433670.942	7771350.172
TO				
	437130.189	7775775.214	437231.977	7775614.902
BY STRAIGHT LINE TO				
	438023.659	7775029.128	438125.450	7774868.832
BY STRAIGHT LINE TO				
	439322.460	7774045.660	439424.243	7773885.396
BY ARC CENTERED AT				
	435968.448	7769616.242	436070.378	7769455.891
TO				
	439388.813	7773994.625	439490.595	7773834.363
BY STRAIGHT LINE TO				
	440213.085	7773350.709	440314.863	7773190.468
BY ARC CENTERED AT				
	436792.720	7768972.326	436894.655	7768811.990
TO				
	440371.806	7773221.947	440473.583	7773061.711
BY STRAIGHT LINE TO				
	441623.513	7772167.743	441725.285	7772007.540
BY ARC CENTERED AT				
	438044.427	7767918.122	438146.373	7767757.810
TO				
	441724.248	7772080.820	441826.020	7771920.620

	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	442777.610	7771149.649	442879.379	7770989.479
BY ARC CENTERED AT				
	439097.789	7766986.951	439199.732	7766826.670
TO				
	443308.073	7770612.230	443409.841	7770452.081
BY STRAIGHT LINE TO				
	443988.820	7769821.632	444090.589	7769661.512
BY ARC CENTERED AT				
	439778.536	7766196.353	439880.482	7766036.090
TO				
	444025.652	7769778.412	444127.421	7769618.293
BY STRAIGHT LINE TO				
	444546.369	7769161.017	444648.139	7769000.921
BY ARC CENTERED AT				
	440299.253	7765578.958	440401.203	7765418.710
TO				
	444881.589	7768720.826	444983.361	7768560.744
BY STRAIGHT LINE TO				
	444930.908	7768691.069	445032.680	7768530.990
BY ARC CENTERED AT				
	442060.651	7763933.889	442162.606	7763773.700
TO				
	445484.687	7768309.402	445586.455	7768149.347
BY STRAIGHT LINE TO				
	445878.497	7768001.228	445980.262	7767841.190
BY ARC CENTERED AT				
	442454.461	7763625.715	442556.416	7763465.540
TO				
	445900.414	7767983.988	446002.179	7767823.951
BY STRAIGHT LINE TO				
	446933.775	7767166.941	447035.536	7767006.951

	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	443487.822	7762808.668	443589.777	7762648.540
TO				
	446934.074	7767166.704	447035.835	7767006.714
BY STRAIGHT LINE TO				
	447832.114	7766456.551	447933.869	7766296.596
BY ARC CENTERED AT				
	444385.862	7762098.515	444487.817	7761938.429
TO				
	448069.993	7766257.399	448171.747	7766097.452
BY STRAIGHT LINE TO				
	448596.931	7765790.613	448698.684	7765630.683
BY ARC CENTERED AT				
	444912.800	7761631.729	445014.757	7761471.669
TO				
	449125.490	7765254.211	449227.243	7765094.299
BY STRAIGHT LINE TO				
	449476.876	7764845.574	449578.632	7764685.673
BY ARC CENTERED AT				
	445264.186	7761223.092	445366.147	7761063.049
TO				
	449845.413	7764366.577	449947.172	7764206.689
BY STRAIGHT LINE TO				
	450121.717	7763963.899	450223.481	7763804.020
BY ARC CENTERED AT				
	446842.847	7759478.573	446944.827	7759318.609
TO				
	450746.482	7763432.149	450848.244	7763272.290
BY ARC CENTERED AT				
	447567.314	7758875.613	447669.295	7758715.679
TO				
	451948.125	7762292.868	452049.889	7762133.047

	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	452430.279	7761674.762	452532.050	7761514.959
BY ARC CENTERED AT				
	448049.468	7758257.507	448151.455	7758097.589
TO				
	452581.028	7761472.177	452682.801	7761312.379
BY ARC CENTERED AT				
	450000.223	7756551.955	450102.211	7756392.098
TO				
	453344.732	7760988.553	453446.502	7760828.783
BY STRAIGHT LINE TO				
	453925.883	7760550.455	454027.652	7760390.706
BY ARC CENTERED AT				
	450581.374	7756113.857	450683.361	7755954.018
TO				
	454344.015	7760201.847	454445.785	7760042.113
BY STRAIGHT LINE TO				
	456308.415	7758393.788	456410.198	7758234.129
BY STRAIGHT LINE TO				
	457349.401	7757536.494	457451.188	7757376.877
BY ARC CENTERED AT				
	453817.384	7753247.672	453919.388	7753087.948
TO				
	457562.447	7757351.772	457664.235	7757192.165
BY STRAIGHT LINE TO				
	458528.948	7756469.824	458630.742	7756310.259
BY STRAIGHT LINE TO				
	459241.168	7755875.179	459342.966	7755715.645
BY STRAIGHT LINE TO				
	460434.046	7755127.979	460535.841	7754968.495
BY STRAIGHT LINE TO				
	460736.790	7754970.270	460838.583	7754810.799

	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	458169.895	7750042.777	458271.925	7749883.237
TO				
	461032.629	7754804.488	461134.421	7754645.030
BY STRAIGHT LINE TO				
	461697.505	7754404.765	461799.295	7754245.336
BY STRAIGHT LINE TO				
	462834.885	7753756.673	462936.665	7753597.300
BY ARC CENTERED AT				
	460084.224	7748929.355	460186.254	7748769.897
TO				
	463038.800	7753634.630	463140.579	7753475.267
BY STRAIGHT LINE TO				
	464180.427	7752917.770	464282.198	7752758.464
BY ARC CENTERED AT				
	461225.851	7748212.495	461327.884	7748053.087
TO				
	464920.046	7752362.442	465021.816	7752203.173
BY STRAIGHT LINE TO				
	465128.913	7752176.513	465230.683	7752017.255
BY ARC CENTERED AT				
	461434.718	7748026.566	461536.754	7747867.167
TO				
	465153.748	7752154.272	465255.518	7751995.015
BY STRAIGHT LINE TO				
	465433.801	7751901.946	465535.573	7751742.704
BY STRAIGHT LINE TO				
	465906.131	7751539.306	466007.903	7751380.089
BY ARC CENTERED AT				
	464451.745	7746177.040	464553.765	7746017.797
TO				
	465977.895	7751519.324	466079.666	7751360.110

	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	466481.564	7751375.439	466583.328	7751216.249
BY ARC CENTERED AT				
	464955.414	7746033.155	465057.425	7745873.937
TO				
	466847.549	7751257.039	466949.311	7751097.866
BY STRAIGHT LINE TO				
	467425.418	7751047.730	467527.176	7750888.584
BY ARC CENTERED AT				
	465533.283	7745823.846	465635.286	7745664.657
TO				
	467631.599	7750968.378	467733.357	7750809.242
BY STRAIGHT LINE TO				
	468300.023	7750695.745	468401.778	7750536.640
BY STRAIGHT LINE TO				
	468546.146	7750597.406	468647.900	7750438.312
BY ARC CENTERED AT				
	466484.673	7745438.000	466586.666	7745278.857
TO				
	468987.285	7750398.450	469089.038	7750239.376
BY STRAIGHT LINE TO				
	470157.655	7749807.983	470259.409	7749648.962
BY ARC CENTERED AT				
	467655.043	7744847.533	467757.037	7744688.437
TO				
	470361.510	7749699.766	470463.264	7749540.754
BY STRAIGHT LINE TO				
	471482.271	7749074.631	471584.037	7748915.670
BY STRAIGHT LINE TO				
	471988.969	7748854.039	472090.744	7748695.102
BY ARC CENTERED AT				
	469771.202	7743759.861	469873.197	7743600.847

	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
TO				
	472353.914	7748679.082	472455.697	7748520.162
BY STRAIGHT LINE TO				
	473476.033	7748089.942	473577.841	7747931.074
BY ARC CENTERED AT				
	470893.321	7743170.721	470995.318	7743011.748
TO				
	473637.152	7748001.925	473738.964	7747843.064
BY STRAIGHT LINE TO				
	474809.867	7747335.894	474911.706	7747177.087
BY ARC CENTERED AT				
	472066.036	7742504.690	472168.058	7742345.767
TO				
	474909.752	7747277.783	475011.594	7747118.981
BY STRAIGHT LINE TO				
	475653.905	7746834.431	475755.765	7746675.662
BY ARC CENTERED AT				
	472810.189	7742061.338	472912.229	7741902.447
TO				
	475984.251	7746621.433	476086.123	7746462.680
BY STRAIGHT LINE TO				
	477421.012	7745621.373	477522.952	7745462.693
BY ARC CENTERED AT				
	474246.950	7741061.278	474349.029	7740902.448
TO				
	477597.481	7745493.329	477699.430	7745334.658
BY STRAIGHT LINE TO				
	479072.128	7744378.529	479174.146	7744219.932
BY ARC CENTERED AT				
	475721.597	7739946.478	475823.720	7739787.709
TO				
	479396.572	7744113.455	479498.606	7743954.874

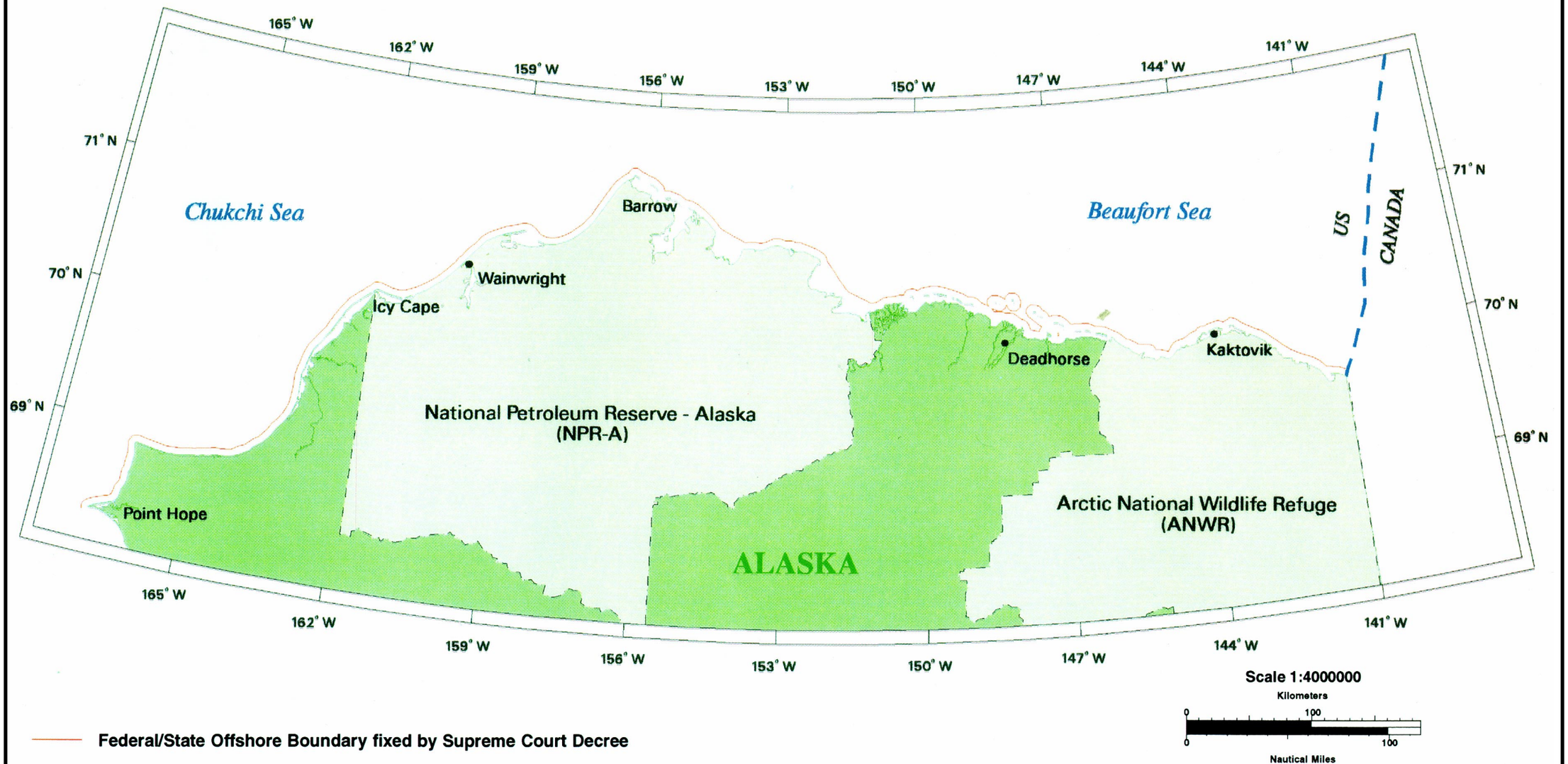
	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	481008.458	7742691.887	481110.577	7742533.388
BY ARC CENTERED AT				
	477333.483	7738524.910	477435.679	7738366.220
TO				
	481244.091	7742471.590	481346.225	7742313.104
BY STRAIGHT LINE TO				
	482506.901	7741220.322	482609.117	7741061.906
BY ARC CENTERED AT				
	478596.293	7737273.642	478698.560	7737115.009
TO				
	482740.130	7740974.689	482842.360	7740816.286
BY STRAIGHT LINE TO				
	483812.999	7739773.463	483915.291	7739615.120
BY ARC CENTERED AT				
	479669.162	7736072.416	479771.500	7735913.829
TO				
	483951.193	7739612.662	484053.493	7739454.326
BY STRAIGHT LINE TO				
	485059.153	7738272.552	485161.508	7738114.279
BY ARC CENTERED AT				
	480777.122	7734732.306	480879.539	7734573.769
TO				
	485119.120	7738198.743	485221.478	7738040.474
BY STRAIGHT LINE TO				
	485538.533	7737673.394	485640.922	7737515.147
BY STRAIGHT LINE TO				
	485667.906	7737636.535	485770.303	7737478.296
BY ARC CENTERED AT				
	484145.563	7732293.165	484248.149	7732134.808
TO				
	486080.698	7737501.273	486183.121	7737343.059

	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY STRAIGHT LINE TO				
	486470.326	7737356.502	486572.774	7737198.311
BY ARC CENTERED AT				
	484535.191	7732148.394	484637.789	7731990.059
TO				
	487467.643	7736867.490	487570.155	7736709.358
BY STRAIGHT LINE TO				
	487802.314	7736659.524	487904.847	7736501.412
BY ARC CENTERED AT				
	488487.687	7731145.959	488590.379	7730987.869
TO				
	488595.830	7736700.906	488698.399	7736542.843
BY STRAIGHT LINE TO				
	488975.685	7736693.511	489078.271	7736535.472
BY ARC CENTERED AT				
	488867.542	7731138.564	488970.239	7730980.498
TO				
	491123.486	7736215.950	491226.241	7736058.050
BY STRAIGHT LINE TO				
	491362.659	7736109.683	491465.442	7735951.801
BY ARC CENTERED AT				
	492207.229	7730618.250	492309.979	7730460.499
TO				
	493647.993	7735984.192	493751.035	7735826.477
BY STRAIGHT LINE TO				
	494457.139	7735766.935	494560.259	7735609.286
BY ARC CENTERED AT				
	493016.375	7730400.993	493119.128	7730243.339
TO				
	494589.149	7735729.737	494692.281	7735572.099
BY STRAIGHT LINE TO				
	496232.986	7735244.560	496336.717	7735086.767

	NAD 83/WGS 84 UTM ZONE 7 (meters)		NAD 27 (CORPSCON 4.11) UTM ZONE 7 (meters)	
	X–COORD	Y–COORD	X–COORD	Y–COORD
BY ARC CENTERED AT				
	494660.212	7729915.816	494762.949	7729758.369
TO				
	497223.565	7734845.152	497327.737	7734687.203
BY STRAIGHT LINE TO				
	497828.884	7734530.374	497933.305	7734372.336
BY ARC CENTERED AT				
	495265.531	7729601.038	495368.319	7729443.619
TO				
	498470.232	7734139.653	498574.897	7733981.527
BY STRAIGHT LINE TO				
	498895.003	7733839.724	498999.814	7733681.544
BY STRAIGHT LINE TO				
	501008.764	7732420.365	501115.675	7732261.270
BY ARC CENTERED AT				
	497911.480	7727807.777	498014.919	7727650.079
TO				
	501198.884	7732286.852	501306.106	7732127.617
BY STRAIGHT LINE TO				
	501520.002	7732051.168	501627.755	7731891.694
BY STRAIGHT LINE TO				
	501972.058	7731755.363	502080.575	7731595.546

[Federal/State Boundary map follows this page.]

Non-Ambulatory Federal/State Boundary in the Beaufort and Chukchi Seas



Reporter's Note

The next page is purposely numbered 1201. The numbers between 1180 and 1201 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 MAY 30 THROUGH
SEPTEMBER 29, 2000

MAY 30, 2000

Certiorari Granted—Vacated and Remanded

No. 99–1266. UNITED STATES *v.* JOHNSON. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Jones* v. *United States*, 529 U. S. 848 (2000). Reported below: 194 F. 3d 657.

No. 99–6136. REA *v.* UNITED STATES. C. A. 8th 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 *Jones* v. *United States*, 529 U. S. 848 (2000). Reported below: 169 F. 3d 1111.

Certiorari Dismissed

No. 99–8771. COTNER *v.* COURT OF CRIMINAL APPEALS OF OKLAHOMA ET AL. Sup. Ct. Okla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 99–8810. MIKKILINENI *v.* CITY OF HOUSTON ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 203 F. 3d 828.

No. 99–8814. PATTERSON *v.* HAWK SAWYER, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 199 F. 3d 439.

Miscellaneous Orders

No. 129, Orig. VIRGINIA *v.* MARYLAND. Motion of Audubon Naturalist Society for leave to file a brief as *amicus curiae* granted. Motion for leave to file bill of complaint granted. Defendant is allowed 60 days within which to file an answer.

No. 99–1403. CEMENT MASONS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA ET AL. *v.* STONE. C. A. 9th Cir. Motions of International Training Institute for the Sheet Metal and Air Conditioning Industry; Multiemployer Trust Funds; Central States, Southeast and Southwest Areas Health and Welfare Fund; and Health Insurance Association of America for leave to file briefs as *amici curiae* granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 99–9336. IN RE JEAN-HENRIQUEZ; and
No. 99–9431. IN RE GLASS. Petitions for writs of habeas corpus denied.

No. 99–8843. IN RE KAZANDJIAN;
No. 99–8931. IN RE BAILEY; and
No. 99–8994. IN RE LEWIS. Petitions for writs of mandamus denied.

Certiorari Granted

No. 99–1331. LEWIS *v.* LEWIS & CLARK MARINE, INC. C. A. 8th Cir. Certiorari granted. Reported below: 196 F. 3d 900.

No. 99–1434. UNITED STATES *v.* MEAD CORP. C. A. Fed. Cir. Certiorari granted. Reported below: 185 F. 3d 1304.

No. 99–1426. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* BROWNER, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. D. C. Cir. Certiorari granted, and case set for oral argument in tandem with No. 99–1257, *Browner, Administrator of Environmental Protection Agency, et al.* v. *American Trucking Assns., Inc., et al.* [certiorari granted, 529 U. S. 1129]. Reported below: 175 F. 3d 1027 and 195 F. 3d 4.

Certiorari Denied

No. 99–213. UNITED STATES *v.* SCS BUSINESS & TECHNICAL INSTITUTE, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 173 F. 3d 870 and 890.

No. 99–321. UNITED STATES EX REL. FOULDS *v.* TEXAS TECH UNIVERSITY ET AL.;
No. 99–365. UNITED STATES *v.* TEXAS TECH UNIVERSITY ET AL.; and

No. 99–513. TEXAS TECH UNIVERSITY ET AL. *v.* UNITED STATES EX REL. FOULDS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 171 F. 3d 279.

No. 99–337. SOWERBY, PERSONAL REPRESENTATIVE OF THE ESTATE OF HINKLEY, DECEASED, ET AL. *v.* PREVO'S FAMILY MARKET, INC., ET AL. Ct. App. Mich. Certiorari denied. Reported below: 230 Mich. App. 131, 583 N. W. 2d 509.

No. 99–464. GASAWAY *v.* UNITED STATES;
No. 99–5614. CHOPANE *v.* UNITED STATES;
No. 99–6259. LIMBRICK *v.* UNITED STATES;
No. 99–6302. MCCRAY *v.* UNITED STATES; and
No. 99–6378. HICKMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 179 F. 3d 230.

No. 99–633. C. W. ROEN CONSTRUCTION CO. ET AL. *v.* UNITED STATES EX REL. PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 38 ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 183 F. 3d 1088.

No. 99–774. UNITED STATES *v.* TEXAS ET AL.;
No. 99–779. UNITED STATES EX REL. CHURCHILL *v.* TEXAS ET AL.; and
No. 99–956. TEXAS ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 192 F. 3d 126.

No. 99–998. MOYER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 182 F. 3d 1018.

No. 99–1060. LOCKHEED MISSILES & SPACE CO., INC. *v.* UNITED STATES EX REL. NEWSHAM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 190 F. 3d 963.

No. 99–1239. OGLALA SIOUX TRIBAL PUBLIC SAFETY DEPARTMENT *v.* BABBITT, SECRETARY OF THE INTERIOR. C. A. Fed. Cir. Certiorari denied. Reported below: 194 F. 3d 1374.

No. 99–1261. MICCOSUKEE CORP. *v.* BABBITT, SECRETARY OF THE INTERIOR. C. A. Fed. Cir. Certiorari denied. Reported below: 217 F. 3d 857.

No. 99–1380. LYONS *v.* STOVALL. C. A. 6th Cir. Certiorari denied. Reported below: 188 F. 3d 327.

No. 99–1421. COUNTY OF LOS ANGELES ET AL. *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 192 F. 3d 1005.

No. 99–1422. FLEMING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 193 F. 3d 522.

No. 99–1481. VAKHARIA *v.* SWEDISH COVENANT HOSPITAL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 190 F. 3d 799.

No. 99–1497. BELSHE, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH SERVICES *v.* CHILDREN'S HOSPITAL AND HEALTH CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 188 F. 3d 1090.

No. 99–1507. DUNN ET AL. *v.* AIR LINE PILOTS ASSN. ET AL.; and

No. 99–1530. NORMAN *v.* AIR LINE PILOTS ASSN. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 193 F. 3d 1185.

No. 99–1557. COBORN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 205 F. 3d 1345.

No. 99–1562. BREWER *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 99–1568. BRITTON *v.* MALONEY. C. A. 1st Cir. Certiorari denied. Reported below: 196 F. 3d 24.

No. 99–1570. BAYER CORP. *v.* HOOVER COLOR CORP. C. A. 4th Cir. Certiorari denied. Reported below: 199 F. 3d 160.

No. 99–1572. VIEHWEG *v.* MELLO. C. A. 8th Cir. Certiorari denied. Reported below: 198 F. 3d 252.

No. 99–1574. LOCAL 1199J *v.* OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF UNITED HEALTH CARE SYSTEM, INC. C. A. 3d Cir. Certiorari denied. Reported below: 200 F. 3d 170.

No. 99–1575. JOHNSON COUNTY BOARD OF COUNTY COMMISSIONERS *v.* SOUTHWESTERN BELL WIRELESS, INC., FKA SOUTHWESTERN BELL MOBILE SYSTEMS, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 199 F. 3d 1185.

No. 99–1579. DONAT *v.* VBB IV, INC., ET AL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 99–1581. HIZAM *v.* MOSSA. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 265 App. Div. 2d 873, 695 N. Y. S. 2d 854.

No. 99–1590. VELARDI *v.* NEW YORK CITY FIRE DEPARTMENT PENSION FUND. C. A. 2d Cir. Certiorari denied. Reported below: 182 F. 3d 902.

No. 99–1605. BARNES ET AL. *v.* CITY OF HOUSTON ET AL. C. A. 5th Cir. Certiorari denied.

No. 99–1609. THEN *v.* MAINE DEPARTMENT OF HUMAN SERVICES; and

No. 99–8956. THEN *v.* MAINE DEPARTMENT OF HUMAN SERVICES. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 742 A. 2d 911.

No. 99–1611. HUTCHINSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF HUTCHINSON, DECEASED, ET AL. *v.* PFEIL ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 201 F. 3d 448.

No. 99–1616. PUNCHARD *v.* LUNA COUNTY COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 282.

No. 99–1658. BELANGER *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 55 Conn. App. 2, 738 A. 2d 1109.

No. 99–1660. STEPARD ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 188 F. 3d 516.

No. 99–1682. VENTURE FUNDING, LTD. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 248.

No. 99–1699. VONDERHEIDE *v.* INTERNAL REVENUE SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 194 F. 3d 1315.

No. 99–6323. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 182 F. 3d 452.

No. 99–6328. NUTALL *v.* UNITED STATES; and
No. 99–6329. NUTALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 180 F. 3d 182.

No. 99–6461. MCCLINTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 94.

No. 99–6762. LIDDELL *v.* UNITED STATES; and
No. 99–6973. GAINES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 192 F. 3d 130.

No. 99–6968. HAMMOND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 194 F. 3d 1306.

No. 99–7268. SERRANO OSORIO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 191 F. 3d 12.

No. 99–8034. WOODRUFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 3d 256.

No. 99–8081. NESBETH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 202 F. 3d 255.

No. 99–8361. HERNANDEZ-FRANCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 189 F. 3d 1151.

No. 99–8396. LOPEZ *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 559 Pa. 131, 739 A. 2d 485.

No. 99–8429. SUMPTER *v.* STEGALL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–8645. ISSAK *v.* MAINE DEPARTMENT OF HUMAN SERVICES; and
No. 99–9014. HIRSI *v.* MAINE DEPARTMENT OF HUMAN SERVICES. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 742 A. 2d 919.

No. 99–8732. BARNES *v.* GILMORE, GOVERNOR OF VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 435.

No. 99–8740. FIERRO *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 197 F. 3d 147.

No. 99–8768. BAKER *v.* MCCLUNG, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 271 Ga. 795, 524 S. E. 2d 718.

No. 99–8772. RAYMOND *v.* WEBER, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 99–8776. BANKS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–8785. BEERS *v.* HENDREN, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 99–8787. BARKER *v.* BROYLE, ACTING SUPERINTENDENT, CORRECTIONAL INDUSTRIAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 99–8788. BUTLER *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 99–8796. JARRELL *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 99–8799. HUNG NAM TRAN *v.* ROSCIZEWSKI ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 202 F. 3d 275.

No. 99–8801. WILSON *v.* MITCHEM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–8802. WALKER *v.* VILLAGE OF BOLINGBROOK ET AL. C. A. 7th Cir. Certiorari denied.

No. 99–8803. VARNER *v.* MILLER, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 99–8804. TORRES *v.* ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–8809. HERNANDEZ CONTRERAS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–8811. JOHNSTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 199 F. 3d 1015.

No. 99–8812. MOORE *v.* GIBSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 195 F. 3d 1152.

No. 99–8813. STOKES *v.* CORCORAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 822.

No. 99–8816. PARK *v.* SHOSTROM ET AL. Sup. Ct. Ore. Certiorari denied.

No. 99–8825. SCHULTZ *v.* SONDALLE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 99–8830. BOWIE *v.* GIBSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 198 F. 3d 257.

No. 99–8832. WYATT *v.* CAREY ET AL. Ct. App. Tenn. Certiorari denied.

No. 99–8833. CAVE *v.* GARRITY ET AL. Sup. Ct. Va. Certiorari denied.

No. 99–8880. PENA *v.* LEOMBRUNI ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 200 F. 3d 1031.

No. 99–8905. MCKINNEY *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 133 Idaho 695, 992 P. 2d 144.

No. 99–8911. MCKINLEY *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 199 F. 3d 1332.

No. 99–8953. PAVEY *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied.

No. 99–8995. RODRIGUES *v.* DEPARTMENT OF THE ARMY. C. A. 9th Cir. Certiorari denied.

No. 99–9000. MITCHELL *v.* SEABOLD, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 202 F. 3d 269.

No. 99–9002. HUGHES *v.* MILLS. C. A. 6th Cir. Certiorari denied.

No. 99–9007. CLARKE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–9030. WAGNER *v.* PUGH, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 99–9042. FRANKS *v.* KAHN, CLERK, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT. C. A. 11th Cir. Certiorari denied.

No. 99–9058. RENOIR *v.* TRUE. C. A. 4th Cir. Certiorari denied.

No. 99–9062. SPENCER *v.* MASCHNER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 205 F. 3d 1347.

No. 99–9069. MARCONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 208 F. 3d 207.

No. 99–9075. BENTON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 338 S. C. 151, 526 S. E. 2d 228.

No. 99–9081. THOMAS *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES. Ct. App. D. C. Certiorari denied.

No. 99–9084. KING *v.* HOLLAND, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 99–9085. MATTHEWS *v.* LEONARD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–9133. MONTFORD *v.* HUTCHINSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 210 F. 3d 361.

No. 99–9172. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 824.

No. 99–9175. BUNCH *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Hertford County, N. C. Certiorari denied.

No. 99–9180. WISE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 99–9185. PADIN-TORRES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 181 F. 3d 81.

No. 99–9216. CHOICE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 201 F. 3d 837.

No. 99–9222. MITCHELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 202 F. 3d 275.

No. 99–9250. DODD *v.* STRUBLE, JUDGE, SUPERIOR COURT OF GEORGIA, MOUNTAIN JUDICIAL CIRCUIT, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 189 F. 3d 482.

No. 99–9257. DEARMITT *v.* MORGAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–9282. BOBBITT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 822.

No. 99–9285. AUSTIN *v.* MITCHELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 200 F. 3d 391.

No. 99–9290. RAPOSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1326.

No. 99–9292. JENKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 833.

No. 99–9293. HANSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 208 F. 3d 215.

No. 99–9300. LAUREANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1326.

No. 99–9316. FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 99–1072. CELPAGE, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 183 F. 3d 393.

No. 99–1549. MRO COMMUNICATIONS, INC. *v.* AT&T CORP. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 205 F. 3d 1350.

No. 99–1223. HANLON ET UX., PARENTS AND NEXT FRIENDS OF HANLON, ET AL. *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Motion of petitioners to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 191 F. 3d 1344.

Rehearing Denied

No. 99–7767. KANAZEH *v.* LOCKHEED MARTIN ET AL., 529 U. S. 1024;

No. 99–8015. BELL *v.* NERO ET AL., 529 U. S. 1057;

No. 99–8090. SMITH *v.* TALLY, WARDEN, 529 U. S. 1028;

No. 99–8134. WALKER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 529 U. S. 1071; and

No. 99–8382. FARRELL *v.* PATAKI, GOVERNOR OF NEW YORK, ET AL., 529 U. S. 1091. Petitions for rehearing denied.

MAY 31, 2000

Rehearing Denied

No. 99–8734 (99A963). CARTER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 529 U. S. 1117. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for rehearing denied.

JUNE 1, 2000

Miscellaneous Order

No. 99–9765 (99A989). IN RE MCGINN. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 99–9808 (99A997). MCGINN *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

JUNE 3, 2000

Miscellaneous Order

No. 99A987. SAFIR, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL. *v.* TUNICK. C. A. 2d Cir. Application for stay, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

JUNE 5, 2000

Certiorari Granted—Vacated and Remanded

No. 99–8119. SALDANO *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the confession of error by the Solicitor General of Texas.

Miscellaneous Orders

No. 99M86. BROOKS *v.* CITIBANK (SOUTH DAKOTA), N. A. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 99M90. RILEY *v.* ARMSTRONG; and
No. 99M91. FULLER *v.* OREGON OFFICE FOR SERVICES TO CHILDREN AND FAMILIES ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for fees and reimbursement of expenses granted, and the River Master is awarded a total of $2,439 for the period January 1 through March 31, 2000, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 528 U. S. 925.]

No. 99–804. CLEVELAND *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 529 U. S. 1017.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 99–1038. EASTERN ASSOCIATED COAL CORP. *v.* UNITED MINE WORKERS OF AMERICA, DISTRICT 17, ET AL. C. A. 4th Cir. [Certiorari granted, 529 U. S. 1017.] Motion of Institute for a Drug-Free Workplace for leave to file a brief as *amicus curiae* granted.

No. 99–8470. IN RE NAGY. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [529 U. S. 1065] denied.

No. 99–8945. BOBROWSKY *v.* TOYOTA MOTOR CORP. ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 26, 2000, 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. 99–9006. IN RE WILLIAMS. Ct. Sp. App. Md. Petition for writ of common-law certiorari denied. Reported below: 124 Md. App. 720.

No. 99–9427. IN RE ALLISON. Petition for writ of habeas corpus denied.

No. 99–1607. IN RE CARR;
No. 99–1812. IN RE PUMPER;
No. 99–8899. IN RE JACKSON;
No. 99–8904. IN RE KLAIMON;
No. 99–8910. IN RE IACOE; and
No. 99–8939. IN RE ROSENZWEIG. Petitions for writs of mandamus denied.

Certiorari Granted

No. 99–1244. GTE SERVICE CORP. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 5th Cir. Certiorari granted. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 183 F. 3d 393.

Certiorari Denied. (See also No. 99–9006, *supra.*)

No. 99–1342. HILL *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 195 F. 3d 790.

No. 99–1347. CAL-ALMOND, INC., ET AL. *v.* DEPARTMENT OF AGRICULTURE. C. A. 9th Cir. Certiorari denied. Reported below: 192 F. 3d 1272.

No. 99–1427. COMPETITION POLICY INSTITUTE *v.* US WEST, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 182 F. 3d 1224.

No. 99–1429. ANADARKO PETROLEUM CORP. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 196 F. 3d 1264 and 200 F. 3d 867.

No. 99–1483. PACIFIC MARITIME ASSN. *v.* INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 68. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 3d 1078.

No. 99–1595. FELDMAN *v.* SKADDEN, ARPS, SLATE, MEAGHER & FLOM ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 198 F. 3d 235.

No. 99–1597. TUCKER *v.* FIRST COMMERCIAL BANK NA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 207 F. 3d 657.

No. 99–1602. BUSSELL *v.* PROVIDENT LIFE & ACCIDENT INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 832.

No. 99–1614. INTERNATIONAL SELECT GROUP, INC., DBA BELL'OGGETTI INTERNATIONAL LTD. *v.* FREHLING ENTERPRISES, INC., DBA OGGETTI. C. A. 11th Cir. Certiorari denied. Reported below: 192 F. 3d 1330.

No. 99–1615. GREENE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 99–1618. HELFFRICH *v.* ATLANTIS SUBMARINES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 383.

No. 99–1619. RILEY *v.* HICKMAN ET AL. C. A. 9th Cir. Certiorari denied.

No. 99–1624. ATC PARTNERSHIP *v.* TOWN OF WINDHAM ET AL. Sup. Ct. Conn. Certiorari denied. Reported below: 251 Conn. 597, 741 A. 2d 305.

No. 99–1626. MEEKER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–1630. EADY *v.* SUPERVALUE TRANSPORTATION, INC., ET AL. Cir. Ct. Wisconsin, Milwaukee County. Certiorari denied.

No. 99–1635. MARCHISHECK *v.* SAN MATEO COUNTY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 199 F. 3d 1068.

No. 99–1636. LORD *v.* BABBITT, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 188 F. 3d 513.

No. 99–1640. Shafer *v.* Suburban Newspapers of Greater St. Louis, Inc., et al. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 99–1649. City of Columbus et al. *v.* Howard, By and Through Her Natural and Legal Guardian, Cobbin, et al. Ct. App. Ga. Certiorari denied. Reported below: 239 Ga. App. 399, 521 S. E. 2d 51.

No. 99–1651. Schroeder *v.* AEL Industries, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 217 F. 3d 859.

No. 99–1662. Corwin *v.* Air Line Pilots Assn. et al. C. A. 11th Cir. Certiorari denied.

No. 99–1672. Buck *v.* Ogden Deseret Industries/L. D. S. Welfare Services. C. A. 10th Cir. Certiorari denied.

No. 99–1678. Reeves et al. *v.* Frierdich et al. C. A. 7th Cir. Certiorari denied. Reported below: 202 F. 3d 274.

No. 99–1686. El Banco de Seguros del Estado *v.* Employers Insurance of Wausau. C. A. 7th Cir. Certiorari denied. Reported below: 199 F. 3d 937.

No. 99–1697. Lynch *v.* Department of the Treasury et al. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 384.

No. 99–1713. Boyadjian *v.* CIGNA Cos. et al. C. A. 3d Cir. Certiorari denied. Reported below: 203 F. 3d 816.

No. 99–1717. Sinclair *v.* Ward, Warden, et al. C. A. 5th Cir. Certiorari denied. Reported below: 205 F. 3d 1338.

No. 99–1719. Paracelsus Healthcare Corp. *v.* Willard et al. Sup. Ct. Miss. Certiorari denied. Reported below: 754 So. 2d 437.

No. 99–1724. Wood *v.* Ohio. Ct. App. Ohio, Richland County. Certiorari denied.

No. 99–1734. District of Columbia *v.* Curry. C. A. D. C. Cir. Certiorari denied. Reported below: 195 F. 3d 654.

No. 99–1737. BADGLEY ET AL. *v.* CONNOR. Sup. Ct. N. J. Certiorari denied. Reported below: 162 N. J. 397, 744 A. 2d 1158.

No. 99–7887. GALLEGO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 191 F. 3d 156.

No. 99–8186. BAKER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 99–8282. DOUGLAS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 558 Pa. 412, 737 A. 2d 1188.

No. 99–8315. MOORE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 999 S. W. 2d 385.

No. 99–8321. CARSON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 559 Pa. 460, 741 A. 2d 686.

No. 99–8477. RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 832.

No. 99–8505. SAUCEDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 203 F. 3d 828.

No. 99–8827. RUCKER *v.* KLINGER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 282.

No. 99–8838. SUTTON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 99–8854. DWYER *v.* DWYER. C. A. 6th Cir. Certiorari denied. Reported below: 187 F. 3d 635.

No. 99–8862. DAVIS *v.* FLORIDA UNEMPLOYMENT APPEALS COMMISSION ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 743 So. 2d 11.

No. 99–8866. HENSLEY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 189 F. 3d 481.

No. 99–8868. WALLACE *v.* GIBSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 191 F. 3d 1235.

No. 99–8870. BORDERS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 99–8881. SMITH *v.* PRICE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 99–8882. PISTORIUS *v.* WALKER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 99–8883. SMITH *v.* SCHRIRO, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 198 F. 3d 251.

No. 99–8884. PEARSON *v.* MAZZUCA, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–8886. MCLEAN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 99–8888. WOODERTS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–8889. TALBERT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 99–8892. SABO *v.* GAITHER, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 204 F. 3d 1122.

No. 99–8906. TENACE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 256 App. Div. 2d 928, 682 N. Y. S. 2d 279.

No. 99–8909. MONTOYA *v.* COWAN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 99–8915. LEWIS *v.* WEST ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 208 F. 3d 1006.

No. 99–8921. WALTON *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 168 F. 3d 504.

No. 99–8924. WATKINS *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 99–8925. CLOUD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 99–8927. KEARSE, aka CROUCH *v.* MANTELLO, SUPERINTENDENT, COXSACKIE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–8935. BRENNAN *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–8942. WHEELOUS *v.* POSEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 825.

No. 99–8947. MCINNIS *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 201 F. 3d 441.

No. 99–8948. LANGON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 791 So. 2d 1105.

No. 99–8951. BARNETT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 99–8975. BUSH *v.* NATIONSBANK; and BUSH *v.* MANPOWER, INC. C. A. D. C. Cir. Certiorari denied.

No. 99–8977. MCINTOSH *v.* LUKAS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 210 F. 3d 372.

No. 99–8982. SHELTON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 744 A. 2d 465.

No. 99–8988. ALLEN *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 128 N. M. 482, 994 P. 2d 728.

No. 99–9009. DEDEAUX *v.* BANNISTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 184 F. 3d 817.

No. 99–9016. COLEMAN *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied.

No. 99–9020. THIEL *v.* SCHUETZLE, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 200 F. 3d 1120.

No. 99–9047. SMITH *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY. C. A. 6th Cir. Certiorari denied. Reported below: 202 F. 3d 270.

No. 99–9070. VINSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 258 Va. 459, 522 S. E. 2d 170.

No. 99–9091. CLYATT *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–9095. REYNOLDS *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 191 F. 3d 448.

No. 99–9108. BETTS *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 9th Cir. Certiorari denied.

No. 99–9130. TRUMAN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 205 F. 3d 844.

No. 99–9139. DEMEO *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 230 F. 3d 1372.

No. 99–9146. FELLS, AKA JOHNSON *v.* UNITED STATES; and
No. 99–9334. MILES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 210 F. 3d 363.

No. 99–9160. DIVINE, AKA HORTON *v.* LOUISIANA. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 738 So. 2d 614.

No. 99–9183. HERMAN *v.* DOVALA, SHERIFF, NATRONA COUNTY, WYOMING, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 208 F. 3d 226.

No. 99–9209. RIVERA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 307 Ill. App. 3d 821, 719 N. E. 2d 154.

No. 99–9218. DEFOE *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied.

No. 99–9248. HOLLAR *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY. C. A. 4th Cir. Certiorari denied. Reported below: 194 F. 3d 1304.

No. 99–9256. HARRIS *v.* SIZER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 194 F. 3d 1304.

No. 99–9258. ROBERTS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–9275. VILLARREAL *v.* EMA. C. A. 11th Cir. Certiorari denied.

No. 99–9277. ZARWELL *v.* MARYLAND ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 127 Md. App. 797.

No. 99–9286. COOK *v.* MCDANIEL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 99–9287. MARTINEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 248.

No. 99–9291. TOWNS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 209 F. 3d 723.

No. 99–9295. RAMOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–9299. PARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 208 F. 3d 1007.

No. 99–9304. CLIFTON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 210 F. 3d 362.

No. 99–9315. FRANKLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 386.

No. 99–9319. MIKAYELYAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 197 F. 3d 966.

No. 99–9322. MYERS, AKA PARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 198 F. 3d 160.

No. 99–9325. CHOATE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 208 F. 3d 215.

No. 99–9328. BLAIR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 385.

No. 99–9331. WOODHOUSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 823.

No. 99–9332. WHITEFORD *v.* REED ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 205 F. 3d 1331.

No. 99–9333. KOYNOK *v.* SCIULLO & GOODYEAR. Super. Ct. Pa. Certiorari denied. Reported below: 737 A. 2d 1287.

No. 99–9335. HERNAN MONTES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 208 F. 3d 207.

No. 99–9337. MATTATALL *v.* VOSE, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied.

No. 99–9339. IGE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 173 F. 3d 844.

No. 99–9346. TREVINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 99–9347. SPINNER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 210 F. 3d 359.

No. 99–9348. SANDOVAL-DANIEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 208 F. 3d 223.

No. 99–9349. PACCIONE *v.* UNITED STATES; and
No. 99–9400. PACCIONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 202 F. 3d 622.

No. 99–9350. KEMMISH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 202 F. 3d 280.

No. 99–9351. LAMBERT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 208 F. 3d 211.

No. 99–9354. TAPIA ANCHONDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 99–9355. CAMILO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 196 F. 3d 1262.

No. 99–9361. ORTIZ-MINAJARES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 99–9364. MONEGRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1326.

No. 99–9367. WIGGINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 210 F. 3d 377.

No. 99–9370. ARTEAGA-NUNEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 208 F. 3d 222.

No. 99–9371. CASTNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 823.

No. 99–9372. COOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 209 F. 3d 718.

No. 99–9373. ABUBAKAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 99–9376. STIFF *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 99–9382. PERRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 99–9386. WHITE *v.* UNITED STATES;
No. 99–9393. MCCOY *v.* UNITED STATES; and
No. 99–9458. GORMLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 206 F. 3d 349.

No. 99–9388. BOYD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 208 F. 3d 204.

No. 99–9394. NAVIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 205 F. 3d 1347.

No. 99–9428. CHIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 208 F. 3d 1010.

No. 99–9439. KOH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 199 F. 3d 632.

No. 99–9448. GARMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 213 F. 3d 637.

No. 99–9449. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 179 F. 3d 265.

No. 99–9452. DUDNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 189 F. 3d 475.

No. 99–9453. DULIGA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 204 F. 3d 97.

No. 99–9463. JONES, AKA SHABAZZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 822.

No. 99–9465. MILLER *v.* LEONARD, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 88 Ohio St. 3d 46, 723 N. E. 2d 114.

No. 99–9477. GREENIDGE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 199 F. 3d 1324.

No. 99–9478. DIXON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 210 F. 3d 394.

No. 99–1249. AT&T CORP. ET AL. *v.* CINCINNATI BELL TELEPHONE CO. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 183 F. 3d 393.

No. 99–1612. RAGSDALE, TRUSTEE OF THE ESTATE OF MILLER *v.* RUBBERMAID, INC., ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 193 F. 3d 1235.

No. 99–1560. INTERNATIONAL PRECIOUS METALS CORP. ET AL. *v.* WATERS ET AL. C. A. 11th Cir. Motion of Lester Brickman et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 190 F. 3d 1291.

Statement of JUSTICE O'CONNOR respecting the denial of the petition for a writ of certiorari.

This case involves an award of attorney's fees that, by any measure, is extraordinary. Respondents brought a securities class action, alleging that petitioners had fraudulently solicited and stimulated excessive trading of commodities options. The parties ultimately settled the suit, whereby petitioners agreed to create a $40 million "reversionary fund" for the class plaintiffs. Under the terms of the settlement, the portion of the fund not claimed by class members and not paid to respondents in attorney's fees and expenses was to revert to petitioners.

After the parties reached their agreement, the District Court approved respondents' application for attorney's fees in the amount of $13,333,333, or one-third of the reversionary fund. The figure was unrelated to the amount actually claimed by class plaintiffs. As it later turned out, the actual distribution to class members was $6,485,362.15. Accordingly, the fee award approved by the District Court was more than twice the amount of the class' actual recovery. The Court of Appeals affirmed the award,

holding that the District Court had not abused its discretion. See 190 F. 3d 1291, 1293 (CA11 1999).

In *Boeing Co.* v. *Van Gemert*, 444 U. S. 472 (1980), we upheld an award of attorney's fees in a class action where the award was based on the total fund available to the class rather than the amount actually recovered. *Id.*, at 480–481. We had no occasion in *Boeing*, however, to address whether there must at least be *some* rational connection between the fee award and the amount of the actual distribution to the class. The approval of attorney's fees absent any such inquiry could have several troubling consequences. Arrangements such as that at issue here decouple class counsel's financial incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiffs' recovery. They potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class. And they could encourage the filing of needless lawsuits where, because the value of each class member's individual claim is small compared to the transaction costs in obtaining recovery, the actual distribution to the class will inevitably be minimal. The Courts of Appeals have differed in their approaches to the problem. Compare *Strong* v. *BellSouth Telecommunications, Inc.*, 137 F. 3d 844, 852 (CA5 1998) (District Court did not abuse its discretion in basing fee award on actual payout rather than reversionary fund), with *Williams* v. *MGM-Pathe Communications Co.*, 129 F. 3d 1026, 1027 (CA9 1997) (benchmark for fee award is 25% of entire fund, and District Court abused its discretion in basing award on actual distribution to class).

Although I believe this issue warrants the Court's attention, this particular case does not present a suitable opportunity for its resolution. As part of their settlement, the parties agreed that respondents would apply for attorney's fees in an amount up to one-third of the reversionary fund, and petitioners expressly pledged not to "directly or indirectly oppose [respondents'] application for fees." App. to Pet. for Cert. G–36. Moreover, according to the District Court's order approving the settlement, petitioners' counsel represented to the court that "the fee application specifically contemplated by the [settlement], i. e. $13,333,333 . . . was reasonable and that its reasonableness was supported by his experience in other class actions." *Id.*, at S–4. Consequently,

petitioners appear to have waived any right to challenge the reasonableness of the fee award in this case. I therefore agree with the Court's decision to deny the petition for a writ of certiorari. Nonetheless, I believe the importance of the issue counsels in favor of granting review in an appropriate case.

No. 99–1592. SANTINI ET AL. *v.* CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE. Sup. Ct. Conn. Motion of National Association of Home Builders for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 251 Conn. 121, 739 A. 2d 680.

No. 99–1603. GENERAL PUBLIC UTILITIES CORP. ET AL. *v.* ABRAMS ET AL.; and

No. 99–1604. DOLAN ET AL. *v.* GENERAL PUBLIC UTILITIES CORP. ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of these petitions. Reported below: 193 F. 3d 613 and 199 F. 3d 158.

No. 99–1653. DE LARRACOECHEA AZUMENDI, AS REPRESENTATIVE AND ANCILLARY CO-EXECUTRIX OF THE ESTATE OF NIEVES DE LARRACOECHEA AZUMENDI, DECEASED *v.* ROSENKRANZ, ON HIS OWN BEHALF AND AS ANCILLARY CO-EXECUTOR OF THE ESTATE OF NIEVES DE LARRACOECHEA AZUMENDI, DECEASED. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 259 App. Div. 2d 313, 684 N. Y. S. 2d 787.

No. 99–1700. CASE CORP. *v.* B & J CO., INC., ET AL. C. A. 8th Cir. Motion of petitioner for leave to lodge under seal District Court order granted. Certiorari denied. Reported below: 205 F. 3d 1345.

Rehearing Denied

No. 98–1935. DEJA VU OF NASHVILLE, INC., ET AL. *v.* METROPOLITAN GOVERNMENT OF NASHVILLE ET AL., 529 U. S. 1052;

No. 99–1200. HERSHFIELD *v.* TOWN OF COLONIAL BEACH ET AL., 529 U. S. 1004;

No. 99–1306. HERSHFIELD *v.* BOARD OF ZONING APPEALS, KING GEORGE COUNTY, 529 U. S. 1054;

No. 99–1446. MCCLELLAN *v.* NORTHERN TRUST CO., 529 U. S. 1069;

No. 99–1463. JUNIOR *v.* WEST VIRGINIA ET AL., 529 U. S. 1069;

No. 99–1484. POLYAK *v.* SUMMERS, ATTORNEY GENERAL OF TENNESSEE, ET AL., 529 U. S. 1094;

No. 99–1491. MALLADI *v.* WEST, SECRETARY OF VETERANS AFFAIRS, 529 U. S. 1069;

No. 99–7345. GLASS *v.* CITY OF CARLSBAD ET AL., 528 U. S. 1166;

No. 99–7666. GEARY *v.* MCKINNEY ET AL., 529 U. S. 1008;

No. 99–7978. ESPINOZA RODRIGUEZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 529 U. S. 1041;

No. 99–8061. COOK *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 529 U. S. 1058;

No. 99–8076. JOHNSON *v.* ESSEX COUNTY HOSPITAL CENTER, 529 U. S. 1070;

No. 99–8140. PEACHLUM *v.* PENNSYLVANIA, 529 U. S. 1072;

No. 99–8149. HAWKINS *v.* MAINE BUREAU OF INSURANCE, 529 U. S. 1042;

No. 99–8240. COLE *v.* CITY OF TAMPA, FLORIDA, 529 U. S. 1073;

No. 99–8276. BLUE *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 529 U. S. 1074;

No. 99–8288. IN RE SANDERS, 529 U. S. 1016;

No. 99–8462. WILLIAMS *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, 529 U. S. 1076;

No. 99–8542. BONOWITZ ET AL. *v.* UNITED STATES, 529 U. S. 1077;

No. 99–8636. DIN *v.* SUMMERS, SECRETARY OF THE TREASURY, 529 U. S. 1102; and

No. 99–8755. HOOK *v.* UNITED STATES, 529 U. S. 1082. Petitions for rehearing denied.

No. 99–1192. BULLOCK *v.* TEXAS, 529 U. S. 1066. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 99–6035 (99A957). TAYLOR *v.* CAIN, WARDEN, 529 U. S. 1088. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for rehearing denied.

JUNE 7, 2000

Miscellaneous Order

No. 99–9911 (99A1015). IN RE DEMPS. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 99–9886 (99A1013). DEMPS *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 761 So. 2d 302.

JUNE 9, 2000

Miscellaneous Order

No. 99–1702 (99A1007). TEXAS *v.* COBB. Ct. Crim. App. Tex. Application for stay, presented to JUSTICE SCALIA, and by him referred to the Court, granted, and it is ordered that the mandate of the Court of Criminal Appeals of Texas, case No. 72,807, is hereby stayed pending the disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

JUNE 12, 2000

Certiorari Granted—Vacated and Remanded

No. 99–8458. JACKSON *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY. 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 *Sims* v. *Apfel*, *ante*, p. 103. Reported below: 196 F. 3d 1257.

Certiorari Dismissed

No. 99–8943. OKORO *v.* SCIBANA, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 201 F. 3d 441.

Miscellaneous Orders

No. 99A979. DOE ET AL. *v.* OREGON ET AL. Ct. App. Ore. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 99M92. WEBB *v.* ATTORNEY GRIEVANCE COMMISSION OF MICHIGAN. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 99M93. TARVER *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 128, Orig. ALASKA *v.* UNITED STATES. Motion for leave to file bill of complaint granted. The United States is allowed 60 days within which to file an answer.

No. 99–1178. SOLID WASTE AGENCY OF NORTHERN COOK COUNTY *v.* UNITED STATES ARMY CORPS OF ENGINEERS ET AL. C. A. 7th Cir. [Certiorari granted, 529 U. S. 1129.] Motion of Cargill, Inc., for leave to file a brief as *amicus curiae* granted.

No. 99–9314. IN RE VARGAS;
No. 99–9607. IN RE TAYLOR; and
No. 99–9615. IN RE WILLIAMS. Petitions for writs of habeas corpus denied.

No. 99–8557. IN RE OTIS;
No. 99–8985. IN RE SNAVELY; and
No. 99–9380. IN RE ALBERT. Petitions for writs of mandamus denied.

No. 99–1692. IN RE MENSAH; and
No. 99–8733. IN RE AWOFOLU. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Denied

No. 99–1225. PARSONS CORP. ET AL. *v.* UNITED STATES EX REL. OLIVER. C. A. 9th Cir. Certiorari denied. Reported below: 195 F. 3d 457.

No. 99–1314. TEFEL ET AL. *v.* RENO, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 180 F. 3d 1286.

No. 99–1482. Osage Tribal Council, on Behalf of the Osage Tribe of Indians *v.* Department of Labor. C. A. 10th Cir. Certiorari denied. Reported below: 187 F. 3d 1174.

No. 99–1486. Sac & Fox Nation of Oklahoma et al. *v.* Cuomo, Secretary of Housing and Urban Development, et al. C. A. 10th Cir. Certiorari denied. Reported below: 193 F. 3d 1162.

No. 99–1511. Halat *v.* United States; and
No. 99–8637. Holcomb *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 193 F. 3d 852.

No. 99–1541. Becker *v.* Becker et al. Sup. Ct. Ohio. Certiorari denied.

No. 99–1559. Yukins, Warden *v.* Barker. C. A. 6th Cir. Certiorari denied. Reported below: 199 F. 3d 867.

No. 99–1620. Garcia et al. *v.* Conoco, Inc., et al.; and
No. 99–1621. Acuna et al. *v.* Brown & Root, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 200 F. 3d 335.

No. 99–1632. Graciano *v.* Pennsylvania Department of Transportation, Bureau of Driver Licensing. Commw. Ct. Pa. Certiorari denied. Reported below: 729 A. 2d 1284.

No. 99–1633. U. S. Borax Inc. *v.* Forster, Personal Representative of the Estate of Reade, Deceased. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 764 So. 2d 24.

No. 99–1634. Thompson *v.* Budd Co. C. A. 6th Cir. Certiorari denied. Reported below: 199 F. 3d 799.

No. 99–1638. Bronner Bros., Inc. *v.* Blount. C. A. 11th Cir. Certiorari denied. Reported below: 199 F. 3d 443.

No. 99–1639. Spivey et ux., dba Thrifty Instant Print *v.* Robertson et al. C. A. 5th Cir. Certiorari denied. Reported below: 197 F. 3d 772.

No. 99–1642. Gould *v.* Smith et al. C. A. 11th Cir. Certiorari denied. Reported below: 207 F. 3d 663.

No. 99–1643. Gould *v.* Smith et al. C. A. 11th Cir. Certiorari denied. Reported below: 208 F. 3d 1009.

No. 99–1644. GOULD *v.* SMITH ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 208 F. 3d 1011.

No. 99–1646. DAVIS *v.* BOARD OF ASSESSORS OF THE CITY OF MALDEN. App. Ct. Mass. Certiorari denied. Reported below: 48 Mass. App. 1110, 720 N. E. 2d 848.

No. 99–1656. CITY OF SHREVEPORT *v.* SIMPSON. C. A. 5th Cir. Certiorari denied. Reported below: 207 F. 3d 658.

No. 99–1657. MCCLURE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 745 A. 2d 42.

No. 99–1666. UNITED STATES EX REL. HARRIS *v.* GEORGE WASHINGTON PRIMARY CARE ASSOCIATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 203 F. 3d 53.

No. 99–1685. VOTING INTEGRITY PROJECT, INC., ET AL. *v.* BOMER, SECRETARY OF STATE OF TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 199 F. 3d 773.

No. 99–1689. LEBLANC *v.* SALEM, TRUSTEE. C. A. 1st Cir. Certiorari denied. Reported below: 196 F. 3d 1.

No. 99–1695. JENKINS *v.* IDAHO STATE BAR. Sup. Ct. Idaho. Certiorari denied.

No. 99–1707. STAVRIDIS *v.* ENERGY ABSORPTION SYSTEMS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 202 F. 3d 287.

No. 99–1721. GAINES *v.* WHITE RIVER ENVIRONMENTAL PARTNERSHIP ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 202 F. 3d 273.

No. 99–1757. MOUNKES ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 204 F. 3d 1024.

No. 99–1759. CONNER *v.* BARBOUR COUNTY BOARD OF EDUCATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 198 F. 3d 236.

No. 99–1765. IN RE LEDVINA. C. A. 8th Cir. Certiorari denied. Reported below: 210 F. 3d 379.

No. 99–1766. UNDERWOOD ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 203 F. 3d 836.

No. 99–1768. DUMANIS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 182 F. 3d 899.

No. 99–1775. FLANDREAU SANTEE SIOUX TRIBE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 197 F. 3d 949.

No. 99–1776. BRODSKY ET AL. *v.* UNION LOCAL 306, MOTION PICTURE PROJECTIONISTS, VIDEO TECHNICIANS AND ALLIED CRAFTS, I. A. T. S. E., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1321.

No. 99–1780. PEEPLES *v.* WRIGHT INVESTMENT PROPERTIES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 204 F. 3d 1122.

No. 99–1784. MANCHAK *v.* SEVENSON ENVIRONMENTAL SERVICES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 217 F. 3d 860.

No. 99–1791. GRAHAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 3d 255.

No. 99–1809. DUPONT *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 730 A. 2d 970.

No. 99–6907. EADS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 191 F. 3d 1206.

No. 99–8069. SMITH *v.* GOMEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 99–8172. PEREZ-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 202 F. 3d 265.

No. 99–8292. KAMMERSELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 196 F. 3d 1137.

No. 99–8314. MELVIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 187 F. 3d 1316.

No. 99–8324. BARNES *v.* SCOTT, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 201 F. 3d 1292.

No. 99–8447. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 183 F. 3d 1291.

No. 99–8560. GARCIA-ANTUNEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 203 F. 3d 827.

No. 99–8581. ULLRING *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 741 A. 2d 1065.

No. 99–8635. GRANDISON *v.* CORCORAN, WARDEN, ET AL. Cir. Ct. Baltimore City, Md. Certiorari denied.

No. 99–8930. VARGAS *v.* THOMPSON, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 99–8941. RODRIGUEZ *v.* SONDALLE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 99–8950. NEALY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–8954. SHARK *v.* ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–8955. MOSHER *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 221 Wis. 2d 203, 584 N. W. 2d 553.

No. 99–8962. ASPELMEIER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 99–8963. JOHNSON *v.* SAFFLE, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 203 F. 3d 835.

No. 99–8965. ASPELMEIER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 99–8973. WYATT *v.* BOONE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 201 F. 3d 450.

No. 99–8976. COUNCIL *v.* SEBERG ET AL. Sup. Ct. Haw. Certiorari denied.

No. 99–8980. JONES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 748 So. 2d 1012.

No. 99–8999. NICHOLSON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 99–9001. MUHAMMAD *v.* COWAN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 99–9017. DIGIOVANNI *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 99–9022. WOOLVERTON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–9025. WILLIAMS *v.* MAYER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 248.

No. 99–9029. WUCHANG *v.* THORNTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 833.

No. 99–9031. WILDER *v.* MCGILL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 825.

No. 99–9033. ADAMS *v.* HARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 181 F. 3d 86.

No. 99–9037. FUNKE *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 99–9038. HUNT *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 46 Mass. App. 1115, 707 N. E. 2d 411.

No. 99–9039. GLORIA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–9040. DOYLE *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 99–9043. GATES *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–9044. GRANT *v.* FISHER, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 99–9045. REED *v.* MARICOPA COUNTY, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 385.

No. 99–9049. CALDWELL *v.* GREINER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–9050. CRAWFORD *v.* PURKETT, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 99–9056. CRAWFORD *v.* UNION CARBIDE CORP. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 257.

No. 99–9063. HENNESS *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 99–9100. MACK ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 200 F. 3d 653.

No. 99–9105. BENOIT ET AL. *v.* LOUISIANA WATER CO. ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 752 So. 2d 987.

No. 99–9116. COSME *v.* ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–9118. WESTON *v.* FIRST UNION NATIONAL BANK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 434.

No. 99–9123. BROWN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 739 A. 2d 582.

No. 99–9141. GRIEFEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 200 F. 3d 1256.

No. 99–9165. BRADFIELD *v.* BOWLEN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–9201. TYREE *v.* MILLIKEN, ASSOCIATE JUDGE, DISTRICT OF COLUMBIA SUPERIOR COURT. Ct. App. D. C. Certiorari denied.

No. 99–9210. STEWART *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 230 F. 3d 1372.

No. 99–9220. JACKSON *v.* WEST, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 230 F. 3d 1371.

No. 99–9230. REYES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 99–9232. CROMPTON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 761 So. 2d 327.

No. 99–9238. JACKSON *v.* WEST, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 232 F. 3d 912.

No. 99–9247. GIBBS *v.* MILLER, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–9307. COGWELL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 304 Ill. App. 3d 1076, —— N. E. 2d ——.

No. 99–9308. SPEIGHTS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 202 F. 3d 287.

No. 99–9326. ARABAXHI *v.* CONSTANTINE, ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION. C. A. 1st Cir. Certiorari denied. Reported below: 201 F. 3d 426.

No. 99–9329. SCOTT *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–9330. WALDER *v.* HUFFMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–9341. SOTO *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 53 M. J. 52.

No. 99–9345. YOUNG *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–9359. RUSSEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 208 F. 3d 223.

No. 99–9369. ALAIMO *v.* STATE UNIVERSITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 99–9379. ALBERT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 203 F. 3d 818.

No. 99–9384. SPOTTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 824.

No. 99–9392. WEISCHEDEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 201 F. 3d 1250.

No. 99–9398. BOLTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 182 F. 3d 933.

No. 99–9402. AKPAETI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–9405. BISHOP *v.* RHODE ISLAND. C. A. 1st Cir. Certiorari denied.

No. 99–9409. MONROE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 210 F. 3d 359.

No. 99–9416. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 386.

No. 99–9419. PEREA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 216 F. 3d 1085.

No. 99–9421. WASHINGTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 99–9434. MANN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–9437. YERUSHALAYIM, FKA BRASCH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1325.

No. 99–9440. BIRBAL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 99–9442. WILLIAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 221 F. 3d 197.

No. 99–9447. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 212.

No. 99–9450. DRAGONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 205 F. 3d 1330.

No. 99–9451. GIL-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 208 F. 3d 223.

No. 99–9457. GIL, AKA GUSTAVO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 208 F. 3d 205.

No. 99–9467. SCHOONOVER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 387.

No. 99–9472. AGUIAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 99–9473. TOWNSEND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 387.

No. 99–9484. PORTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1326.

No. 99–9493. JOHNSON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 189 F. 3d 479.

No. 99–9494. BREWINGTON *v.* DUNCAN, SUPERINTENDENT, GREAT MEADOWS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–9499. OSBORN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 1176.

No. 99–9500. BRON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 437.

No. 99–9503. CALDWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 204 F. 3d 1120.

No. 99–9507. INZUNZA-GIL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 208 F. 3d 223.

No. 99–9509. RIVERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 189 F. 3d 476.

No. 99–9512. TUNCAP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 99–9514. NANCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 205 F. 3d 1336.

No. 99–9516. RUSSELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 205 F. 3d 1336.

No. 99–9522. MULLINS, AKA ISAACS *v.* UNITED STATES; and No. 99–9559. SWINEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 203 F. 3d 397.

No. 99–9524. BRADLEY *v.* OHIO. Ct. App. Ohio, Logan County. Certiorari denied.

No. 99–9525. ALVARADO-TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 208 F. 3d 222.

No. 99–9529. SANDERS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 197 F. 3d 568.

No. 99–9530. ROBERTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 203 F. 3d 867.

No. 99–9545. MORRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 208 F. 3d 207.

No. 99–9547. RAMIREZ-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 99–9558. RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 210 F. 3d 367.

No. 99–1353. FRIZZELL CONSTRUCTION CO., INC. *v.* GATLINBURG, L. L. C. Sup. Ct. Tenn. Motion of Associated General Contractors of America, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 9 S. W. 3d 79.

No. 99–1629. CHING-RONG WANG *v.* WINNER INTERNATIONAL ROYALTY CORP. C. A. Fed. Cir. Motion of Intellectual Property Creators for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 202 F. 3d 1340.

No. 99–9851 (99A1006). MASON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 203 F. 3d 829.

Rehearing Denied

No. 99–1412. CHEROKEE CORPORATION OF LINDEN, VIRGINIA, INC. *v.* CAPITAL SKIING CORP., 529 U. S. 1087;

No. 99–6199. COLVIN-EL *v.* NUTH, WARDEN, ET AL., 529 U. S. 1088;

No. 99–7763. JOHNSON *v.* LUMBERMENS MUTUAL CASUALTY CO. ET AL., 529 U. S. 1024;

No. 99–7781. WISNIEWSKI *v.* CONTI ET AL., 529 U. S. 1070;

No. 99–7813. FELIX *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 528 U. S. 1193;

No. 99–7821. HORNSBY *v.* EVANS, WARDEN, 529 U. S. 1026;

No. 99–8137. COLEMAN *v.* JOHN THOMAS BATTS, INC., 529 U. S. 1071;

No. 99–8141. SPAIN *v.* WEST, SECRETARY OF VETERANS AFFAIRS, 529 U. S. 1059;

No. 99–8144. MICHELFELDER *v.* GAY & CHACKER, P. C., 529 U. S. 1042;

No. 99–8193. GREEN *v.* TEXAS, 529 U. S. 1059;

No. 99–8289. PEABODY *v.* ZLAKET, CHIEF JUSTICE, SUPREME COURT OF ARIZONA, ET AL., 529 U. S. 1074;

No. 99–8291. STEWART *v.* UNITED STATES, 529 U. S. 1059;

No. 99–8305. IN RE RUSSEL, 529 U. S. 1065;

No. 99–8319. JOHNSON *v.* JEFFERSON, 529 U. S. 1089;

No. 99–8354. DAVIS *v.* UNITED PARCEL SERVICE, INC., ET AL., 529 U. S. 1090;

No. 99–8388. CANCASSI *v.* ROBINSON, 529 U. S. 1075;

No. 99–8519. WOODS *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL., 529 U. S. 1092;

No. 99–8574. HADDAD *v.* MICHIGAN NATIONAL CORP. ET AL., 529 U. S. 1078; and

No. 99–8823. MARCELLO *v.* MAINE DEPARTMENT OF HUMAN SERVICES, 529 U. S. 1102. Petitions for rehearing denied.

No. 96–8823. JANECKA *v.* TEXAS, 522 U. S. 825. Motion for leave to file petition for rehearing denied.

JUNE 13, 2000

Miscellaneous Order

No. 99–9574 (99A948). IN RE BRYSON. Application for stay of execution of sentence of death, presented to JUSTICE BREYER,

and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

JUNE 14, 2000

Miscellaneous Order

No. 99A1035. BURKS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Application to vacate the June 14, 2000, order of the United States Court of Appeals for the Fifth Circuit, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

Certiorari Denied

No. 99–9501 (99A995). BURKS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 207 F. 3d 658.

JUNE 15, 2000

Miscellaneous Orders

No. 99–10023 (99A1038). IN RE NUNCIO. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

No. 99–10034 (99A1041). IN RE NUNCIO. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 99–9678 (99A968). NUNCIO *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 208 F. 3d 1007.

JUNE 19, 2000

Certiorari Granted—Vacated and Remanded

No. 98–1836. UNITED STATES HEALTHCARE SYSTEMS OF PENNSYLVANIA, INC. *v.* PENNSYLVANIA HOSPITAL INSURANCE CO. ET AL. Sup. Ct. Pa. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pegram* v. *Herdrich*, *ante*, p. 211. Reported below: 555 Pa. 342, 724 A. 2d 889.

No. 99–937. MOTEL 6 OPERATING L. P. ET AL. *v.* HUTTINGER ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reeves* v. *Sanderson Plumbing Products, Inc.*, *ante*, p. 133. Reported below: 187 F. 3d 647.

Certiorari Dismissed

No. 99–9144. DENARDO *v.* CUNNINGHAM 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. Reported below: 194 F. 3d 1316.

No. 99–9517. KARIM-PANAHI *v.* COMMISSIONER OF INTERNAL REVENUE. 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. 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: 208 F. 3d 221.

Miscellaneous Orders

No. D–2120. IN RE DISBARMENT OF GELBWAKS. Disbarment entered. [For earlier order herein, see 528 U. S. 984.]

No. 99–8465. NAGY *v.* LAPPIN ET AL. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [529 U. S. 1096] denied.

No. 99–9005. IN RE ABIDEKUN. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [529 U. S. 1096] denied.

No. 99–9647. IN RE VONDETTE; and
No. 99–9669. IN RE CROMEDY. Petitions for writs of habeas corpus denied.

No. 99–9395. IN RE MORRISON;
No. 99–9527. IN RE MORRISON;
No. 99–9555. IN RE MORRISON; and
No. 99–9567. IN RE MORRISON. Petitions for writs of mandamus denied.

No. 99–1696. IN RE JOHNSTON. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 99–1529. EGELHOFF *v.* EGELHOFF, A MINOR, BY AND THROUGH HER NATURAL PARENT, BREINER, ET AL. Sup. Ct. Wash. Motions of Boeing Co. et al. and American Council of Life Insurers for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 139 Wash. 2d 557, 989 P. 2d 80.

No. 99–1680. CITY NEWS & NOVELTY, INC. *v.* CITY OF WAUKESHA. Ct. App. Wis. Certiorari granted limited to Question 3 as presented by the petition. Reported below: 231 Wis. 2d 93, 604 N. W. 2d 870.

Certiorari Denied

No. 99–679. CONOVER *v.* FERNALD ENVIRONMENTAL RESTORATION MANAGEMENT CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 178 F. 3d 414.

No. 99–1383. U. S. HEALTHCARE, INC. *v.* BAUMAN ET UX., INDIVIDUALLY AND AS ADMINISTRATORS AD PROSEQUENDUM OF THE ESTATE OF BAUMAN, DECEASED. C. A. 3d Cir. Certiorari denied. Reported below: 193 F. 3d 151.

No. 99–1555. BICKERSTAFF *v.* VASSAR COLLEGE. C. A. 2d Cir. Certiorari denied. Reported below: 196 F. 3d 435.

No. 99–1563. S&M ENTERPRISES *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 199 F. 3d 1317.

No. 99–1582. BROWNING ET AL. *v.* ROHM & HAAS CO. C. A. 6th Cir. Certiorari denied. Reported below: 194 F. 3d 1311.

No. 99–1637. RAFFENSPERGER, HUGHES & CO., INC., ET AL. *v.* BROUWER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 199 F. 3d 961.

No. 99–1650. SPIEGEL *v.* CORTESE. C. A. 7th Cir. Certiorari denied. Reported below: 196 F. 3d 717.

No. 99–1655. WEI *v.* FINK, TRUSTEE, ET AL.; and
No. 99–9098. GRAVEN *v.* FINK, TRUSTEE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 186 F. 3d 871.

No. 99–1659. SHARON P. *v.* ARMAN, LTD., ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 21 Cal. 4th 1181, 989 P. 2d 121.

No. 99–1665. PENLEY *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 2 S. W. 3d 534.

No. 99–1679. COUNTY OF SAN DIEGO ET AL. *v.* MCALINDIN. C. A. 9th Cir. Certiorari denied. Reported below: 192 F. 3d 1226 and 201 F. 3d 1211.

No. 99–1681. PURDY *v.* BURLINGTON NORTHERN SANTA FE CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1114.

No. 99–1684. STEHLIK *v.* CHARLES. Sup. Ct. Pa. Certiorari denied. Reported below: 560 Pa. 334, 744 A. 2d 1255.

No. 99–1690. CITY OF HOUSTON *v.* KOLB ET AL. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 982 S. W. 2d 949.

No. 99–1701. BERK *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–1714. FERGUSON *v.* CSX TRANSPORTATION. C. A. 3d Cir. Certiorari denied. Reported below: 208 F. 3d 205.

No. 99–1732. DAVENPORT, AN INFANT, BY HER LEGAL GUARDIAN AND NATURAL MOTHER, BELT, ET AL. *v.* YOUNG MEN'S CHRISTIAN ASSN. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 205 F. 3d 1345.

No. 99–1735. BROOKS *v.* DELTA AIR LINES. C. A. 11th Cir. Certiorari denied. Reported below: 208 F. 3d 1010.

No. 99–1736. OSTERBERG ET UX. *v.* PECA. Sup. Ct. Tex. Certiorari denied. Reported below: 12 S. W. 3d 31.

No. 99–1740. ATLAS TURNER, INC. *v.* HAMILTON, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF HAMILTON, DECEASED. C. A. 2d Cir. Certiorari denied. Reported below: 197 F. 3d 58.

No. 99–1755. HENDERSON *v.* SHEAHAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 196 F. 3d 839.

No. 99–1778. HAMAMCY *v.* TEXAS BOARD OF MEDICAL EXAMINERS. C. A. 5th Cir. Certiorari denied. Reported below: 210 F. 3d 369.

No. 99–1782. SUMMERFIELD HOUSING LIMITED PARTNERSHIP *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 217 F. 3d 860.

No. 99–1785. THAYER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 201 F. 3d 214.

No. 99–1797. BRECK ET AL. *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 203 F. 3d 392.

No. 99–1806. WILLETT *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied.

No. 99–1816. ZUNAMON ET AL. *v.* BOWER, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 308 Ill. App. 3d 69, 719 N. E. 2d 130.

No. 99–1818. RAMBACHER ET VIR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 194 F. 3d 1313.

No. 99–1831. CAMPILLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 197 F. 3d 1108.

No. 99–1832. HIDALGO ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 197 F. 3d 1108.

No. 99–1833. Baptist Memorial Hospital *v.* Bakery & Confectionery Union & Industry International Health Benefits Fund. C. A. 6th Cir. Certiorari denied. Reported below: 208 F. 3d 212.

No. 99–1835. Cantor *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1321.

No. 99–1854. Frye *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 202 F. 3d 270.

No. 99–1902. P. J. *v.* Eagle-Union Community School Corp. C. A. 7th Cir. Certiorari denied. Reported below: 202 F. 3d 274.

No. 99–7602. Bey *v.* New Jersey. Sup. Ct. N. J. Certiorari denied. Reported below: 161 N. J. 233, 736 A. 2d 469.

No. 99–8421. McInnis *v.* Farmon, Warden. C. A. 9th Cir. Certiorari denied.

No. 99–8527. Stanley *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 99–8630. Horning *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 99–8703. Jennings *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 195 F. 3d 795.

No. 99–8708. Chestaro *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 197 F. 3d 600.

No. 99–8913. Cheek *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 351 N. C. 48, 520 S. E. 2d 545.

No. 99–9057. Hunt *v.* Massachusetts. App. Ct. Mass. Certiorari denied. Reported below: 47 Mass. App. 1107, 713 N. E. 2d 404.

No. 99–9061. Peggs *v.* Nassau County Police Department. C. A. 2d Cir. Certiorari denied.

No. 99–9068. McGee *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–9078. OCHOA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 99–9079. RENWICK *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 298 Ill. App. 3d 1184, 738 N. E. 2d 242.

No. 99–9087. MCCLENDON *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 748 So. 2d 814.

No. 99–9092. BARELA *v.* REED ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 381.

No. 99–9099. GONZALEZ MEJIAS ET AL. *v.* M/V EMILY S. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 201 F. 3d 427.

No. 99–9104. HOLSEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 271 Ga. 856, 524 S. E. 2d 473.

No. 99–9110. BLAYLOCK *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–9113. MUSGROVE *v.* PAGE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 99–9114. MERRIMAN *v.* TRIPPETT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–9115. CHEATHAM *v.* MILLER, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–9117. WILLIAMS *v.* HEAD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 185 F. 3d 1223.

No. 99–9119. WILLIAMS *v.* POLUNSKY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 209 F. 3d 719.

No. 99–9121. BENTON *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 99–9122. BRIDGEWATER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 99–9124. LEWIS *v.* MICHIGAN DEPARTMENT OF CORRECTIONS; and LEWIS *v.* MICHIGAN PAROLE BOARD. Ct. App. Mich. Certiorari denied.

No. 99–9126. BUTERBAUGH *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 99–9128. BINDER *v.* STEGALL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 177.

No. 99–9131. AUSTIN *v.* ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–9134. BOLES *v.* FENTON SECURITY, INC. OF COLORADO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 281.

No. 99–9135. CREUSERE *v.* TWYMAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 99–9143. GOLLIVER *v.* WALKER, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–9154. GRIFFIN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 717 N. E. 2d 73.

No. 99–9158. FRAZIER *v.* SNYDER, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 99–9166. AL-HAKIM *v.* CARVER ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–9168. BODIN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–9174. PENA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 99–9177. CAVENDER *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–9179. BARNES *v.* SUPERIOR COURT OF CALIFORNIA, SAN DIEGO COUNTY. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 99–9181. CHEN LIU *v.* PORTUONDO, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–9186. CLAYTON *v.* HARRIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 99–9187. ALLEN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 99–9196. ROWBOTTOM *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 99–9237. MCCRAY *v.* ATWELL. Sup. Ct. Tex. Certiorari denied.

No. 99–9266. BROWN *v.* DANZIG, SECRETARY OF THE NAVY. C. A. 4th Cir. Certiorari denied. Reported below: 194 F. 3d 1303.

No. 99–9297. FINNEY *v.* FLORIDA PAROLE AND PROBATION COMMISSION. C. A. 11th Cir. Certiorari denied. Reported below: 158 F. 3d 588.

No. 99–9298. DHALIWAL *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 99–9357. CLIFTON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 207 F. 3d 662.

No. 99–9391. BAUMER *v.* LEMKE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 187 F. 3d 646.

No. 99–9404. CRUZ-MENDEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 201 F. 3d 449.

No. 99–9407. YOUNG *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 99–9414. ALLEN *v.* SHOE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 819.

No. 99–9415. MURPHY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 99–9424. BUTLER *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied.

No. 99–9426. BUSTAMONTE *v.* LeMASTER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 203 F. 3d 834.

No. 99–9432. GREEN *v.* PRICE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 188 F. 3d 518.

No. 99–9436. McCOWN *v.* MACK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–9438. TEAGUE *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 208 F. 3d 215.

No. 99–9441. BRANDON *v.* PENNSYLVANIA BOARD OF PROBATION AND PAROLE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 208 F. 3d 207.

No. 99–9454. HECHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 212 F. 3d 847.

No. 99–9459. HULSE ET AL. *v.* HALL, SHERIFF, BOTTINEAU COUNTY, NORTH DAKOTA. C. A. 8th Cir. Certiorari denied. Reported below: 205 F. 3d 1346.

No. 99–9469. CASEY *v.* BRAXTON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 194 F. 3d 1303.

No. 99–9479. BROOKS *v.* RIDDLE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 819.

No. 99–9510. RIDDICK *v.* BOGUS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 208 F. 3d 206.

No. 99–9515. ORTIZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1326.

No. 99–9546. KEITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–9548. COPLEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 203 F. 3d 836.

No. 99–9564. PROCTOR *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 99–9580. ZACKULAR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 203 F. 3d 72.

No. 99–9584. REGISTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 182 F. 3d 820.

No. 99–9586. BLACKMORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 209 F. 3d 720.

No. 99–9590. DANIELS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–9596. FRAZIER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 438.

No. 99–9597. HERNANDEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 205 F. 3d 1348.

No. 99–9613. WALKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1327.

No. 99–9617. ALARCON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 210 F. 3d 368.

No. 99–9623. LONES ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 205 F. 3d 1335.

No. 99–9624. JOY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 192 F. 3d 761.

No. 99–9642. WEATHERFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 207 F. 3d 661.

No. 99–9643. PEREZ-HINOJOSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 191 F. 3d 462.

No. 99–1388. PHELPS DODGE CORP. ET AL. *v.* UNITED STATES ET AL.; and

No. 99–1389. SALT RIVER VALLEY WATER USERS' ASSN. ET AL. *v.* UNITED STATES ET AL. Sup. Ct. Ariz. Motion of Mountain States Legal Foundation et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and these petitions. Reported below: 195 Ariz. 411, 989 P. 2d 739.

No. 99–1625. TANGIPAHOA PARISH BOARD OF EDUCATION ET AL. *v.* FREILER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 185 F. 3d 337.

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

I

On April 19, 1994, the Tangipahoa Parish, Louisiana, Board of Education (Board) passed the following resolution:

> "Whenever, in classes of elementary or high school, the scientific theory of evolution is to be presented, whether from textbook, workbook, pamphlet, other written material, or oral presentation the following statement shall be quoted immediately before the unit of study begins as a disclaimer from endorsement of such theory.
>
> "It is hereby recognized by the Tangipahoa Parish Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.
>
> "It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion or maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion." Pet. for Cert. 2.

Approximately seven months after this resolution was adopted, respondents, three parents of children attending the Tangipahoa Parish Public Schools, brought suit in the United States District Court for the Eastern District of Louisiana against petitioners, the Board, its members, and the superintendent of the school district. They brought a facial challenge to the disclaimer contained in the last two paragraphs of the resolution, claiming that it violated the coextensive Establishment Clauses of the United States and Louisiana Constitutions. The District Court ruled in favor of respondents. 975 F. Supp. 819 (1997). It concluded that the disclaimer lacked a secular purpose, and thus failed the first prong of the three-prong test outlined in *Lemon* v. *Kurtzman*,

403 U. S. 602 (1971), because the Board's articulated purpose—that it adopted the disclaimer to promote critical thinking by students on the subject of the origin of life—was a sham. See 975 F. Supp., at 829. It therefore held the disclaimer unconstitutional under both the Federal and the Louisiana Constitutions. See *id.*, at 830.

The Fifth Circuit affirmed. 185 F. 3d 337 (1999). It began by noting that, in the context of public education, this Court has used three different tests to evaluate state actions challenged on Establishment Clause grounds: the three-prong test of *Lemon;* the "endorsement" test of *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573 (1989); and the "coercion" test of *Lee* v. *Weisman*, 505 U. S. 577 (1992). See 185 F. 3d, at 343. Although noting that the *Lemon* test has been "widely criticized and occasionally ignored," the court opted to apply it. 185 F. 3d, at 344. The court first concluded that the disclaimer had a secular purpose and therefore survived the first prong of the *Lemon* test. See 185 F. 3d, at 344–346. While agreeing with the District Court that the purpose of promoting critical thinking by students on the subject of the origin of life was a sham, the court concluded that the disclaimer served two other, legitimate secular purposes: disclaiming any orthodoxy of belief that could be inferred from the exclusive place of evolution in the curriculum, and reducing offense to any student or parent caused by the teaching of evolution. See *ibid.*

The Fifth Circuit then turned to the second prong of the *Lemon* test—the so-called "effects" prong. See 185 F. 3d, at 346–348. The court concluded that the disclaimer failed this prong because "the primary effect of the disclaimer is to protect and maintain a particular religious viewpoint, namely belief in the Biblical version of creation." *Id.*, at 346. It based this conclusion on three factors: "(1) the juxtaposition of the disavowal of endorsement of evolution with an urging that students contemplate alternative theories of the origin of life; (2) the reminder that students have the right to maintain beliefs taught by their parents regarding the origin of life; and (3) the 'Biblical version of Creation' as the only alternative theory explicitly referenced in the disclaimer." *Ibid.* (Finally, the court noted, albeit in passing and without elaboration, that, because the disclaimer failed the second prong of the *Lemon* test, it would also fail the endorsement test. See 185 F. 3d, at 348.)

Petitioners unsuccessfully moved for rehearing by the panel and by the en banc Fifth Circuit. 201 F. 3d 602 (2000). Judge Barksdale, joined by six other judges, dissented from the denial of rehearing en banc. See *id.*, at 603–608.

II

Like a majority of the Members of this Court, I have previously expressed my disapproval of the *Lemon* test. See *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 398–400 (1993) (SCALIA, J., joined by THOMAS, J., concurring in judgment); *County of Allegheny*, *supra*, at 655–657 (KENNEDY, J., concurring in judgment in part and dissenting in part); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 346–349 (1987) (O'CONNOR, J., concurring in judgment); *Wallace* v. *Jaffree*, 472 U. S. 38, 107–113 (1985) (REHNQUIST, J., dissenting). I would grant certiorari in this case if only to take the opportunity to inter the *Lemon* test once for all.

Even assuming, however, that the Fifth Circuit correctly chose to apply the *Lemon* test, I believe the manner of its application so erroneous as independently to merit the granting of certiorari, if not summary reversal. Under the second prong of *Lemon*, the "principal or primary effect [of a state action] must be one that neither advances nor inhibits religion." *Lemon*, *supra*, at 612. Far from advancing religion, the "principal or primary effect" of the disclaimer at issue here is merely to advance freedom of thought. At the outset, it is worth noting that the theory of evolution is the only theory actually *taught* in the Tangipahoa Parish schools. As the introductory paragraph of the resolution suggests, the disclaimer operates merely as a (perhaps not too believable) "disclaimer from endorsement" of that single theory, and not as an affirmative endorsement of any particular religious theory as to the origin of life, or even of religious theories as to the origin of life generally. The only allusion to religion in the entire disclaimer is a reference to the "Biblical version of Creation," mentioned as an illustrative *example*—surely the most obvious example—of a "concept" that the teaching of evolution was "not intended to influence or dissuade." The disclaimer does not refer again to the "Biblical version of Creation," much less provide any elaboration as to what that theory entails; instead, it merely reaffirms that "it is the basic right and privilege of each

student to form his/her own opinion or maintain beliefs taught by parents on this very important matter of the origin of life and matter," and neutrally encourages students "closely [to] examine *each* alternative" before forming an opinion.

As even this cursory discussion of the disclaimer amply demonstrates, the Fifth Circuit's conclusion that "[t]he disclaimer . . . encourages students to read and meditate upon religion in general and the 'Biblical version of Creation' in particular," 185 F. 3d, at 346, lacks any support in the text of the invalidated document. In view of the fact that the disclaimer merely reminds students of their right to form their own beliefs on the subject, or to maintain beliefs taught by their parents—not to mention the fact that the theory of evolution is the only theory actually taught in the lesson that follows the disclaimer—there is "no realistic danger that the community would think that the [School Board] was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental." *Lamb's Chapel*, *supra*, at 395. At bottom, the disclaimer constitutes nothing more than "simply a tolerable acknowledgment of beliefs widely held among the people of this country," *Marsh* v. *Chambers*, 463 U. S. 783, 792 (1983). See also *Lynch* v. *Donnelly*, 465 U. S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

In denying the petition for rehearing, the Fifth Circuit panel took another tack: "In denying rehearing, we emphasize that we do not decide that a state-mandated statement violates the Constitution simply because it disclaims any intent to communicate to students that the theory of evolution is the only accepted explanation of the origin of life, informs students of their right to follow their religious principles, and encourages students to evaluate all explanations of life's origins, including those taught outside the classroom. We decide only that under the facts and circumstances of this case, the statement of the Tangipahoa Parish School Board is not sufficiently neutral to prevent it from violating the Establishment Clause." 201 F. 3d, at 603. Inasmuch as what the disclaimer contains is nothing more than what this statement purports to allow, the explanation is incoherent. Reference to unnamed "facts and circumstances of this case" is not a substi-

tute for judicial reasoning. The only aspect of the disclaimer that could conceivably be regarded as going beyond what the rehearing statement purports to approve is the explicit mention—as an example—of "the Biblical version of Creation." To think that this reference to (and plainly not endorsement of) a reality of religious literature—and this use of an example that is not a contrived one, but to the contrary the example most likely to come into play—somehow converts the otherwise innocuous disclaimer into an establishment of religion is quite simply absurd.

In *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), we invalidated a statute that forbade the teaching of evolution in public schools; in *Edwards* v. *Aguillard*, 482 U. S. 578 (1987), we invalidated a statute that required the teaching of creationism whenever evolution was also taught; today we permit a Court of Appeals to push the much beloved secular legend of the Monkey Trial one step further. We stand by in silence while a deeply divided Fifth Circuit bars a school district from even suggesting to students that other theories besides evolution—including, but not limited to, the Biblical theory of creation—are worthy of their consideration. I dissent.

Rehearing Denied

No. 99–1460. WATTS *v.* NETWORK SOLUTIONS, INC., 529 U. S. 1088;

No. 99–1631. ICELAND STEAMSHIP CO., LTD.-EIMSKIP *v.* DEPARTMENT OF THE ARMY ET AL., 529 U. S. 1112;

No. 99–8278. IN RE BARDELLA, 529 U. S. 1065;

No. 99–8349. WINGATE *v.* TEXAS, 529 U. S. 1090;

No. 99–8408. LEONE *v.* KERLEY ET AL., 529 U. S. 1076;

No. 99–8546. REYNOLDS *v.* ROONEY ET UX., 529 U. S. 1092; and

No. 99–8626. COLLINS *v.* G/H CONTRACTING CO. ET AL., 529 U. S. 1116. Petitions for rehearing denied.

JUNE 20, 2000

Certiorari Denied

No. 99–9990 (99A1031). PROVENZANO *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE BREYER would grant the petition for writ of certiorari and the application for stay of execution. Reported below: 760 So. 2d 137.

JUNE 21, 2000

Miscellaneous Orders

No. 99A1052 (99–9917). BURKET *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. 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 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.

No. 99–10090 (99A1056). IN RE PROVENZANO. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 99–10089 (99A1055). PROVENZANO *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 215 F. 3d 1233.

JUNE 22, 2000

Miscellaneous Order

No. 99–10120 (99A1065). IN RE GRAHAM. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution.

JUNE 26, 2000

Certiorari Granted—Vacated and Remanded

No. 99–935. CHANDLER, FATHER AND NEXT FRIEND OF CHANDLER *v.* SIEGELMAN, GOVERNOR OF ALABAMA AND PRESIDENT OF THE STATE BOARD OF EDUCATION, ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded

for further consideration in light of *Santa Fe Independent School Dist.* v. *Doe*, *ante*, p. 290. Reported below: 180 F. 3d 1254.

No. 99–1264. BROWN *v.* O'DEA, WARDEN. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Williams* v. *Taylor*, 529 U. S. 362 (2000). Reported below: 187 F. 3d 572.

Miscellaneous Orders

No. D–2148. IN RE DISBARMENT OF STONE. Disbarment entered. [For earlier order herein, see 529 U. S. 1035.]

No. D–2149. IN RE DISBARMENT OF RASKIN. Disbarment entered. [For earlier order herein, see 529 U. S. 1035.]

No. D–2150. IN RE DISBARMENT OF KORONES. Disbarment entered. [For earlier order herein, see 529 U. S. 1035.]

No. D–2152. IN RE DISBARMENT OF HALEY. Disbarment entered. [For earlier order herein, see 529 U. S. 1036.]

No. D–2153. IN RE DISBARMENT OF SCALF. Disbarment entered. [For earlier order herein, see 529 U. S. 1050.]

No. D–2154. IN RE DISBARMENT OF ADAMS. Disbarment entered. [For earlier order herein, see 529 U. S. 1051.]

No. D–2156. IN RE DISBARMENT OF MITCHELL. Disbarment entered. [For earlier order herein, see 529 U. S. 1051.]

No. D–2159. IN RE DISBARMENT OF BLACK. Disbarment entered. [For earlier order herein, see 529 U. S. 1085.]

No. D–2165. IN RE DISBARMENT OF TAMER. David Ferris Tamer, of Winston-Salem, N. C., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on May 22, 2000 [529 U. S. 1127], is discharged.

No. D–2166. IN RE DISBARMENT OF CARROLL. Daniel G. Carroll, of Chicago, Ill., 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–2167. IN RE DISBARMENT OF JACOBS. Charles H. Jacobs, of Dubuque, Iowa, 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–2168. IN RE DISBARMENT OF BROOKS. Trevor L. Brooks, of New York, N. Y., 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–2169. IN RE DISBARMENT OF BOOKER. Thomas Michael Booker, of Austin, Tex., 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–2170. IN RE DISBARMENT OF ESPER. Richard Dennis Esper, of El Paso, Tex., 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–2171. IN RE DISBARMENT OF BURNETT. Robert Lee Burnett, Jr., of Beaumont, Tex., 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–2172. IN RE DISBARMENT OF SILVER. Ronald Silver, of Coral Gables, Fla., 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–2173. IN RE DISBARMENT OF ROCCA. Glenn Michael Rocca, of Fort Lee, 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–2174. IN RE DISBARMENT OF KIERPIEC. Joseph Paul Kierpiec, of Detroit, Mich., 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–2175. IN RE DISBARMENT OF TANDY. Marshall D. Tandy, of Tucson, Ariz., 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–2176. IN RE DISBARMENT OF GREGORY. Howell Jackson Gregory, of Columbia, S. C., 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. 99M94. BYRD *v.* SALMON. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is awarded a total of $90,755.32 for the period December 2, 1999, through June 5, 2000, to be paid as follows: 40% by Nebraska, 40% by Wyoming, 3% by Colorado, 12% by the United States, and 5% by Basin Electric Power Cooperative. [For earler order herein, see, *e. g.*, 528 U. S. 1059.]

No. 99–1178. SOLID WASTE AGENCY OF NORTHERN COOK COUNTY *v.* UNITED STATES ARMY CORPS OF ENGINEERS ET AL. C. A. 7th Cir. [Certiorari granted, 529 U. S. 1129.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 99–1257. BROWNER, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, ET AL. *v.* AMERICAN TRUCKING ASSNS., INC., ET AL. C. A. D. C. Cir. [Certiorari granted, 529 U. S. 1129.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 99–1426. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* BROWNER, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 1202.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 99–9772. IN RE DEEMER. Petition for writ of habeas corpus denied.

No. 99–9563. IN RE JEFFS. Petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 99–1864. HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. *v.* CROMARTIE ET AL.; and

No. 99–1865. SMALLWOOD ET AL. *v.* CROMARTIE ET AL. Appeals from D. C. E. D. N. C. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 133 F. Supp. 2d 407.

Certiorari Granted

No. 99–1551. SEMTEK INTERNATIONAL INC. *v.* LOCKHEED MARTIN CORP. Ct. Sp. App. Md. Certiorari granted. Reported below: 128 Md. App. 39, 736 A. 2d 1104.

No. 99–1571. TRAFFIX DEVICES, INC. *v.* MARKETING DISPLAYS, INC. C. A. 6th Cir. Certiorari granted. Reported below: 200 F. 3d 929.

No. 99–1408. ATWATER ET AL. *v.* CITY OF LAGO VISTA ET AL. C. A. 5th Cir. Motions of American Civil Liberties Union of Texas, Inc., Texas Criminal Defense Lawyers Association, and National Association of Criminal Defense Lawyers et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 195 F. 3d 242.

No. 99–1687. BARTNICKI ET AL. *v.* VOPPER, AKA WILLIAMS, ET AL.; and

No. 99–1728. UNITED STATES *v.* VOPPER, AKA WILLIAMS, ET AL. C. A. 3d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 200 F. 3d 109.

No. 99–1702. TEXAS *v.* COBB. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Motions of Criminal Justice Legal Foundation, National Association of Police Organizations et al., and Texas District and County Attorneys Association et al. for leave to file briefs as *amici curiae* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition.

No. 99–1792. DIRECTOR OF REVENUE OF MISSOURI *v.* COBANK ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERA-

TIVES. Sup. Ct. Mo. Certiorari granted limited to the following question: "Does 12 U. S. C. § 2134 authorize States to tax the income of the National Bank for Cooperatives, a federally chartered instrumentality of the United States?" Reported below: 10 S. W. 3d 142.

No. 99–8576. GLOVER *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 182 F. 3d 921.

Certiorari Denied

No. 99–905. ARMSTRONG SURGICAL CENTER, INC. *v.* ARMSTRONG COUNTY MEMORIAL HOSPITAL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 185 F. 3d 154.

No. 99–1349. HALE *v.* COMMITTEE ON CHARACTER AND FITNESS OF THE ILLINOIS BAR ET AL. Sup. Ct. Ill. Certiorari denied.

No. 99–1457. DITTMAN *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 191 F. 3d 1020.

No. 99–1490. SOUTH DAKOTA ET AL. *v.* YANKTON SIOUX TRIBE ET AL.; and

No. 99–1683. YANKTON SIOUX TRIBE ET AL. *v.* GAFFEY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 188 F. 3d 1010.

No. 99–1504. NEDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 197 F. 3d 1122.

No. 99–1556. ALCOA INC. ET AL. *v.* BONNEVILLE POWER ADMINISTRATION (two judgments). C. A. 9th Cir. Certiorari denied.

No. 99–1594. BUTTS ET AL. *v.* MCNALLY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 195 F. 3d 1039.

No. 99–1623. WASHINGTON ET AL. *v.* CSC CREDIT SERVICES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 199 F. 3d 263.

No. 99–1677. MYSTIC TRANSPORTATION, INC., ET AL. *v.* CARLTON. C. A. 2d Cir. Certiorari denied. Reported below: 202 F. 3d 129.

No. 99–1704. INTER-MODAL RAIL EMPLOYEES ASSN. ET AL. *v.* BURLINGTON NORTHERN & SANTA FE RAILWAY CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 383.

No. 99–1706. SULLIVAN *v.* RIVER VALLEY SCHOOL DISTRICT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 197 F. 3d 804.

No. 99–1708. HILLCREST DEVELOPMENT *v.* COUNTY OF RIVERSIDE ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 99–1710. UTAH *v.* CANNON. Sup. Ct. Utah. Certiorari denied. Reported below: 994 P. 2d 1254.

No. 99–1711. CUCAMONGANS UNITED FOR REASONABLE EXPANSION ET AL. *v.* CITY OF RANCHO CUCAMONGA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 382.

No. 99–1715. SOPER, A MINOR, BY HER MOTHER AND NEXT FRIEND, SOPER, ET AL. *v.* HOBEN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 195 F. 3d 845.

No. 99–1716. BIBBEE *v.* SCOTT, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 201 F. 3d 447.

No. 99–1742. BARRETT ET UX. *v.* HARWOOD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 189 F. 3d 297.

No. 99–1743. BUCKLEY *v.* CITY OF PORTAGE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 191 F. 3d 451.

No. 99–1744. FLORIDA *v.* CONNER. Sup. Ct. Fla. Certiorari denied. Reported below: 748 So. 2d 950.

No. 99–1752. SPORTY'S FARM, L. L. C. *v.* SPORTSMAN'S MARKET, INC. C. A. 2d Cir. Certiorari denied. Reported below: 202 F. 3d 489.

No. 99–1753. SEWELL *v.* MICHIGAN. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 99–1754. KAHN *v.* GENERAL MOTORS CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 230 F. 3d 1374.

No. 99–1761. NOVARTIS PHARMACEUTICALS CORP., FKA SANDOZ PHARMACEUTICALS CORP. *v.* PARNELL, INDIVIDUALLY AND

ON BEHALF OF HER MINOR SON, PARNELL, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–1764. CERVONE *v.* BORIS. Ct. App. Ohio, Mahoning County. Certiorari denied.

No. 99–1767. CASKEY *v.* PENSION BENEFIT GUARANTY CORPORATION. C. A. 3d Cir. Certiorari denied. Reported below: 203 F. 3d 816.

No. 99–1771. KAHRE *v.* UNITED STATES FIDELITY & GUARANTY CO. C. A. 9th Cir. Certiorari denied. Reported below: 202 F. 3d 280.

No. 99–1773. MEYER *v.* MEYER. Ct. App. Ariz. Certiorari denied.

No. 99–1779. WEE ET UX. *v.* ANDREWS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1327.

No. 99–1781. PIETRANGELO *v.* UNITED STATES SENATE. C. A. 6th Cir. Certiorari denied. Reported below: 210 F. 3d 372.

No. 99–1793. BOWEN ET AL. *v.* BOARD OF PATENT APPEALS AND INTERFERENCES. C. A. Fed. Cir. Certiorari denied. Reported below: 230 F. 3d 1373.

No. 99–1803. MCDUFFIE, DBA D & M CONTRACTING CO. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 205 F. 3d 1355.

No. 99–1810. MARTIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 195 F. 3d 961.

No. 99–1830. MOBIL OIL CORP. ET AL. *v.* MCMAHON FOUNDATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 200 F. 3d 317.

No. 99–1837. ANDERSON ET UX. *v.* CLINTON FOR PRESIDENT COMMITTEE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 194 F. 3d 139.

No. 99–1846. GOULD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 203 F. 3d 840.

No. 99–1866. INFELISE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 99–1868. FRIES *v.* WISCONSIN COURT OF APPEALS, DISTRICT I, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 202 F. 3d 273.

No. 99–1873. LODD ENTERPRISES, INC., ET AL. *v.* COASTAL FORD, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 202 F. 3d 288.

No. 99–1885. STROGOV *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 191 F. 3d 188.

No. 99–1888. INTERNATIONAL CUSTOMS ASSOCIATES, INC., ET AL. *v.* FORD MOTOR CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 431.

No. 99–1895. DEVEGTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 198 F. 3d 1324.

No. 99–1905. EL-FADLY *v.* INTERNAL REVENUE SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 3d 253.

No. 99–6865. CAGLE ET AL. *v.* HUTTO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 177 F. 3d 253.

No. 99–7367. VAZQUEZ ET AL. *v.* CARVER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 181 F. 3d 85.

No. 99–8312. TUCKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 202 F. 3d 287.

No. 99–8585. COLLADO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 433.

No. 99–8837. SHEHEE *v.* LUTTRELL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 199 F. 3d 295.

No. 99–8842. DELEVEAUX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 205 F. 3d 1292.

No. 99–9164. SMITH *v.* HARGETT, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 282.

No. 99–9170. HERNANDEZ ORTIZ *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 99–9171. SHEA *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 170 Vt. 660, 745 A. 2d 177.

No. 99–9191. PORTER *v.* POTOCKI. C. A. 6th Cir. Certiorari denied. Reported below: 202 F. 3d 269.

No. 99–9195. LUKEN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 99–9198. OWENS *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 198 F. 3d 679.

No. 99–9199. TIMMONS *v.* KEMNA ET AL. C. A. 8th Cir. Certiorari denied.

No. 99–9205. NASH *v.* BATTLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–9206. THOMPSON *v.* OKLAHOMA. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 283.

No. 99–9208. ODOM *v.* COLLEGE OF CHARLESTON BOOKSTORE. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 821.

No. 99–9213. AGUIRRE *v.* CLARKE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 99–9217. LITTERAL *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 203 F. 3d 835.

No. 99–9221. KING *v.* BOYD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 194 F. 3d 1312.

No. 99–9223. MELONCON *v.* GODINICH. C. A. 5th Cir. Certiorari denied. Reported below: 210 F. 3d 367.

No. 99–9225. MARTIN *v.* EHRLICH. C. A. 2d Cir. Certiorari denied. Reported below: 199 F. 3d 1322.

No. 99–9227. ODOM *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 199 F. 3d 1327.

No. 99–9228. SPULKA *v.* WALKER, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–9231. BOITNOTT *v.* CRIST, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 99–9233. ATHERTON *v.* SNYDER ET AL. Sup. Ct. Va. Certiorari denied.

No. 99–9234. CUDNOHOSKY *v.* CIRCUIT COURT OF WISCONSIN, DANE COUNTY, ET AL. Ct. App. Wis. Certiorari denied.

No. 99–9235. ALDAZABAL *v.* MORGAN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 99–9236. BAEZ *v.* FOLES, CHIEF DEPUTY SHERIFF, CLAYTON COUNTY, GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 99–9251. HARRISON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 99–9252. DUBUC *v.* JOHNSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 201 F. 3d 447.

No. 99–9253. DANIEL *v.* PAPERBACK SWAP-N-SHOP. C. A. 5th Cir. Certiorari denied.

No. 99–9255. GIBSON *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 182 F. 3d 899.

No. 99–9259. SMITH *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 99–9263. CHEATHAM *v.* WARD, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 281.

No. 99–9265. BURNETT *v.* GREEN. Ct. App. Mich. Certiorari denied.

No. 99–9273. THAMES *v.* WHITE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 194 F. 3d 1318.

No. 99–9274. TAYLOR *v.* CONNECTICUT BOARD OF MEDIATION AND ARBITRATION. App. Ct. Conn. Certiorari denied. Reported below: 54 Conn. App. 550, 736 A. 2d 175.

No. 99–9296. ROBERTS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 737 So. 2d 1083.

No. 99–9317. RICHARDSON-LONGMIRE *v.* KANSAS. C. A. 10th Cir. Certiorari denied. Reported below: 198 F. 3d 258.

No. 99–9321. MORGAN *v.* NEVADA BOARD OF PRISON COMMISSIONERS. C. A. 9th Cir. Certiorari denied.

No. 99–9362. PROPER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–9433. KHASHOGGI *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–9487. ORYANG *v.* MITCHEM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–9488. REDMOND *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–9489. RICHARDSON *v.* WEST VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 210 F. 3d 361.

No. 99–9506. MATHIS *v.* HENDERSON, POSTMASTER GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 204 F. 3d 1123.

No. 99–9565. JOHNSON *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 232 Wis. 2d 679, 605 N. W. 2d 846.

No. 99–9566. JACKSON *v.* UNITED STATES; and
No. 99–9693. MEDINA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 196 F. 3d 383.

No. 99–9568. LOWRY *v.* DEPARTMENT OF DEFENSE. C. A. Fed. Cir. Certiorari denied. Reported below: 230 F. 3d 1374.

No. 99–9578. TORRECH-GONZALEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 99–9588. HERNANDEZ-GARCIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 215 F. 3d 1312.

No. 99–9594. ERVIN *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 194 F. 3d 908.

No. 99–9606. UPSHER *v.* UNITED STATES ARMY. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 248.

No. 99–9616. ROBINSON *v.* UNITED STATES; and
No. 99–9672. WARREN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 210 F. 3d 369.

No. 99–9620. KELLY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 204 F. 3d 652.

No. 99–9640. YEPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 99–9653. HOGAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 205 F. 3d 1335.

No. 99–9656. HILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 210 F. 3d 368.

No. 99–9658. ANIEKWU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 210 F. 3d 369.

No. 99–9660. DAVID *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 204 F. 3d 1121.

No. 99–9662. GUIMOND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 205 F. 3d 1342.

No. 99–9663. HANKEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 1160.

No. 99–9670. BELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–9671. PRINCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 387.

No. 99–9673. ZAKARIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 439.

No. 99–9680. PEARSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 203 F. 3d 1243.

No. 99–9685. JARRELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 208 F. 3d 210.

No. 99–9689. ISAACS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 203 F. 3d 397.

No. 99–9691. CISNEROS LEDESMA, AKA GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 203 F. 3d 836.

No. 99–9700. BROOKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 211 F. 3d 1270.

No. 99–9704. LIPSCOMB ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 197 F. 3d 879.

No. 99–9711. WINTERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 193 F. 3d 515.

No. 99–9714. PEARSALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 205 F. 3d 1355.

No. 99–9716. REYNOLDS *v.* OHIO. Ct. App. Ohio, Miami County. Certiorari denied.

No. 99–9725. PENA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 213 F. 3d 634.

No. 99–9727. SPADE *v.* OHIO. Ct. App. Ohio, Miami County. Certiorari denied.

No. 99–9728. FRAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 192 F. 3d 130.

No. 99–9733. HAZEL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 99–9742. HINOJOSA *v.* PURDY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 99–9744. HUNT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 210 F. 3d 367.

No. 99–9758. BIVINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 205 F. 3d 1335.

No. 99–9759. COLLINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 208 F. 3d 218.

No. 99–9764. ALALADE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 204 F. 3d 536.

No. 99–1667. ANDERSON *v.* JOHNSON ET AL. C. A. 6th Cir. Motion of respondents Wayne County Circuit Court et al. for

sanctions, including double costs and attorney's fees, denied. Certiorari denied. Reported below: 194 F. 3d 1311.

No. 99–1733. SHOPPERS FOOD WAREHOUSE MD CORP. *v.* MORENO. Ct. App. D. C. Motion of Chamber of Commerce of the United States et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 746 A. 2d 320.

Rehearing Denied

No. 99–1453. UNITED STATES EX REL. A–1 AMBULANCE SERVICE, INC., ET AL. *v.* COUNTY OF MONTEREY ET AL., 529 U. S. 1099. Petition for rehearing denied.

JUNE 27, 2000

Miscellaneous Order

No. 99–10164 (99A1072). IN RE HUNTER. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 99–10215 (99A1080). HUNTER *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

JUNE 28, 2000

Certiorari Denied

No. 99–2079 (99A1076). GONZALEZ, NEXT FRIEND, OR ALTERNATIVELY, AS TEMPORARY LEGAL CUSTODIAN OF GONZALEZ, A MINOR *v.* RENO, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 212 F. 3d 1338.

JUNE 29, 2000

Certiorari Granted—Remanded

No. 98–1658. HELMS, INDIVIDUALLY, AND AS NEXT FRIEND OF HELMS, A MINOR, ET AL. *v.* PICARD, SUPERINTENDENT OF LOUISIANA PUBLIC EDUCATION, ET AL.; and

No. 98–1671. PICARD, SUPERINTENDENT OF LOUISIANA PUBLIC EDUCATION, ET AL. *v.* HELMS ET AL. C. A. 5th Cir. The Court reversed the judgment below in *Mitchell* v. *Helms*, *ante*, p. 793. Therefore, certiorari granted, and cases remanded for further proceedings. Reported below: 151 F. 3d 347 and 165 F. 3d 311.

Certiorari Granted—Vacated and Remanded

No. 99–1152. HOPE CLINIC ET AL. *v.* RYAN, ATTORNEY GENERAL OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Stenberg* v. *Carhart*, *ante*, p. 914. Reported below: 195 F. 3d 857.

No. 99–1156. PLANNED PARENTHOOD OF WISCONSIN ET AL. *v.* DOYLE, ATTORNEY GENERAL OF WISCONSIN, ET AL.; and

No. 99–1177. CHRISTENSEN ET AL. *v.* DOYLE, ATTORNEY GENERAL OF WISCONSIN, ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Stenberg* v. *Carhart*, *ante*, p. 914. Reported below: 195 F. 3d 857.

No. 99–7890. GREEN *v.* UNITED STATES. C. A. 4th 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 *Dickerson* v. *United States*, *ante*, p. 428. Reported below: 201 F. 3d 438.

No. 99–8176. JONES *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Apprendi* v. *New Jersey*, *ante*, p. 466. Reported below: 194 F. 3d 1178.

Certiorari Dismissed

No. 99–9268. ROCHON *v.* LOUISIANA. Sup. Ct. La. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 754 So. 2d 963.

No. 99–9284. COTNER *v.* BOONE, WARDEN. Ct. Crim. App. Okla.; and

No. 99–9306. COTNER *v.* COURT OF CRIMINAL APPEALS OF OKLAHOMA ET AL. Sup. Ct. Okla. 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. 99–9374. COUSINO *v.* KIEFER. Ct. App. Mich.; and

No. 99–9375. COUSINO *v.* SUPREME COURT OF MICHIGAN. Sup. Ct. Mich. 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. Reported below: No. 99–9375, 461 Mich. 882, 603 N. W. 2d 636.

Miscellaneous Orders. (See also No. 84, Orig., *ante*, p. 1021.)

No. 99M95. FARLEY *v.* TEXAS. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 99M96. VIRAMONTES *v.* GALAZA, WARDEN, ET AL.; and

No. 99M97. GARDNER ET UX. *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 126, Orig. KANSAS *v.* NEBRASKA ET AL. Motion of Nebraska to dismiss denied, and case is recommitted to the Special Master for further proceedings. [For earlier order herein, see, *e. g.*, 528 U. S. 1151.]

No. 130, Orig. NEW HAMPSHIRE *v.* MAINE. Motion for leave to file bill of complaint granted, and defendant is allowed 60 days within which to file a motion to dismiss on res judicata grounds.

Plaintiff is allowed 45 days to file a response to the motion. The Solicitor General is invited to file a brief expressing the views of the United States. JUSTICE SOUTER took no part in the consideration or decision of this order.

No. 99–936. FERGUSON ET AL. *v.* CITY OF CHARLESTON ET AL. C. A. 4th Cir. [Certiorari granted, 528 U. S. 1187.] Motions of American Civil Liberties Union et al., National Coalition for Child Protection Reform et al., NARAL Foundation et al., American Public Health Association et al., and American Medical Association for leave to file briefs as *amici curiae* granted.

No. 99–8898. NAGY *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [529 U. S. 1106] denied.

No. 99–9576. VIELE ET VIR *v.* FORD MOTOR CO. C. A. 2d Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 20, 2000, 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. 99–9822. IN RE HEIMERMANN;
No. 99–9894. IN RE JONES; and
No. 99–9974. IN RE MANCILLAS. Petitions for writs of habeas corpus denied.

No. 00–5002 (00A2). IN RE SAN MIGUEL. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 98–1768. BUCKMAN CO. *v.* PLAINTIFFS' LEGAL COMMITTEE. C. A. 3d Cir. Motions of Medical Device Manufacturers Association, Danek Medical, Inc., Product Liability Advisory Council, Inc., and Pharmaceutical Research and Manufacturers of America for leave to file briefs as *amici curiae* granted. Certiorari granted limited to the following question: "Whether federal law pre-empts state-law tort claims alleging fraud on the Food and Drug Administration during the regulatory process for marketing clearance applicable to certain medical devices?" Reported below: 159 F. 3d 817.

Certiorari Denied

No. 99–1112. MILLER, ATTORNEY GENERAL OF IOWA *v.* PLANNED PARENTHOOD OF GREATER IOWA, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 195 F. 3d 386.

No. 99–1307. HOTTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 189 F. 3d 462.

No. 99–1416. BROWN ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 188 F. 3d 579.

No. 99–1462. CITY OF FORT WORTH *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 202 F. 3d 788.

No. 99–1517. UNIVERSAL MANAGEMENT SERVICES, INC., ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 191 F. 3d 750.

No. 99–1552. FOSTER, GOVERNOR OF LOUISIANA, ET AL. *v.* O'NEILL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 197 F. 3d 1169.

No. 99–1577. GREENBRIER ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 193 F. 3d 1348.

No. 99–1580. JARAMILLO ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 99–1596. CARNIVAL CRUISE LINES, INC., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 200 F. 3d 1361.

No. 99–1600. PRINCESS CRUISES, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 201 F. 3d 1352.

No. 99–1674. VANDEL *v.* STANDARD MOTOR PRODUCTS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 433.

No. 99–1698. UNITED AIRLINES, INC., ET AL. *v.* CITY AND COUNTY OF DENVER. Sup. Ct. Colo. Certiorari denied. Reported below: 992 P. 2d 41.

No. 99–1718. JAMES, ASSIGNEE OF THE RIGHTS OF MERIDIAN ENGINEERING, INC., AND COMPANION, INC., DBA COMPANION AS-

SURANCE CO. *v.* ZURICH-AMERICAN INSURANCE COMPANY OF ILLINOIS. C. A. 3d Cir. Certiorari denied. Reported below: 203 F. 3d 250.

No. 99–1727. GATES *v.* FORREST GENERAL HOSPITAL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 196 F. 3d 1258.

No. 99–1729. UNIVERSE SALES CO., LTD. *v.* OFFSHORE SPORTSWEAR, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 182 F. 3d 1036.

No. 99–1738. CHILDREN'S SEASHORE HOUSE *v.* GUHL, COMMISSIONER, NEW JERSEY DEPARTMENT OF HUMAN SERVICES, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 197 F. 3d 654.

No. 99–1741. SUNOCO, INC., ET AL. *v.* SEYMOUR ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 559 Pa. 380, 740 A. 2d 1139.

No. 99–1748. WILEY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 750 So. 2d 1193.

No. 99–1751. OCEANSIDE-MISSION ASSOCIATES *v.* CITY OF OCEANSIDE. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 99–1758. DELAWARE RIVER PORT AUTHORITY *v.* FRATERNAL ORDER OF POLICE, PENN JERSEY LODGE 30, ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 323 N. J. Super. 444, 733 A. 2d 545.

No. 99–1762. VIRGINIA ELECTRONIC & LIGHTING CORP. *v.* NATIONAL SERVICE INDUSTRIES, INC., DBA LITHONIA LIGHTING. C. A. Fed. Cir. Certiorari denied. Reported below: 230 F. 3d 1377.

No. 99–1763. GULF INSURANCE CO. *v.* SIEGFRIED CONSTRUCTION, INC. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 822.

No. 99–1769. STRAIN, SHERIFF OF ST. TAMMANY PARISH *v.* CLIFFORD, AKA COLEMAN. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1115.

No. 99–1770. SIMPSON *v.* GALANOS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 198 F. 3d 263.

No. 99–1772. PORT AUTHORITY OF NEW YORK AND NEW JERSEY *v.* RYDUCHOWSKI. C. A. 2d Cir. Certiorari denied. Reported below: 203 F. 3d 135.

No. 99–1774. DILLARD DEPARTMENT STORES, INC., ET AL. *v.* BECKWITH. Sup. Ct. Nev. Certiorari denied. Reported below: 115 Nev. 372, 989 P. 2d 882.

No. 99–1794. GERRISH *v.* COUNTY OF GENESEE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 198 F. 3d 233.

No. 99–1795. CIRCUIT CITY STORES, INC. *v.* JOHNSON. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 821.

No. 99–1802. ALSCHULER *v.* UNIVERSITY OF PENNSYLVANIA LAW SCHOOL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 430.

No. 99–1808. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 99–1825. PORT JEFFERSON HEALTH CARE FACILITY ET AL. *v.* WING ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 94 N. Y. 2d 284, 726 N. E. 2d 449.

No. 99–1839. HARRIS *v.* WEST, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 203 F. 3d 1347.

No. 99–1879. HARDY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HARDY, DECEASED, ET AL. *v.* TESTA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 208 F. 3d 1007.

No. 99–1886. CIRAULO *v.* MICHIGAN. Cir. Ct. Macomb County, Mich. Certiorari denied.

No. 99–1889. VALICENTI ADVISORY SERVICES, INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 198 F. 3d 62.

No. 99–1898. KHAN *v.* ABERCROMBIE & FITCH, INC. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 431.

No. 99–1917. COZART *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 53 M. J. 57.

No. 99–1921. TITTJUNG *v.* RENO, ATTORNEY GENERAL, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 199 F. 3d 393.

No. 99–1926. LANZOTTI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 205 F. 3d 951.

No. 99–1928. TARAWALY *v.* FARREY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 99–1931. BEARDSLEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 197 F. 3d 378 and 204 F. 3d 983.

No. 99–1936. RAYHANI ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 199 F. 3d 1334.

No. 99–1941. IDEMA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 261.

No. 99–1949. NIJMEH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 387.

No. 99–1954. PERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 205 F. 3d 1336.

No. 99–7579. COTTON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 99–8165. HARDY *v.* UNITED STATES;
No. 99–8184. CAUSEY *v.* UNITED STATES; and
No. 99–8285. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 185 F. 3d 407.

No. 99–8463. WIGGINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 439.

No. 99–8489. BOBILLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 203 F. 3d 840.

No. 99–8675. OMELEBELE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1116.

No. 99–8839. PISTONE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 177 F. 3d 957.

No. 99–8848. KOONS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 283.

No. 99–8978. MARTIN *v.* ORANGE DISTRICT SCHOOLS. C. A. 11th Cir. Certiorari denied. Reported below: 189 F. 3d 484.

No. 99–9151. DAVIS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 710 So. 2d 723.

No. 99–9193. RENOIR *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied.

No. 99–9229. SARTORI *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 99–9260. STATON *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–9276. WILLIAMS *v.* ZELLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 209 F. 3d 718.

No. 99–9278. PON ET UX. *v.* CITY AND COUNTY OF SAN FRANCISCO. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 99–9283. BILLUPS *v.* PRUNTY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 99–9288. KUPLEN *v.* FRANKLIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 188 F. 3d 502.

No. 99–9289. KIRKENDALL *v.* UNIVERSITY OF CONNECTICUT HEALTH CENTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1323.

No. 99–9301. JONES *v.* PENNSYLVANIA WORKERS' COMPENSATION APPEAL BOARD. Commw. Ct. Pa. Certiorari denied.

No. 99–9302. NAVA *v.* GARCIA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 205 F. 3d 1352.

No. 99–9303. LABRANCH *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 99–9305. ALLISON *v.* BRONSON, PROBATION OFFICER, BRONX COUNTY, NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 99–9309. STOCKENAUER *v.* KAPTURE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 202 F. 3d 270.

No. 99–9310. RISLEY *v.* SCOTT, FORMER DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 199 F. 3d 440.

No. 99–9311. JACKSON *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 99–9312. MERILATT *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 99–9313. WILLIAMS *v.* CHOATE, SHERIFF, BOWIE COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 208 F. 3d 1007.

No. 99–9318. JACOBSEN-WAYNE *v.* KAM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 3d 254.

No. 99–9324. SANGSTER *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–9338. MAFFE *v.* SCOTT, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 282.

No. 99–9340. SAVIOR *v.* HUMPHREY ET AL. Ct. App. Minn. Certiorari denied.

No. 99–9342. WALSH *v.* CORCORAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 210 F. 3d 364.

No. 99–9343. WARD *v.* TERRANGI, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 99–9344. WILLIAMS *v.* NEWSWEEK, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 262.

No. 99–9352. KREPS *v.* PESINA ET AL. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 99–9353. MARCELLO *v.* MAINE DEPARTMENT OF HUMAN SERVICES. Sup. Jud. Ct. Me. Certiorari denied.

No. 99–9356. BAILEY *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 208 F. 3d 205.

No. 99–9360. SHOMO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 265 App. Div. 2d 184, 696 N. Y. S. 2d 674.

No. 99–9366. WALKER *v.* GASPARINI, SHERIFF, WINNEBAGO COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 210 F. 3d 377.

No. 99–9387. BARRITT *v.* WEST VIRGINIA. Cir. Ct. Ohio County, W. Va. Certiorari denied.

No. 99–9401. SATTERWHITE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 207 F. 3d 658.

No. 99–9408. WILLIAMS *v.* CONROY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 205 F. 3d 1336.

No. 99–9411. TAYLOR *v.* LARKINS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 99–9413. COLON *v.* ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–9464. JEMZURA *v.* NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES ET AL. C. A. 2d Cir. Certiorari denied.

No. 99–9468. SHABAZZ, FKA HURLEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 99–9474. TALFORD *v.* SCARBERRY. Sup. Ct. Va. Certiorari denied.

No. 99–9502. BOYD *v.* DAVIS, CLERK, SUPREME COURT OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 99–9533. PRICE *v.* RYDER SYSTEM, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 210 F. 3d 369.

No. 99–9538. WATSON *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 8th Cir. Certiorari denied. Reported below: 205 F. 3d 1349.

No. 99–9571. BEADLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 205 F. 3d 1337.

No. 99–9592. GONZALEZ *v.* WEST, SECRETARY OF VETERANS AFFAIRS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 202 F. 3d 254.

No. 99–9601. VEGA *v.* ADULT PROBATION DEPARTMENT OF COOK COUNTY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 202 F. 3d 276.

No. 99–9604. MCKEE *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 757 So. 2d 511.

No. 99–9608. BOLTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 204 F. 3d 1121.

No. 99–9622. MARTINEZ *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 430 Mass. 517, 722 N. E. 2d 406.

No. 99–9631. BARBER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 99–9632. CICCHINELLI *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 747 A. 2d 410.

No. 99–9650. SALLEY *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 99–9651. PHILLIPS *v.* BUSH, GOVERNOR OF FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 760 So. 2d 948.

No. 99–9659. ANDREWS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 99–9667. ACKLIN *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 99–9675. PARSONS *v.* RYDER, SUPERINTENDENT, TOMOKA CORRECTIONAL INSTITUTION AND WORK CAMP. C. A. 11th Cir. Certiorari denied.

No. 99–9682. PALMER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 203 F. 3d 55.

No. 99–9687. BROCKMAN *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 339 S. C. 57, 528 S. E. 2d 661.

No. 99–9692. MENDOZA-MARTINEZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1118.

No. 99–9696. OSWALD *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 232 Wis. 2d 103, 606 N. W. 2d 238.

No. 99–9709. ANDERSON *v.* OHIO. Ct. App. Ohio, Miami County. Certiorari denied.

No. 99–9717. OAKLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 213 F. 3d 649.

No. 99–9718. OCHSNER *v.* PRATT, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 99–9726. SEIBEL *v.* OHIO. Ct. App. Ohio, Morgan County. Certiorari denied.

No. 99–9730. GAONA-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 189 F. 3d 475.

No. 99–9734. WATSON *v.* KONTEH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–9736. CAMPILLO-RESTREPO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–9749. WHITE *v.* OHIO. Ct. App. Ohio, Miami County. Certiorari denied.

No. 99–9757. COSTA *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 11 S. W. 3d 670.

No. 99–9785. KIISTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 208 F. 3d 227.

No. 99–9787. CARMOUCHE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 210 F. 3d 369.

No. 99–9790. LIVINGSTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 99–9791. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 213 F. 3d 633.

No. 99–9796. HUDSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–9803. PAGAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 196 F. 3d 884.

No. 99–9805. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 202 F. 3d 275.

No. 99–9816. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 99–9820. HEWLETT *v.* LAPPIN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 99–9828. MARZETTE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 202 F. 3d 271.

No. 99–9834. BEASLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 212 F. 3d 600.

No. 99–9835. COKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 202 F. 3d 270.

No. 99–9838. HUGHES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–9839. FULLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 205 F. 3d 1335.

No. 99–9846. SHURLAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 208 F. 3d 211.

No. 99–9859. COOPER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 199 F. 3d 898.

No. 99–9860. BUGH *v.* OHIO. Ct. App. Ohio, Carroll County. Certiorari denied.

No. 99–9861. CARTER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 99–9883. WOOD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 209 F. 3d 847.

No. 99–9884. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–9917. BURKET *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 208 F. 3d 172.

No. 99–1584. CALIFORNIA *v.* JOHNSON. Ct. App. Cal., 4th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 99–1641. U S WEST COMMUNICATIONS, INC. *v.* MFS INTELENET, INC., ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 193 F. 3d 1112.

No. 99–1691. BOULAHANIS ET AL. *v.* BOARD OF REGENTS OF THE ILLINOIS STATE UNIVERSITY ET AL. C. A. 7th Cir. Motion of Dennis Hastert, Speaker of the House of Representatives, et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 198 F. 3d 633.

No. 99–1739. DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD *v.* DEPARTMENT OF TRANSPORTATION ET AL.; and

No. 99–1745. AMERICAN AIRLINES, INC. *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. 5th Cir. Motion of Airports Council International-North America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 202 F. 3d 788.

No. 00–5001 (00A1). SAN MIGUEL *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

Rehearing Denied

No. 99–1193. FRAZER *v.* CALIFORNIA, 529 U. S. 1108;

No. 99–1475. STONIER ET AL. *v.* DIGITAL EQUIPMENT CORP., 529 U. S. 1109;

No. 99–1543. JOHNSON *v.* JOHNSON ET AL., 529 U. S. 1111;

No. 99–7470. LOFTON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL., 528 U. S. 1170;

No. 99–8153. FLOURNOY *v.* MOSKOWITZ, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, 529 U. S. 1072;

No. 99–8210. GAINES *v.* DALLAS COUNTY ET AL., 529 U. S. 1073;

No. 99–8365. FIELDS *v.* JACKSON, 529 U. S. 1090;

No. 99–8521. WATERS *v.* HESSON, WARDEN, 529 U. S. 1114;

No. 99–8526. BITTERMAN *v.* HARDING, CHIEF JUSTICE, SUPREME COURT OF FLORIDA, ET AL., 529 U. S. 1114;

No. 99–8590. JACKSON *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, 529 U. S. 1092;

No. 99–8604. POWELL *v.* TEXAS, 529 U. S. 1116;

No. 99–8649. DECARO *v.* UNITED STATES, 529 U. S. 1079;

No. 99–8690. AYERS *v.* CITY OF MEMPHIS ET AL., 529 U. S. 1133;

No. 99–8743. FLANAGAN *v.* ARNAIZ ET AL., 529 U. S. 1117;

No. 99–8806. YOUNG *v.* SMEEKS, 529 U. S. 1117;

No. 99–8926. DOUGHERTY *v.* UNITED STATES, 529 U. S. 1119;

No. 99–8960. ATAMIAN *v.* GORKIN, 529 U. S. 1135; and

No. 99–9178. CONWAY *v.* GAMBLE, WARDEN, 529 U. S. 1123. Petitions for rehearing denied.

JULY 3, 2000

Dismissal Under Rule 46

No. 99–1676. DICKERSON *v.* ALACHUA COUNTY BOARD OF COUNTY COMMISSIONERS. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 200 F. 3d 761.

JULY 6, 2000

Certiorari Denied

No. 99–10071 (99A1073). CLAGETT *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 209 F. 3d 370.

JULY 12, 2000

Miscellaneous Orders

No. 00A26. YOUNG *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

No. 00A33. JOYCE-HAYES ET AL. *v.* YOUNG. Application to vacate the stay of execution of sentence of death entered by the

United States Court of Appeals for the Eighth Circuit on July 11, 2000, presented to JUSTICE THOMAS, and by him referred to the Court, denied. JUSTICE KENNEDY took no part in the consideration or decision of this application.

Certiorari Denied

No. 00–5116 (00A25). YOUNG *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

JULY 18, 2000

Dismissal Under Rule 46

No. 99–10191. SCHERER *v.* G. E. CAPITAL CORP. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 211 F. 3d 1279.

JULY 19, 2000

Miscellaneous Order

No. 99A1064 (99–2055). SHEA *v.* FLORIDA JUDICIAL QUALIFICATIONS COMMISSION. Sup. Ct. Fla. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

Certiorari Denied

No. 00–5258 (00A66). BRAUN *v.* KEATING, GOVERNOR OF OKLAHOMA, ET AL. C. A. 10th Cir. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Certiorari denied.

JULY 25, 2000

Certiorari Denied

No. 99–10042 (99A1046). SORIA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 207 F. 3d 232.

JULY 26, 2000

Miscellaneous Order

No. 00–5402 (00A88). IN RE SORIA. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

AUGUST 1, 2000

Dismissal Under Rule 46

No. 99–845. NIAGARA MOHAWK POWER CORP. *v.* LOCAL 97, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 196 F. 3d 117.

AUGUST 7, 2000

Miscellaneous Orders

No. D–2080. IN RE DISBARMENT OF O'GRADY. Disbarment entered. [For earlier order herein, see 526 U. S. 1156.]

No. D–2134. IN RE DISBARMENT OF GROSKIN. Disbarment entered. [For earlier order herein, see 528 U. S. 1072.]

No. D–2158. IN RE DISBARMENT OF FRESE. Disbarment entered. [For earlier order herein, see 529 U. S. 1085.]

No. D–2161. IN RE DISBARMENT OF SOKOLOW. Disbarment entered. [For earlier order herein, see 529 U. S. 1127.]

No. D–2163. IN RE DISBARMENT OF FRIEDLER. Disbarment entered. [For earlier order herein, see 529 U. S. 1127.]

No. D–2164. IN RE DISBARMENT OF CARLSON. Robert Bent Carlson, of North Port, Fla., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on May 22, 2000 [529 U. S. 1127], is discharged.

No. D–2166. IN RE DISBARMENT OF CARROLL. Daniel G. Carroll, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before

this Court. The rule to show cause, issued on June 26, 2000 [*ante*, p. 1257], is discharged.

No. D–2177. IN RE DISBARMENT OF DINGMAN. Harold W. Dingman, of Ooltewah, Tenn., 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–2178. IN RE DISBARMENT OF PHILLIPS. John J. Phillips, of Overland Park, Kan., 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–2179. IN RE DISBARMENT OF LEE. Clifford Leon Lee, of Fayetteville, N. C., 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–2180. IN RE DISBARMENT OF CLARK. Wilson Meredith Clark, of Memphis, Tenn., 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–2181. IN RE DISBARMENT OF POTTERS. Robert Sands Potters, of Wellesley, Mass., 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–2182. IN RE DISBARMENT OF SANDS. Lawrence M. Sands, of New York, N. Y., 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–2183. IN RE DISBARMENT OF VINING. Edward C. Vining, Jr., of Miami, Fla., 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–2184. In re Disbarment of Aulakh. I. Singh Aulakh, of Visalia, Cal., 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–2185. In re Disbarment of Kozel. Kenneth A. Kozel, of LaSalle, Ill., 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.

Rehearing Denied

No. 98–9849. Hood *v.* United States District Court for the Western District of North Carolina, 528 U. S. 856;

No. 99–1555. Bickerstaff *v.* Vassar College, *ante*, p. 1242;

No. 99–1560. International Precious Metals Corp. et al. *v.* Waters et al., *ante*, p. 1223;

No. 99–1561. Oliver et vir *v.* Saha et al., 529 U. S. 1130;

No. 99–1568. Britton *v.* Maloney, *ante*, p. 1204;

No. 99–1616. Punchard *v.* Luna County Commission et al., *ante*, p. 1205;

No. 99–1678. Reeves et al. *v.* Frierdich et al., *ante*, p. 1215;

No. 99–1699. Vonderheide *v.* Internal Revenue Service, *ante*, p. 1205;

No. 99–1776. Brodsky et al. *v.* Union Local 306, Motion Picture Projectionists, Video Technicians and Allied Crafts, I. A. T. S. E., et al., *ante*, p. 1231;

No. 99–6779. Cruz *v.* Angelone, Director, Virginia Department of Corrections, 528 U. S. 1087;

No. 99–7000. Ramdass *v.* Angelone, Director, Virginia Department of Corrections, *ante*, p. 156;

No. 99–7649. In re Gullion, 528 U. S. 1152;

No. 99–7663. Franks *v.* Martin et al., 529 U. S. 1007;

No. 99–7866. O'Neal *v.* Georgia, 529 U. S. 1039;

No. 99–8128. A'Ku *v.* Motorola, Inc., 529 U. S. 1071;

No. 99–8156. Ford *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division, 529 U. S. 1072;

No. 99–8157. Ellis *v.* Illinois, 529 U. S. 1072;

No. 99–8206. In re Holloman, 529 U. S. 1097;

No. 99–8303. WELLS *v.* PHILLIPS, WARDEN, 529 U. S. 1075;

No. 99–8317. MURPHY *v.* CITY OF SMITHVILLE, TENNESSEE, ET AL., 529 U. S. 1089;

No. 99–8438. SELMAN *v.* SANDERS, WARDEN, 529 U. S. 1101;

No. 99–8466. CHANDLER *v.* KENNEDY ET AL., 529 U. S. 1101;

No. 99–8481. O'NEAL *v.* SINNREICH & FRANCISCO ET AL., 529 U. S. 1112;

No. 99–8544. ABRAM *v.* DEPARTMENT OF AGRICULTURE, 529 U. S. 1077;

No. 99–8577. HABELMAN *v.* GARVEY, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, 529 U. S. 1115;

No. 99–8669. TAYLOR *v.* DEES, WARDEN, ET AL., 529 U. S. 1132;

No. 99–8679. JEFFERS *v.* CAIN, WARDEN, 529 U. S. 1132;

No. 99–8694. BUCHANAN *v.* TATE, WARDEN, 529 U. S. 1093;

No. 99–8733. IN RE AWOFOLU, *ante*, p. 1228;

No. 99–8772. RAYMOND *v.* WEBER, WARDEN, ET AL., *ante*, p. 1207;

No. 99–8844. COROPUNA *v.* VIRGINIA DEPARTMENT OF CORRECTIONS, 529 U. S. 1118;

No. 99–8854. DWYER *v.* DWYER, *ante*, p. 1216;

No. 99–8871. BELLO *v.* UNITED STATES, 529 U. S. 1118;

No. 99–8897. MCCOY *v.* UNITED STATES, 529 U. S. 1119;

No. 99–8906. TENACE *v.* NEW YORK, *ante*, p. 1217;

No. 99–8925. CLOUD *v.* TEXAS, *ante*, p. 1217;

No. 99–8948. LANGON *v.* FLORIDA, *ante*, p. 1218;

No. 99–8964. WAI CHONG LEUNG *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, 529 U. S. 1120;

No. 99–9002. HUGHES *v.* MILLS, *ante*, p. 1208;

No. 99–9007. CLARKE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 1208;

No. 99–9017. DIGIOVANNI *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL., *ante*, p. 1233;

No. 99–9022. WOOLVERTON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 1233;

No. 99–9095. REYNOLDS *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 1219;

No. 99–9134. BOLES *v.* FENTON SECURITY, INC. OF COLORADO, ET AL., *ante*, p. 1247;

No. 99–9171. SHEA *v.* VERMONT, *ante*, p. 1265;

No. 99–9196. ROWBOTTOM *v.* MCDANIEL, WARDEN, ET AL., *ante*, p. 1248;

No. 99–9248. HOLLAR *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY, *ante*, p. 1219;

No. 99–9277. ZARWELL *v.* MARYLAND ET AL., *ante*, p. 1220;

No. 99–9376. STIFF *v.* UNITED STATES, *ante*, p. 1222; and

No. 99–9563. IN RE JEFFS, *ante*, p. 1260. Petitions for rehearing denied.

No. 99–5252. BURNETT *v.* ROE, WARDEN, ET AL., 528 U. S. 894. Motion for leave to file petition for rehearing denied.

AUGUST 9, 2000

Certiorari Denied

No. 00–5037 (00A13). ROBERSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 212 F. 3d 595.

No. 00–5509 (00A112). CRUZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution. Reported below: 228 F. 3d 409.

AUGUST 15, 2000

Dismissal Under Rule 46

No. 99–1828. EHLMANN ET AL. *v.* KAISER FOUNDATION HEALTH PLAN OF TEXAS ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 198 F. 3d 552.

AUGUST 18, 2000

Miscellaneous Order

No. 99A942. GOLUB *v.* GENERAL ELECTRIC CO. ET AL. C. A. 2d Cir. Application for stay, addressed to JUSTICE BREYER and referred to the Court, denied.

AUGUST 21, 2000

Miscellaneous Orders

No. 00A149. IN RE GIBBS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. 00–5792 (00A153). IN RE GIBBS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of mandamus denied.

Certiorari Denied

No. 00–5102 (00A139). GIBBS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

No. 00–5107 (00A27). JONES *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 212 F. 3d 595.

AUGUST 22, 2000

Certiorari Denied

No. 00–5807 (00A161). JONES *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

AUGUST 23, 2000

Certiorari Denied

No. 99–9581 (99A954). CALDWELL *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 210 F. 3d 369.

Rehearing Denied

No. 00–5792 (00A163). IN RE GIBBS, *ante*, p. 1292. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for rehearing denied.

AUGUST 25, 2000

Dismissal Under Rule 46

No. 99–1948. STEINHAUSER *v.* HAWKINS. Certiorari dismissed under this Court's Rule 46.1. Reported below: 210 F. 3d 383.

Certiorari Dismissed

No. 00–5920 (00A176). HAUSER, BY HIS NEXT FRIENDS, CRAWFORD ET AL. *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari dismissed. JUSTICE STEVENS would grant the application for stay of execution. Reported below: 223 F. 3d 1316.

AUGUST 28, 2000

Miscellaneous Orders

No. D–2157. IN RE DISBARMENT OF BAKER. Disbarment entered. [For earlier order herein, see 529 U. S. 1085.]

No. D–2160. IN RE DISBARMENT OF TIERNEY. Disbarment entered. [For earlier order herein, see 529 U. S. 1127.]

No. D–2162. IN RE DISBARMENT OF MURCHISON. Disbarment entered. [For earlier order herein, see 529 U. S. 1127.]

No. D–2168. IN RE DISBARMENT OF BROOKS. Disbarment entered. [For earlier order herein, see *ante*, p. 1258.]

No. D–2170. IN RE DISBARMENT OF ESPER. Disbarment entered. [For earlier order herein, see *ante*, p. 1258.]

No. D–2171. IN RE DISBARMENT OF BURNETT. Disbarment entered. [For earlier order herein, see *ante*, p. 1258.]

No. D–2172. IN RE DISBARMENT OF SILVER. Disbarment entered. [For earlier order herein, see *ante*, p. 1258.]

No. D–2173. IN RE DISBARMENT OF ROCCA. Disbarment entered. [For earlier order herein, see *ante*, p. 1258.]

No. D–2175. IN RE DISBARMENT OF TANDY. Disbarment entered. [For earlier order herein, see *ante*, p. 1259.]

No. D–2176. IN RE DISBARMENT OF GREGORY. Disbarment entered. [For earlier order herein, see *ante*, p. 1259.]

No. D–2186. IN RE DISBARMENT OF FREMONT. Kenneth P. Fremont, of Louden, Tenn., 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–2187. IN RE DISBARMENT OF RISKER. Frederick L. Risker, Jr., of Stafford, Tex., 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–2188. IN RE DISBARMENT OF TIDWELL. Drew V. Tidwell III, of Amherst, N. Y., 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–2189. IN RE DISBARMENT OF SEPE. Alfonso C. Sepe, of North Bay Village, Fla., 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–2190. IN RE DISBARMENT OF FERGUSON. Donald L. Ferguson, of Boca Raton, Fla., 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–2191. IN RE DISBARMENT OF GARCIA. David Garcia, of Edinburg, Tex., 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–2192. In re Disbarment of Hinson. Hillord Hensley Hinson, of Houston, Tex., 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–2193. In re Disbarment of Moore. Fred Henderson Moore, of Charleston, S. C., 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–2194. In re Disbarment of Albanese. Joseph P. Albanese, of New York, N. Y., 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–2195. In re Disbarment of Vogel. Peter F. Vogel, of Hackensack, 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. 99–603. Legal Services Corporation *v.* Velazquez et al.; and

No. 99–960. United States *v.* Velazquez et al. C. A. 2d Cir. [Certiorari granted, 529 U. S. 1052.] Motion of the Solicitor General for divided argument granted.

No. 99–901. Brentwood Academy *v.* Tennessee Secondary School Athletic Assn. et al. C. A. 6th Cir. [Certiorari granted, 528 U. S. 1153.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 99–1038. Eastern Associated Coal Corp. *v.* United Mine Workers of America, District 17, et al. C. A. 4th Cir. [Certiorari granted, 529 U. S. 1017.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 99–936. Ferguson et al. *v.* City of Charleston et al. C. A. 4th Cir. [Certiorari granted, 528 U. S. 1187.] Motion of

Rutherford Institute for leave to file a brief as *amicus curiae* granted.

No. 99–1030. CITY OF INDIANAPOLIS ET AL. *v.* EDMOND ET AL. C. A. 7th Cir. [Certiorari granted, 528 U. S. 1153.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Kansas et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 99–1235. GREEN TREE FINANCIAL CORP.-ALABAMA ET AL. *v.* RANDOLPH. C. A. 11th Cir. [Certiorari granted, 529 U. S. 1052.] Motion of Terry Johnson et al. for leave to file a brief as *amici curiae* granted.

No. 99–1238. ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY *v.* BENNETT. C. A. 2d Cir. [Certiorari granted, 529 U. S. 1065.] Motion of Florida for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 99–1434. UNITED STATES *v.* MEAD CORP. C. A. Fed. Cir. [Certiorari granted, *ante,* p. 1202.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 99–1680. CITY NEWS & NOVELTY, INC. *v.* CITY OF WAUKESHA. Ct. App. Wis. [Certiorari granted, *ante,* p. 1242.] Motion of the parties to dispense with printing the joint appendix granted.

No. 99–1702. TEXAS *v.* COBB. Ct. Crim. App. Tex. [Certiorari granted, *ante,* p. 1260.] Motion of the parties to dispense with printing the joint appendix granted.

Rehearing Denied

No. 98–1648. MITCHELL ET AL. *v.* HELMS ET AL., *ante,* p. 793;

No. 99–1556. ALCOA INC. ET AL. *v.* BONNEVILLE POWER ADMINISTRATION (two judgments), *ante,* p. 1261;

No. 99–1582. BROWNING ET AL. *v.* ROHM & HAAS CO., *ante,* p. 1243;

No. 99–1771. KAHRE *v.* UNITED STATES FIDELITY & GUARANTY CO., *ante,* p. 1263;

No. 99–1779. WEE ET UX. *v.* ANDREWS ET AL., *ante,* p. 1263;

No. 99–1794. GERRISH *v.* COUNTY OF GENESEE ET AL., *ante*, p. 1276;

No. 99–1837. ANDERSON ET UX. *v.* CLINTON FOR PRESIDENT COMMITTEE ET AL., *ante*, p. 1263;

No. 99–7643. HIBBERT *v.* TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL., 529 U. S. 1007;

No. 99–8341. ROGERS *v.* ILLINOIS, 529 U. S. 1089;

No. 99–8587. FEURTADO *v.* UNITED STATES, 529 U. S. 1102;

No. 99–8724. IN RE KING, 529 U. S. 1129;

No. 99–8888. WOODERTS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 1217;

No. 99–9047. SMITH *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY, *ante*, p. 1218;

No. 99–9049. CALDWELL *v.* GREINER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY, *ante*, p. 1234;

No. 99–9104. HOLSEY *v.* GEORGIA, *ante*, p. 1246;

No. 99–9223. MELONCON *v.* GODINICH, *ante*, p. 1265;

No. 99–9250. DODD *v.* STRUBLE, JUDGE, SUPERIOR COURT OF GEORGIA, MOUNTAIN JUDICIAL CIRCUIT, ET AL., *ante*, p. 1210;

No. 99–9356. BAILEY *v.* FEDERAL BUREAU OF PRISONS ET AL., *ante*, p. 1279;

No. 99–9487. ORYANG *v.* MITCHEM, WARDEN, ET AL., *ante*, p. 1267;

No. 99–9533. PRICE *v.* RYDER SYSTEM, INC., ET AL., *ante*, p. 1280;

No. 99–9632. CICCHINELLI *v.* PENNSYLVANIA, *ante*, p. 1281; and

No. 99–9772. IN RE DEEMER, *ante*, p. 1259. Petitions for rehearing denied.

No. 99–1481. VAKHARIA *v.* SWEDISH COVENANT HOSPITAL ET AL., *ante*, p. 1204; and

No. 99–7210. STANCLIFF *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 528 U. S. 1164. Motions for leave to file petitions for rehearing denied.

No. 99–1641. U S WEST COMMUNICATIONS, INC. *v.* MFS INTELENET, INC., ET AL., *ante*, p. 1284. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

AUGUST 29, 2000

Miscellaneous Order

No. 00A145. UNITED STATES *v.* OAKLAND CANNABIS BUYERS' COOPERATIVE ET AL. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted as to the order granting the motion to modify the injunction, and as to paragraph 6 of the amended preliminary injunction, both entered by the United States District Court for the Northern District of California, case No. 98–0088 CRB, on July 17, 2000. The stay shall be in effect pending final disposition of the appeal by the United States Court of Appeals for the Ninth Circuit and further order of this Court. JUSTICE BREYER took no part in the consideration or decision of this application.

JUSTICE STEVENS, dissenting.

When faced with an application of this kind, we are required to engage in the speculative task of balancing the "stay equities," *INS* v. *Legalization Assistance Project of Los Angeles County Federation of Labor*, 510 U. S. 1301, 1304 (1993) (O'CONNOR, J., in chambers); see also *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 322 (1982) (STEVENS, J., dissenting) ("Unless Congress specifically commands a particular form of relief, the question of remedy remains subject to a court's equitable discretion"). Because the applicant in this case has failed to demonstrate that the denial of necessary medicine to seriously ill and dying patients will advance the public interest or that the failure to enjoin the distribution of such medicine will impair the orderly enforcement of federal criminal statutes, whereas respondents have demonstrated that the entry of a stay will cause them irreparable harm, I am persuaded that a fair assessment of that balance favors a denial of the extraordinary relief that the Government seeks. I respectfully dissent.

AUGUST 30, 2000

Certiorari Denied

No. 00–5971 (00A185). CALDWELL *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred

to the Court, denied. Certiorari denied. JUSTICE O'CONNOR and JUSTICE THOMAS took no part in the consideration or decision of this application and this petition. Reported below: 226 F. 3d 367.

SEPTEMBER 1, 2000

Dismissal Under Rule 46

No. 00–5516. MONTOYA *v.* UNITED STATES. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.

SEPTEMBER 8, 2000

Certiorari Granted

No. 99–9136. DANIELS *v.* UNITED STATES. C. A. 9th Cir. Motion of petitoner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 195 F. 3d 501.

Rehearing Denied

No. 99–1806. WILLETT *v.* ILLINOIS ET AL., *ante*, p. 1244;
No. 99–8732. BARNES *v.* GILMORE, GOVERNOR OF VIRGINIA, *ante*, p. 1206;
No. 99–9220. JACKSON *v.* WEST, SECRETARY OF VETERANS AFFAIRS, *ante*, p. 1234;
No. 99–9229. SARTORI *v.* VIRGINIA, *ante*, p. 1278;
No. 99–9266. BROWN *v.* DANZIG, SECRETARY OF THE NAVY, *ante*, p. 1248;
No. 99–9502. BOYD *v.* DAVIS, CLERK, SUPREME COURT OF MICHIGAN, *ante*, p. 1280;
No. 99–9571. BEADLES *v.* UNITED STATES, *ante*, p. 1280; and
No. 99–9615. IN RE WILLIAMS, *ante*, p. 1228. Petitions for rehearing denied.

No. 96–6839. ALMENDAREZ-TORRES *v.* UNITED STATES, 523 U. S. 224. Motion for leave to file petition for rehearing denied.

SEPTEMBER 11, 2000

Dismissal Under Rule 46

No. 00–234. HAAS AUTOMATION, INC., ET AL. *v.* IMS TECHNOLOGY, INC. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 206 F. 3d 1422.

Miscellaneous Order

No. 00A158 (99–1331). LEWIS *v.* LEWIS & CLARK MARINE, INC. C. A. 8th Cir. [Certiorari granted, *ante,* p. 1202.] Application for stay, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

SEPTEMBER 12, 2000

Miscellaneous Order

No. 00–6106 (00A228). IN RE HARRIS. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

SEPTEMBER 14, 2000

Certiorari Denied

No. 00–6070 (00A221). BARNABEI *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 214 F. 3d 463.

No. 00–6153 (00A237). BARNABEI *v.* EARLEY, ATTORNEY GENERAL OF VIRGINIA, ET AL. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 15, 2000

Dismissal Under Rule 46

No. 00–89. ALLSTATE INSURANCE CO. *v.* BACHER ET VIR. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 211 F. 3d 52.

SEPTEMBER 22, 2000

Dismissal Under Rule 46

No. 99–1799. PFEIFER ET UX. *v.* E. I. DU PONT DE NEMOURS & CO. Sup. Ct. Neb. Certiorari dismissed under this Court's Rule 46.1. Reported below: 258 Neb. 756, 606 N. W. 2d 773.

SEPTEMBER 26, 2000

Appeal Denied

No. 00–139. MICROSOFT CORP. *v.* UNITED STATES ET AL. Appeal from D. C. D. C.; and

No. 00–261. NEW YORK EX REL. SPITZER, ATTORNEY GENERAL OF NEW YORK, ET AL. *v.* MICROSOFT CORP. C. A. D. C. Cir. In No. 00–139, direct appeal denied, and case remanded to the United States Court of Appeals for the District of Columbia Circuit. The Clerk is directed to issue the judgment forthwith. In No. 00–261, certiorari before judgment denied. Reported below: No. 00–139, 97 F. Supp. 2d 59.

JUSTICE BREYER, dissenting in No. 00–139.

I would note probable jurisdiction in this case. 15 U. S. C. § 29(b). The case significantly affects an important sector of the economy—a sector characterized by rapid technological change. Speed in reaching a final decision may help create legal certainty. That certainty, in turn, may further the economic development of that sector so important to our Nation's prosperity.

I recognize that there are competing considerations. A Court of Appeals proceeding would likely narrow, focus, and initially decide the legal issues now presented here. It would thereby facilitate any later deliberation in this Court. Nonetheless, I believe this Court can consider the issues fully now by taking additional briefs and by granting additional time for oral argument, if necessary. Consequently, I would hear the appeal.

Statement of CHIEF JUSTICE REHNQUIST.

Microsoft Corporation has retained the law firm of Goodwin, Procter & Hoar in Boston as local counsel in private antitrust litigation. My son James C. Rehnquist is a partner in that firm and is one of the attorneys working on those cases. I have therefore considered at length whether his representation requires me to disqualify myself on the Microsoft matters currently before this Court. I have reviewed the relevant legal authorities and consulted with my colleagues. I have decided that I ought not to disqualify myself from these cases.

Title 28 U. S. C. § 455 sets forth the legal criteria for disqualification of federal magistrates, judges, and Supreme Court Justices. This statute is divided into two subsections, both of which are relevant to the present situation. Section 455(b) lists specific

instances in which disqualification is required, including those instances where the child of a Justice "[i]s known . . . to have an interest that could be substantially affected by the outcome of the proceeding." § 455(b)(5)(iii). As that provision has been interpreted in relevant case law, there is no reasonable basis to conclude that the interests of my son or his law firm will be substantially affected by the proceedings currently before the Supreme Court. It is my understanding that Microsoft has retained Goodwin, Procter & Hoar on an hourly basis at the firm's usual rates. Even assuming that my son's nonpecuniary interests are relevant under the statute, it would be unreasonable and speculative to conclude that the outcome of any Microsoft proceeding in this Court would have an impact on those interests when neither he nor his firm would have done any work on the matters here. Thus, I believe my continued participation is consistent with § 455(b)(5)(iii).

Section 455(a) contains the more general declaration that a Justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." As this Court has stated, what matters under § 455(a) "is not the reality of bias or prejudice but its appearance." *Liteky* v. *United States*, 510 U. S. 540, 548 (1994). This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances. See *ibid.*; *In re Drexel Burnham Lambert Inc.*, 861 F. 2d 1307, 1309 (CA2 1988). I have already explained that my son's personal and financial concerns will not be affected by our disposition of the Supreme Court's Microsoft matters. Therefore, I do not believe that a well-informed individual would conclude that an appearance of impropriety exists simply because my son represents, in another case, a party that is also a party to litigation pending in this Court.

It is true that both my son's representation and the matters before this Court relate to Microsoft's potential antitrust liability. A decision by this Court as to Microsoft's antitrust liability could have a significant effect on Microsoft's exposure to antitrust suits in other courts. But, by virtue of this Court's position atop the Federal Judiciary, the impact of many of our decisions is often quite broad. The fact that our disposition of the pending Microsoft litigation could potentially affect Microsoft's exposure to antitrust liability in other litigation does not, to my mind, signifi-

cantly distinguish the present situation from other cases that this Court decides. Even our most unremarkable decision interpreting an obscure federal regulation might have a significant impact on the clients of our children who practice law. Giving such a broad sweep to § 455(a) seems contrary to the "reasonable person" standard which it embraces. I think that an objective observer, informed of these facts, would not conclude that my participation in the pending Microsoft matters gives rise to an appearance of partiality.

Finally, it is important to note the negative impact that the unnecessary disqualification of even one Justice may have upon our Court. Here—unlike the situation in a District Court or a Court of Appeals—there is no way to replace a recused Justice. Not only is the Court deprived of the participation of one of its nine Members, but the even number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court.

Miscellaneous Orders

No. 99–929. COOK *v.* GRALIKE ET AL. C. A. 8th Cir. [Certiorari granted, 529 U. S. 1065.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 99–1132. ILLINOIS *v.* MCARTHUR. App. Ct. Ill., 4th Dist. [Certiorari granted, 529 U. S. 1097.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 99–1240. BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA ET AL. *v.* GARRETT ET AL. C. A. 11th Cir. [Certiorari granted, 529 U. S. 1065.] Motion of the Solicitor General for divided argument granted.

No. 99–1295. GITLITZ ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. [Certiorari granted, 529 U. S. 1097.] Motion of Real Estate Roundtable for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

Certiorari Granted

No. 99–1613. SHAW ET AL. *v.* MURPHY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis*

granted. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. This Court's Rule 29.2 does not apply. Reported below: 195 F. 3d 1121.

No. 99–1815. NATIONAL LABOR RELATIONS BOARD *v.* KENTUCKY RIVER COMMUNITY CARE, INC., ET AL. C. A. 6th Cir. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. This Court's Rule 29.2 does not apply. Reported below: 193 F. 3d 444.

No. 99–1848. BUCKHANNON BOARD & CARE HOME, INC., ET AL. *v.* WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES ET AL. C. A. 4th Cir. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. This Court's Rule 29.2 does not apply. Reported below: 203 F. 3d 819.

No. 99–1871. DEPARTMENT OF THE INTERIOR ET AL. *v.* KLAMATH WATER USERS PROTECTIVE ASSN. C. A. 9th Cir. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. This Court's Rule 29.2 does not apply. Reported below: 189 F. 3d 1034.

No. 99–1908. ALEXANDER, DIRECTOR, ALABAMA DEPARTMENT OF PUBLIC SAFETY, ET AL. *v.* SANDOVAL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 11th Cir. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. This Court's Rule 29.2 does not apply. Reported below: 197 F. 3d 484.

No. 99–1953. DISTRICT OF COLUMBIA ET AL. *v.* TRI COUNTY INDUSTRIES, INC. C. A. D. C. Cir. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. This Court's Rule 29.2 does not apply. Reported below: 200 F. 3d 836 and 208 F. 3d 1066.

No. 99–2071. TUAN ANH NGUYEN ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. This Court's Rule 29.2 does not apply. Reported below: 208 F. 3d 528.

No. 99–8508. KYLLO *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or be-

fore 3 p.m., Friday, December 29, 2000. This Court's Rule 29.2 does not apply. Reported below: 190 F. 3d 1041.

No. 99–9073. BUFORD *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. This Court's Rule 29.2 does not apply. Reported below: 201 F. 3d 937.

No. 00–24. PGA TOUR, INC. *v.* MARTIN. C. A. 9th Cir. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. This Court's Rule 29.2 does not apply. Reported below: 204 F. 3d 994.

No. 00–46. MURPHY *v.* BECK, SUCCESSOR AGENT FOR SOUTHEAST BANK, N. A. C. A. 11th Cir. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. This Court's Rule 29.2 does not apply. Reported below: 208 F. 3d 959.

No. 00–5250. SHAFER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the

Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. This Court's Rule 29.2 does not apply. Reported below: 340 S. C. 291, 531 S. E. 2d 524.

Certiorari Denied. (See also No. 00–261, *supra.*)

No. 99–9889. LAWTON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 211 F. 3d 125.

SEPTEMBER 29, 2000

Miscellaneous Order

No. 00A241. NIXON, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* MISSOURI REPUBLICAN PARTY ET AL. C. A. 8th Cir. Application for stay, presented to JUSTICE THOMAS, and by him referred to the Court, denied. JUSTICE STEVENS would grant the application for stay.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 1997, 1998 AND 1999

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	1997	**1998**	**1999**	**1997**	**1998**	**1999**	**1997**	**1998**	**1999**	**1997**	**1998**	**1999**
Number of cases on dockets	7	7	8	2,432	2,387	2,413	5,253	5,689	6,024	7,692	8,083	8,445
Number disposed of during term	1	2	0	2,106	2,066	2,062	4,611	4,947	5,270	6,718	7,015	7,332
Number remaining on dockets	6	5	8	326	321	351	642	742	754	974	1,058	1,113

	TERMS		
	1997	**1998**	**1999**
Cases argued during term	96	90	[1] 83
Number disposed of by full opinions	93	84	[2] 74
Number disposed of by per curiam opinions	1	4	2
Number set for reargument	0	2	1
Cases granted review this term	90	81	93
Cases reviewed and decided without oral argument	51	59	54
Total cases to be available for argument at outset of following term	41	30	37

[1] Includes reargument in 98–6322.

[2] Includes 98–942 question certified to Supreme Court of Pennsylvania.

JUNE 29, 2000

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